United States Court of Appeals

for the

District of Columbia Circuit

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JOINT APPENDIX
(Volume I)

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the
District of Columbia Circuit
FILED
1955
Joseph W. Stewart
CLERK

Nos. 12,527, 12,666 and 12,752

W. S. BUTTERFIELD THEATRES, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC., *Intervenor*

592

Nos. 12,528, 12,667 and 12,753

TREBIT CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC., *Intervenor*

Appeals from Decisions and Orders of the Federal Communications Commission

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527, 12,666 and 12,752

W. S. BUTTERFIELD THEATRES, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WJR, THE GOODWILL STATION, INC., *Intervenor*

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WJR, THE GOODWILL STATION, INC., *Intervenor*

JOINT APPENDIX

Stipulation

Counsel for the parties herein stipulate:

1. That the questions presented by these appeals cannot be agreed upon at the present time, and therefore that each party will state the questions presented in its brief as required by the rules of this Court. Appellants, to the extent that they raise common questions, will state such questions identically.

2. Appellants will serve and file their briefs on or before August 30, 1955. Appellee and Intervenor will serve and file their briefs on or before December 9, 1955. Appellants' replies, if any, will be served and filed on or before February 3, 1956. A printed Joint Appendix will be served and filed on or before March 8, 1956.

3. Only such parts of the Notice of Appeal as may be designated by any party shall be printed in the Joint Appendix.

4. All references in briefs to record material shall be by designation of page numbers in the original record filed with this Court. Such record page numbering shall also be utilized in the printed Joint Appendix in addition to consecutive numbering of the pages of the Joint Appendix so that references to the record material printed in the Joint Appendix may readily be found.

/s/ PARKER D. HANCOCK
Parker D. Hancock
Counsel for W. S. Butterfield Theatres, Inc., Appellant

/s/ HARRY J. OCKERSHAUSEN
Harry J. Ockershausen
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/s/ RICHARD A. SOLOMON
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R. Russell Eagan
Counsel for WJR, The Goodwill Station, Inc., Intervenor

Dated: March 2, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

Nos. 12,527, 12,666 and 12,752

W. S. BUTTERFIELD THEATRES, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

WJR, THE GOODWILL STATION, INC., *Intervenor*.

Nos. 12,528, 12,667 and 12,753

TREBIT CORPORATION, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

WJR, THE GOODWILL STATION, INC., *Intervenor*.

Before: Edgerton, Chief Judge, in Chambers.

Order

Upon consideration of the joint motion of the parties in the above cases to substitute another prehearing stipulation for the one previously filed, and it appearing that said amended prehearing stipulation has been lodged with the Clerk, it is

ORDERED that the aforesaid amended prehearing stipulation be approved and that the Clerk be, and he is hereby, directed to file said amended stipulation forthwith.

Dated: March 5, 1956.

Docket Entries of the Filing of Notices of Appeal and Notices of Intervention

Case No. 12,527

Notice of Appeal filed 1/5/55
Notice of Intervention filed 1/21/55

Case No. 12,528

Notice of Appeal filed 1/5/55
Notice of Intervention filed 1/21/55

Case No. 12,666

Notice of Appeal filed 4/26/55
Notice of Intervention filed 4/29/55

Case No. 12,667

Notice of Appeal filed 4/26/55
Notice of Intervention filed 4/29/55

Case No. 12,752

Notice of Appeal filed 6/22/55
Notice of Intervention filed 6/24/55

Case No. 12,753

Notice of Appeal filed 6/22/55
Notice of Intervention filed 6/24/55

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

FCC 52-1325 81421

In re Applications of

WJR, THE GOODWILL STATION, INC., Flint, Michigan

Docket No. 10268—File No. BPCT-967

TREBIT CORPORATION, Flint, Michigan

Docket No. 10269—File No. BPCT-968

For Construction Permits for New Television Stations

Order

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 15th day of October, 1952;

The Commission having under consideration a motion filed August 11, 1952, as amended September 12, 1952, by the Trebit Corporation to enlarge the issues in the above-entitled proceeding, a reply thereto filed September 15, 1952, by WJR, The Goodwill Station, Inc., an opposition thereto filed September 15, 1952, by the Chief of the Broadcast Bureau, and requests of petitioner and WJR, The Goodwill Station, Inc. for oral argument thereon; and

IT APPEARING, That the Commission, on July 11, 1952, ordered a consolidated hearing on the applications of the petitioner and other applicants for television facilities at Flint, Michigan, and specified the standard issues for television proceedings; and

IT FURTHER APPEARING, That the Commission is requested to strike issues numbered 1 through 4, leaving only Issue No. 5, in order that petitioner will have the right and opportunity to present evidence on such factors of comparison as the areas, communities, and populations within the proposed Grade A and B contours, the extent to which each applicant will provide an efficient utilization of the channel, the type of technical service to be rendered, the availability of other television services, existing or proposed, and the location of proposed sites as they affect a fair and equitable distribution of service and the possibility of interference to and from other stations, and

It Further Appearing, That the Commission, by its Memorandum Opinion and Order of October 6, 1952 (FCC 52-1225) *In the Matter of Westinghouse Radio Stations, Inc., et al.* (Docket No. 9138, *etc.*) has explored the substantive questions raised by the petitioner in the instant motion, and for the same reasons advanced therein the Comission believes that the instant motion should be denied, but that petitioner should be afforded the relief set forth in the above-cited Memorandum Opinion and Order; and

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It Further Appearing, That oral argument on the subject motion would serve no useful purpose;

It Is Ordered, That the above-described motion of Trebit Corporation and requests for oral argument Are Denied.

Federal Communications Commission *
T. J. Slowie,
Secretary.

[Seal]
JRB

Released: October 16, 1952.

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* Commissioner Hennock concurs in the result denying instant motion, but for different reasons which have already been set forth in her separate statement attached to the above-described Memorandum Opinion and Order of October 6, 1952.

BEFORE THE FEDERAL COMMUNICATION COMMISSION

WASHINGTON 25, D. C.

Federal Communications Commission, Jan. 19, 1953

In re Applications of

WJR, THE GOODWILL STATION, INC., Flint, Michigan

Docket No. 10268—File No. BPCT-967

TREBIT CORPORATION, Flint, Michigan

Docket No. 10269—File No. BPCT-968

W. S. BUTTERFIELD THEATRES, INC., Flint, Michigan

Docket No. 10270—File No. BPCT-953

For construction permits for new television stations.

Petition for Review of Hearing Examiner's Grant of Petition for Leave to Amend

Comes now TREBIT CORPORATION, Flint, Michigan, one of the applicants in the above-entitled proceeding (hereinafter referred to as Petitioner) through its attorneys, and respectfully requests review of the Examiner's Memorandum Opinion and Order, dated January 14, 1953 (published January 15, 1953) granting a petition for leave to amend filed by WJR, The Goodwill Station, Inc. (hereinafter referred to as WJR) and for reversal of the Examiner's ruling so as to deny said petition. In support of this petition it is respectfully shown:

History of Proceedings

1. On July 11, 1952 the Commission designated the applications of Booth Radio and Television Stations, Inc. (hereinafter referred to as Booth) (Docket No. 8953), WJR, and Petitioner (above docket numbers), all appli-

cants for construction permit for a new television station on Channel 12 in Flint, Michigan, for consolidated hearing.[1]

2. On August 11, 1952, Petitioner filed a petition for enlargement of the issues specified for the consolidated hearing. (This motion was amended and supplemented on September 12, 1952) On August 7, 1952, Booth filed a similar petition. The Booth motion and Petitioner's motion, particularly as amended on September 12th, 1952, pointed out that a comparison of the WJR proposal and the proposals of Petitioner and Booth based on the sites specified was of vital importance to the determination of the instant proceeding.[2] The Commission, by Memorandum Opinion and Order dated October 15, 1952 found it unnecessary to enlarge the issues as requested, stating that "petitioner (Trebit) should be afforded the relief set forth" in its Memorandum Opinion and Order *In the matter of Westinghouse Radio Stations, Inc. et al.* (Docket 9138, *etc.*). At paragraph 4 of the Westinghouse Memo-

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[1] The Commission's Notice of Hearing contained the following issues:

"1. To determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations.

"2. To determine the type and character of the program services proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours.

"3. To determine whether the construction and operation of the proposed stations would be in compliance with the Commission's Rules and Regulations governing television broadcast stations.

"4. To determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation.

"5. To determine on a comparative basis which, if any, of the above-entitled applications should be granted."

[2] The Booth application was dismissed September 19, 1952.

randum Opinion and Order the Commission stated as follows:

"At the outset, the Commission wishes to make clear that all relevant, material and pertinent differences between applicants will be given full consideration." * * * "such weight will probably vary in each individual case. This variance will be due primarily to differences in maximum and minimum power, differences in antenna heights, and other assorted elements of difference which may be shown to exist as among specific applicants in a particular case;"

3. On September 24, 1952 WJR, after hearing before the Chicago Regional Airspace Subcommittee of the Air Coordinating Committee, requested that Committee to defer decision on its request for approval of its specified site. WJR indicates this action was taken because the Subcommittee attached "undue weight" to objections filed by the City Commissioners of Pontiac,

Michigan, and objections of the Manager of the Pontiac Airport.[3]

4. The Commission by Order dated October 24, 1952 scheduled the hearing in the instant proceedings for November 17, 1952. W. S. Butterfield Theatres, Inc. (hereinafter referred to as Butterfield) was permitted to amend its application for Flint television station to specify Channel 12 rather than Channel 16. This application was formally consolidated in this proceeding by Order of the Commission dated November 10, 1952.

5. Several prehearing conferences were held between counsel for the parties hereto, including Butterfield, coun-

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[3] WJR Petition for Leave to Amend, paragraph 9, page 3.

sel for the Broadcast Bureau and the Examiner. The first of such conferences was held on October 31, 1952. The last of such conferences was held on November 13, 1952, pursuant to an Order, copy of which is attached hereto as Exhibit A. At these prehearing conferences all of the parties expressed their willingness and ability to commence the hearing on November 17, 1952 on the engineering phases of the three applications. Counsel for WJR stated that although formal approval of the WJR site had not yet been obtained from the Air Coordinating Committee that such approval would be forthcoming shortly. On that understanding, all the parties agreed that it would be satisfactory if such approval were made a part of the record prior to the commencement of lay testimony which by agreement was scheduled to begin on January 7, 1953. At the prehearing conferences counsel for Petitioner made it clear to all parties that a comparison between the operation of WJR's proposed station from its then specified site and the operation of Trebit's proposed station from its specified site was considered by Petitioner to be of decisive importance in this proceeding.

6. As a result of agreements made at the prehearing conference exhaustive examination of the engineering proposals of each of the applicants was made by the consulting engineers for all of the applicants and by the engineer representing the Broadcast Bureau prior to the taking of any testimony and a resulting agreement was reached under which the various engineering proposals were conceded to meet minimum Commission requirements and exhibits describing said proposals were offered and admitted without objection or cross-examination. In addition it was agreed after study that certain figures accurately described the square miles of area within the A and B contours of

the proposed stations and that other figures correctly described the populations shown by the U. S. Census to reside in such areas. Thereafter, Petitioner proceeded to introduce extensive engineering testimony comparing the various proposals with respect, *inter alia,* to (a) the amount of service which would be provided on both a Grade A and a Grade B basis to Zone 2, (b) the number of receiving locations which would receive Grade A service from each of the various proposals 99% of the time and 90% of the time in the City of Flint the Flint metropolitan area and the composite Flint trade area, and (c) the loss of service which would result from adjacent channel interference from Toledo station operations. This evidence, accepted by the Examiner, was vigorously objected to by WJR. The engineering testimony was concluded on December 3, 1952.

7. On December 30, 1952, WJR advised counsel for the other parties that it had not been able to obtain approval of its site and that it proposed to amend its application to specify a new site in the event such approval had not been obtained by January 5, 1953. Both counsel for Petitioner and for Butterfield advised counsel for WJR that they would oppose any amendment specifying a new site but would be willing to give WJR a reasonable time beyond the 5th of January, 1953 to obtain a decision from the Air Coordinating Committee provided that, if WJR filed a petition to amend, reasonable

opportunity would be given to obtain a ruling of the Examiner and a ruling on petition for review of said ruling from the Commission before proceeding with either further engineering testimony on a new site or non-technical testimony. The Examiner on January 5, 1953 fixed January 9th as the date on which WJR must obtain approval of its original site or request an amendment and fixed January 26th as the date for taking of further testimony.

8. On January 9, 1953 WJR filed a motion for leave to amend its application to specify a new site. Argument on said motion was heard by the Examiner on January 12th (all parties waiving the requirement of 4-day notice). By Memorandum Opinion and Order released January 15, 1953 the Examiner granted the WJR petition.

Facts with Respect to Amendment

9. Issue No. 4, posed in July 1952, requires WJR to prove that the erection of a tower on the site specified in its application (Waterford Hill), which is less than 3 miles from the Pontiac Municipal Airport, would not constitute a hazard to air navigation. The height of the tower proposed by WJR in this proceeding is 897 feet above ground and 2046 feet above mean sea level.

10. WJR knew during the summer of 1952 that the Manager of the Pontiac Airport objected to the site.[4]

11. Protests to the site were filed with the Commission by Airport Manager Hoskins, by the City Commissioners of Pontiac and others in August of 1952. (See FCC Docket 10268.)

12. WJR was notified on September 3, 1952 that objections to the site had been filed with the Chicago Regional Airspace Subcommittee of the Air Coordinating Committee.

13. WJR was given a hearing before this Subcommittee on September 24, 1952 and learned that the Committee would oppose use of this site because of objections by the

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[4] Counsel for WJR quoted Mr. Homer Hoskins, the Airport Manager, as stating to representatives of WJR that he "did not like it but saw no basis upon which he could object". (Tr. of Argument on Motion, page 9.)

City of Pontiac and the Safety Division of the Civil Aeronautics Administration.[5] For this reason on that date WJR requested the Subcommittee not to rule on the matter but to defer action so that WJR could "assemble further evidence". (Petition for Leave to Amend, paragraph 9.)

14. WJR acquired land 5 miles north of Waterford Hill and had a complete new engineering proposal prepared by new consulting engineers, specifying this land as a site, prior to November 17, 1952, the date on which hearing was scheduled and commenced in this proceeding. WJR alleges that the Subcommittee has given "informal" approval to this new site.

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15. All of the engineering evidence relating to the WJR engineering proposal from the Waterford Hill site was concluded on December 3, 1952.

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[5] The published notice of the September 24, 1952 Airspace Meeting mailed to WJR and all parties prior to September 15, 1952 contains the following summary of the objection of the Air Safety Division of the Civil Aeronautics Administration:

> "This office objects to the proposed construction as a plot indicated the tower to be on the hair line edge inside of Red Airway 63. Further, it is believed that this tower would constitute a hazard to air navigation due to its nearness to the Pontiac Municipal Airport, Pontiac, Michigan, and its overall height of ground level of 904 feet.
>
> "The Pontiac Municipal Airport has considerable operation of large multi-engine executive and non-scheduled aircraft. Aircraft of this type would be subjected to a considerable hazard by a structure of this type, and elevation at such close proximity to the airport.
>
> "It is further understood from the management of this airport that plans have been made and approved for expansion of this field and public moneys have been spent or committed toward this end. It follows, therefore, that more and more heavy aircraft traffic will utilize this field as it is the only airport serving this highly industrial community at this time.
>
> "In view of the above, it is most urgently recommended that this matter be denied with the recommendation that a site be chosen at some location further removed from this airport."

16. The engineering evidence mentioned in the preceding paragraph and in paragraph 6 above, demonstrated, in the opinion of Petitioner, that the WJR application would have to be denied by the Commission on grounds unrelated to Issue No. 4 (hazard to air navigation). Much of this evidence was admitted only over the most vigorous protest by WJR. This petition is not the proper vehicle for arguing the merits of the WJR original engineering proposal—it cannot be gainsaid, however, that all of the parties by their actions have recognized the problem as serious and substantial.

17. WJR alleges that after requesting the Chicago Regional Airspace Subcommittee to defer ruling on September 24, 1953 until WJR could "assemble additional evidence", it undertook (apparently in lieu of assembling evidence) to convince the City Commissioners of Pontiac that their objections to the WJR proposal were not well founded and that such efforts continued up to December 30, 1952, on which date the Pontiac City Commissioners directed the City Manager to forward the record on the WJR proposal to the Chicago Regional Airspace Subcommittee. This was done on January 2, 1953.

18. WJR then requested the Subcommittee to rule on the Waterford Hill site. WJR was notified on January 9, 1953 that the Subcommittee would oppose the site because of CAA objections (the same objections which were before the Subcommittee September 24, 1952).

19. On January 9, 1953 WJR moved to amend its application to substitute the new engineering proposal and specify the new site mentioned above, the existence of which proposal was first disclosed to any of the parties herein on December 30, 1952.

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20. The Examiner, in his Memorandum Opinion and Order on the WJR motion for leave to amend, found that WJR was entitled either (a) to amend its application to specify the engineering proposal it had available (but had concealed) since before this hearing started and to go forward with evidence on that proposal; or (b) to proceed with its original application and present evidence in an attempt to meet Issue No. 4 by demonstrating that the CAA's objection is not meritorious. WJR, preferring to amend, the Examiner granted the amendment.

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The Examiner's Action in Granting the WJR Petition to Amend is Erroneous.

A. Good cause has not been shown for the WJR amendment.

21. Section 1.365 of the Commission's Rules and Regulations provides that an amendment tendered after an application has been designated for hearing would only be accepted on motion served on all parties for "good cause shown." The Examiner found that "good cause" for the amendment was shown by WJR on the following grounds:

Efforts to "eliminate" the objections of the City of Pontiac and the Airport Manager "appeared to have been diligently pursued by WJR," and, "In the opinion of WJR and its counsel such efforts seemed virtually assured of success." (Examiner's Opinion, paragraph 4)
which led him to the following conclusion:

"... WJR believed every indicia pointed to the resolution of such objections and to ultimate approval of the site. * * * the record does not show an unreasonable basis for reliance by WJR upon the expectation of approval and does not indicate a reckless gamble against known probable odds. Although a decision the site could undoubtedly be obtained sooner, the cause of delay, though fundamentally attributable to WJR, is not such as to require a finding that WJR acted unreasonably." (Examiner's Opinion, paragraph 7)

22. The record does not support the grounds urged and the law does not support the conclusion reached by the Examiner on the question of good cause. Efforts to "eliminate" the objections were admittedly efforts to "convince the City Commissioners (of Pontiac) that their objections were not well founded." (Petition for Leave to Amend, paragraph 10) WJR does not deny that such objections were in fact well founded. On the contrary it admits by its action that they were and that WJR knew they were. If in fact such objections were not well founded, WJR could have demonstrated them to have been otherwise to the Chicago Airspace Subcommittee and, if necessary, to the Washington Subcommittee of the Air Coordinating Committee and, if still necessary, to the Commission in this proceeding. (See Part 17 of Commis-

sion's Rules) WJR has made one thing clear and unambiguous here, namely that its only hope and expectation to overcome the objections was to persuade the City Commissioners of Pontiac, who by WJR's characterizations were without "expert knowledge on the subject" (Petition for Leave to Amend, paragraph 10), that they should withdraw them. WJR's unwillingness to test the merits of these objections in the appropriate forums and its determination to avoid such a contest which led it, while the matter was still pending, to acquire a new site and to prepare a completely new engineering proposal are actions which speak louder than any protestation. WJR's "diligence" therefore consisted only in an attempt to convince men it believed to be not expert to withdraw objections WJR was unwilling to meet. No conclusion that WJR believed its efforts were "virtually assured of success" can be maintained in the face of these facts. Any claim that such conclusion was based on "assurances" of an undisclosed character from persons unnamed obviously must be disregarded. The only record indication of any specific assurance from any named person is contained in the following statement made by counsel for WJR at the argument on the Petition to Amend:

"The application was filed and discussions were had with the airport man at Pontiac Municipal Airport and with a Mr. Maitland who is Commissioner of Aeronautics for the State of Michigan, and again assurances were given that well, to quote correctly the Airport Manager, he said he did not like it but saw no basis upon which he could object."

"The fact that there was opposition raised after that, after these conversations, came as a complete surprise to WJR. . . ." (Tr. of Argument on Motion, page 9)
That WJR could continue to rely after September 3, 1952, if in fact it ever did, upon such statements as they are above quoted as giving virtual assurance of success is incredible. It is submitted that these facts of record show that WJR had no reasonable basis for reliance upon the expectation of approval and further that the Examiner's conclusion that good cause could be assumed because the record did not show the contrary distorts Section 1.365 so as to put the burden on persons opposing a motion to amend to show that good cause for the amendment does not exist rather than upon the moving party to prove that it

does.

B. *The Examiner's conclusion that the WJR amendment does not make a substantial change in the case is in error.*

23. The Examiner concluded that the new engineering proposal of WJR involving a new site five miles from the site specified in its application was not a substantial change because (a) WJR would, through its engineers, undertake to correct the evidence heretofore admitted in the record so that it would relate to the new proposal rather than the old one (Examiner's Opinion, paragraph 9); and (b) the new engineering proposal does not affect the theories under which the applicants were proceeding (Examiner's Opinion, paragraph 8). The Examiner is in error on both counts.

24. Butterfield and Petitioner, at that time the suggestion of having WJR engineers "correct" the record was made, emphatically and unequivocally refused to accept a comparative evaluation of WJR's new engineering proposal by WJR's own engineers in lieu of such evaluation by the Butterfield and Trebit engineers. It hardly takes argument to show that there is substantial difference between two engineering proposals which are alike only in that they both specify Channel 12; and which differ, among other things, in that the sites involved are five miles apart; one site "favors" Flint as against Detroit from terrain considerations, the other "favors" Detroit as against Flint from terrain considerations; one site has been found by CAA to menace air navigation because of its proximity to the Pontiac Airport, the other may or may not be a hazard to air navigation; one site provides city service signal intensity (77 dbu) over all of the City of Detroit,

the other (being some 39 miles from the far side of Detroit and involving less favorable terrain factors) may well fail to provide such intensity over the City of Detroit; one site has been shown of record to meet all Commission requirements with respect to operation and minimum signal intensities, the other may or may not meet such requirements.

25. The issues in this proceeding require an affirmative record showing of compliance with the Commission's rules and regulations, including

Part 17 thereof, with respect to each applicant's engineering proposals. Counsel for WJR stated with respect to the proposed new site, "If it is disapproved, we are also stuck with it. We would have to present evidence with respect to the issue which reads: 'to determine whether or not the proposed site constitutes a hazard to air navigation in an effort to prove on the record that it is not a hazard.' That is a difficult problem but we would endeavor to meet it." (Tr. of Argument on Motion, page 29) The granting of the amendment will obviously require that all testimony with respect to the original WJR engineering proposal be stricken from the record and a complete new record made on its new proposal. That such a change is substantial is established by uniform Commission precedent. That it would cause "substantial engineering and legal expenses" to Butterfield and to Petitioner is obvious.

26. It is no answer to suggest that if the amendment is refused WJR will be entitled in this proceeding to go forward with evidence in an attempt to prove that the CAA rejection of its Waterford Hill site should be set aside and that such an effort would probably involve substantial expense to the other parties. The threat that expense

will be imposed on other applicants in a comparative hearing if one of them seeks to prove that his application meets issues specified by the Commission cannot be a proper ground, over opposition of the other parties, for permitting an amendment which relieves the applicant from the burden of meeting the issues.

27. The Examiner's conclusion that WJR at this stage of the proceeding is entitled to present evidence in an attempt to show that CAA has wrongly held its site to be a menace to air navigation is, we submit, also erroneous. The point was raised at the argument on the motion to amend by Commission counsel and by counsel for WJR. The Examiner cut off discussion on the point with the statement: "Let me cut this off here because the question is either completely academic or in the event that the petition to amend is no granted, then I think there will be an opportunity for parties to raise that issue at the proper time and place." (Tr. of Oral Argument on Motion, Page 32) Notwithstanding, the Examiner resolved the issue in a Memorandum Opinion without hearing further from the parties. It is

appropriate therefore to point out that if such procedure is permitted not only prejudice to the parties but abuse of the Commission's processes will result. WJR (having full knowledge of Part 17 of the Commission's Rules) by delaying decision of the Chicago Airspace Subcommittee from September 24, 1952 (nearly 2 months before the hearing in this proceeding commenced) to January 9, 1953 (over a month after the engineering testimony had been completed) and at that time specifying a new site rather than proceeding to appeal the adverse ruling of the Chicago Subcommittee to the Washington Committee precluded itself from contesting any final ruling of the Air Coordinating Committee in this proceeding at the appropriate time. Petitioner submits that WJR has thereby estopped itself from contesting the conclusion that its proposed tower on the Waterford Hill site would menace air navigation. The consequence of this, in the light of *Simmons* v. *FCC,* 145 F. 2d 578 [6] is to render meaningless any comparison of any aspect of the WJR application with the applications of Petitioner and Butterfield. In these circumstances to require the parties and the Commission to proceed with any further hearing on the WJR application violates elementary due process.

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28. The Examiner's conclusion that the theories of the parties would not be affected by permitting WJR to substitute its proposed new engineering proposal for its original one is based on his conclusion that both proposals provide Grade A service over both Detroit and Flint. In view of the fact that no engineering conclusions were accepted in this proceeding until after the engineers offering such conclusions had been qualified as experts on television engineering matters and the fact that the new engineering proposal of WJR is made by engineers whose qualifications were not tested in this proceeding, raises the question of

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[6] As the Court of Appeals held in sustaining the Commission in *Simmons* v. *FCC (WGAR Broadcasting Co. Intervenor)*, 145 F. 2d 578 at 579:

> "We think the findings on which the Commission based its denial of appellant's application are supported by substantial evidence. We think that public convenience, interest and necessity [2] clearly require the Commission to deny applications for construction which would menace air navigation. It follows that appellant's application was rightly denied. No formal or direct comparison is necessary between an application which must be denied and one which may be granted. Relative consideration is meaningless unless there are two applications either of which, considered alone, might be granted.
>
> ---
>
> [2] Communications Act of 1934, sec. 303(c), 48 Stat. 1082, 47 U. S. C. A. 303(c)."

how the Examiner could properly reach this conclusion. There are, however, more serious questions with respect to it. First the contention of WJR that its new proposal would not affect the theory of either Petitioner or Butterfield is based on an allegation that its original proposal would deliver city service signal intensities to Flint and would also deliver the same signal intensity to Detroit and that its new proposal would deliver "similar" signal intensities to Flint and Detroit. The record demonstrates that the original WJR proposal would in fact provide signal intensities of 77 dbu to Detroit. In other words, the original proposal qualified from the standpoint of minimum signal intensity to be called a Detroit station. In view of the fact that the new site is five miles farther from Detroit and has a lower effective height, there is serious question whether it will provide 77 dbu over all of the City of Detroit. This question can only be settled after evidence and opportunity for cross-examination with respect to the new proposal has been had. The Examiner's gratuitous conclusion, not supported by any record evidence, that in a situation where the location of a specific contour is critical (*e.g.* the 77 dbu contour at the far side of the City of Detroit) a move of a transmitter from a point of higher relative elevation 34 miles away to a point of lower relative elevation 39 miles away is hardly supported by his discussion of the Commission's decision *In the Matter of Westinghouse Radio Stations, Inc., supra.* The necessity for providing a margin of safety

where there are error factors in the methods of prediction, rather than a conclusion that the existence of such error factors removes a need for any margin of safety, is patently wrong.

29. Furthermore, a conclusion that there is no substantial difference between the coverage which WJR would

obtain from its new proposal as compared to that obtained from its original proposal, would seem to require the conclusion that WJR had no vestige of justification for failing to amend its application before this hearing commenced to specify the new site and new engineering which it had available.[7]

30. The Examiner's ruling effectively permits WJR, in direct violation of the Commission's long established policy and rules, to obtain a full hearing on alternative engineering proposals. WJR was given a full hearing on its original site which involved such issues as whether that site was located at an excessive distance from the city of Flint (there is no denial that Waterford Hill is the nearest site to Detroit which will permit minimum service to Flint) and whether because Waterford Hill is so far to the south of areas and communities which ought to be served by a Flint television station that WJR should be denied. After a complete hearing on these and related matters, WJR is permitted by the Examiner to amend its proposal so as to reduce its distance from Flint and to move 5 miles further north by specifying new engineering which it had in its possession before this hearing commenced. Nothing short of overweening considerations of public interest can justify such a procedure. No such reasons are present in this case.

Wherefore, in the premises it is respectfully prayed that the Commission should (1) reverse the order of the Examiner granting the WJR Petition for Leaveto Amend and (2) enter an order dismissing or denying the WJR application on the ground that its proposal constitutes a hazard to air navigation.

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[7] In this connection WJR in its petition has only this to say: "Petitioner believes that the site originally proposed is more efficient and has, therefore, been reluctant to amend until it could obtain a ruling on the original site." (Paragraph 12 of the WJR Petition for Leave to Amend.)

Respectfully submitted,

Trebit Corporation,
By William J. Dempsey,
Its Attorney,
938 Bowen Building,
Washington 5, D. C.

Attachment

January 19, 1953

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Exhibit A

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

83215

In the Matter of:

WJR, The Goodwill Station, Inc., Flint, Michigan

Docket No. 10268—File No. BPCT-967

Trebit Corporation, Flint, Michigan

Docket No. 10269—File No. BPCT-968

W. S. Butterfield Theatres, Inc., Flint, Michigan

Docket No. 10270—File No. BPCT-953

For Construction Permits for New Television Stations

Notice of Pretrial Conference

Notice, Is Hereby Given, That pursuant to Section 1.813 of the Commision's Rules of Practice and Procedure, a further Pretrial Conference in the above entitled proceedings will be held in Room 2704, Temporary "T" Building, Washington, D. C. at 10:00 a. m., Thursday, November 13, 1952, to consider, among other things, the following:

(1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues;

(2) The possibility of stipulating with respect to facts;

(3) The procedure at the hearing;

(4) The limitation of the number of witnesses;

(5) The necessity or desirability of prior mutual exchange between or among the parties of prepared testimony and exhibits;

Dated, this 12th day of November, 1952.

FEDERAL COMMUNICATIONS COMMISSION,

/s/ BENITO GAGUINE,
Hearing Examiner.

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Federal Communications Commission, Jan. 22, 1953

WJR Reply to Petitions for Review

Now comes WJR, The Goodwill Station, Inc. (hereinafter referred to as "WJR") applicant in Docket No. 10268, by its attorneys, and submits the following reply to the petitions filed in the above-entitled cause on January 19, 1953 by Trebit Corporation (hereinafter referred to as "Trebit") and W. S. Butterfield Theatres, Inc. (hereinafter referred to as "Butterfield") requesting the Commission to review and reverse the Examiner's Memorandum Opinion and Order of January 14, 1953 granting a Petition for Leave to Amend filed by WJR on January 9, 1953. The amendment changes the proposed transmitter site from Waterford Hill, approximately one mile from the city of Waterford, Oakland County, Michigan, to a site 3.2 miles northwest of Clarkston, Oakland County, Michigan. The distance from the site specified in the original application of WJR to the amended site is 5.2 miles in a northwesterly direction and is five miles nearer the city of Flint, Michigan. The amendment also includes other matters of a corrective nature which are not contested by the parties.

The Issue

The issue raised by the Petitions for Review is clear and simple, namely, whether under the facts in this particular case WJR has shown sufficient "good cause" to meet the requirements of Section 1.365(a) of the Commission's Rules. WJR set forth its reasons supporting its contention that "good cause" had been shown in its Petition for Leave to Amend and in its oral argument on said Petition held before the Examiner on January 12, 1953. Said Petition and the transcript of the oral argument are hereby incorporated herein by reference as if fully set forth herein.

The Examiner has found in his Memorandum Opinion and Order that "good cause" has been shown because (a) efforts to eliminate Civil Aeronautics Administration objections to the original site appear to have been diligently pursued by WJR and that WJR's reliance upon the expectation of CAA approval

was not unreasonable and (b) the proposed change in transmitter site is not "substantial".

Trebit and Butterfield contend on the other hand that the Examiner erred on both counts.

Argument

1. The basic facts in this case are that WJR in spite of diligent efforts and contrary to all reasonable expectations

has not been able to obtain approval of its original site by the Regional Office of the Civil Aeronautics Administration. At all prehearing conferences among counsel for the parties, counsel for WJR has kept the other parties advised that CAA approval was still being pursued. Finally, at a conference on December 30, 1952, counsel for WJR established as its own arbitrary deadline the date of January 9, 1953 for filing the Petition for Leave to Amend, and *at the suggestion of counsel for Trebit,* it was agreed that the non-technical phases of the hearing, then scheduled to commence on January 7, 1953, be continued to January 26, subject to approval of the Examiner. Engineering testimony and exhibits based upon the original site of WJR are already a matter of hearing record and it will, therefore, become necessary to submit additional engineering exhibits and testimony in support of the amended site. This, in turn, will require the revision of certain rebuttal exhibits, which WJR has agreed to have prepared at its own expense.

2. The facts establishing WJR's diligence in seeking site approval appear in its Petition for Leave to Amend.

3. Many factors areinvolved in WJR's reliance on expectation of approval of its original site. In the first place, the resolution of the City Commissioners of Pontiac, adopted August 19, 1952, objecting to the erection of the proposed WJR tower (see pages 30-31 of Exhibit A of Butterfield Petition for Review) was adopted without any debate whatsoever and, therefore, it is obvious that the Commissioners did not have the facts in their possession. After facts supporting the position of WJR were called to their attention, they changed to a neutral position and adopted a resolution on December 30, 1952 referring the problem to the Chicago Regional Airspace Subcommittee for such action as may be warranted by the facts. In addition, 67 pilots operating planes out of the Pontiac Municipal

Airport signed a petition to the effect that erection of the tower originally proposed by WJR would be beneficial rather than hazardous to air traffic. The objection of the Air Transport Association was more than met by lowering the overall

height by 7.5 feet and by changing the tower from guyed to self-supporting (see amendment dated November 15, 1952). The Aeronautics Commission of Michigan stated that the approach protection requirements of the CAA would not be violated and that it would not object to the proposed construction. The statement by the Aviation Safety Division, CAA that the Pontiac Municipal Airport had considerable operation of large multi-engine executive aircraft was, according to information received by WJR from Pontiac sources, an exaggeration. Furthermore, WJR has been informed and believes and therefore alleges that its proposed site does not violate any rules of the Civil Aeronautics Administration. The contention of the airport manager to the effect that the airport could be upgraded in the future was highly questionable in the light of the nature of the area surrounding the airport and the lack of available funds to make the necessary improvements to the airport. Finally, local Pontiac counsel for WJR has been in close touch with the problem for the past several months and has advised WJR from time to time that it could expect approval by the City Commissioners.

4. As the Examiner has found in his Memorandum Opinion and Order, the proposed move is not substantial. See Engineering Affidavit hereto attached marked Exhibit No. 1. The slight differences in the original and amended contours of WJR are unquestionably within the accuracy of the methods used to determine the locations of the contours. As stated by the Examiner in Paragraph 8 of his Memorandum Opinion:

"* * * the technical tools used by the Commission in making the allocations, which tools have been those used in developing the engineering phase of this proceeding, are not sufficiently sharp and definite in view of the known error factors to permit precise location of contours or prediction of precise probable service to any specific areas."

5. While it is recognized that the question of whether or not "good cause", as required by Section 1.365(a) of the Commission's Rules, must be determined from the facts of each particular case, the following cases are cited to establish the proposition that in previous factual situations, similar to those here presented, the Commission has permitted amendments.

6. *In re Applications of On the Air, Inc. (WGBF) et al.*, 5 RR 558, the Commission reversed the action of the Motions Commissioner and permitted an amendment specifying a new transmitter site *after the hearing record had been closed.*

7. In the matter of the applications of *Crescent Bay Broadcasting Company, Santa Monica, California, et al.*, 7 RR 725, after the adoption of Section 17 of the Commission's Rules and after the hearing and the issuance of an initial decision, upon receipt of disapproval of a site by the Airspace

Subcommittee, the Commission set aside the initial decision, reopened the record and remanded the proceeding to the examiner for taking of evidence on additional issues, one of which involved the question of hazard to air navigation. This procedure was adopted pursuant to the provisions of Section 17.4 of the Commission's Rules.

8. The Petitions for Review raise a collateral issue regarding the right of WJR, in the event its amendment is

not allowed, to present evidence to meet Issue No. 4 which reads, "To determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation" and in support thereof cite *Simmons* v. *Federal Communications Commission,* 145 Fed. 2d 578. The case relied upon is clearly distinguishable from the instant case. At the Simmons hearing no attempt whatever was made to submit evidence in response to the issue of air hazard. On the contrary, it conceded that the CAA had disapproved its site and offered only to paint and light the towers in any manner prescribed by the Federal Communications Commission, the Civil Aeronautics Administration or other governmental bodies.

Respectfully,

WJR, The Goodwill Station, Inc.,
By Reed T. Rollo,
By R. Russell Eagan,
of
Kirkland, Fleming, Green, Martin & Ellis,
800 World Center Building,
16th and K Streets, N. W.,
Washington 6, D. C.,
Its Attorneys.

January 22, 1953.

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Exhibit No. 1

VANDIVERE, COHEN AND WEARN
CONSULTING ELECTRONIC ENGNIEERS
WASHINGTON, D. C.

ENGINEERING AFFIDAVIT IN SUPPORT OF REPLY OF WJR, THE GOODWILL STATION, INC., TO PETITIONS FOR REVIEW, FLINT, MICHIGAN.

BPCT-967 DO-10268

WASHINGTON,)
DISTRICT OF COLUMBIA,) ss.:

Jules Cohen, being first duly sworn, says that his qualifications as an expert in radio engineering are a matter of record with the Federal Communications Commission; that he is a member of the firm of Vandivere, Cohen and Wearn, Consulting Electronic Engineers; that he is a registered professional engineer (D. C. No. 1131); and that the accompanying exhibit was prepared by him and under his direction.

The firm of Vandivere, Cohen and Wearn has been retained by WJR, The Goodwill Station, Inc., to prepare the engineering studies necessary to accompany an amended application for television construction permit. The amendment involves a change in transmitter location.

The coverage contours of Trebit Corp., W. S. Butterfield Theatres, Inc., and initially proposed WJR (BPCT-967) shown on the accompanying exhibit were copied directly from information on file at the Federal Communications Commission. Contours for the WJR amended application were determined in accordance with the FCC Rules Governing Television and are as shown in the amended WJR application for television construction permit.

Distance between the initially proposed site and the presently proposed site and distances from each of these locations to Flint, Detroit, and the proposed sites of Trebit and Butterfield are indicated in the following table:

	WJR Amended Site	Trebit	Butterfield	Detroit	Flint
WJR Initially Proposed Site	5.2	32.0	7.8	32.1	25.4
WJR Amended Site	—	27.0	2.8	37.2	20.4

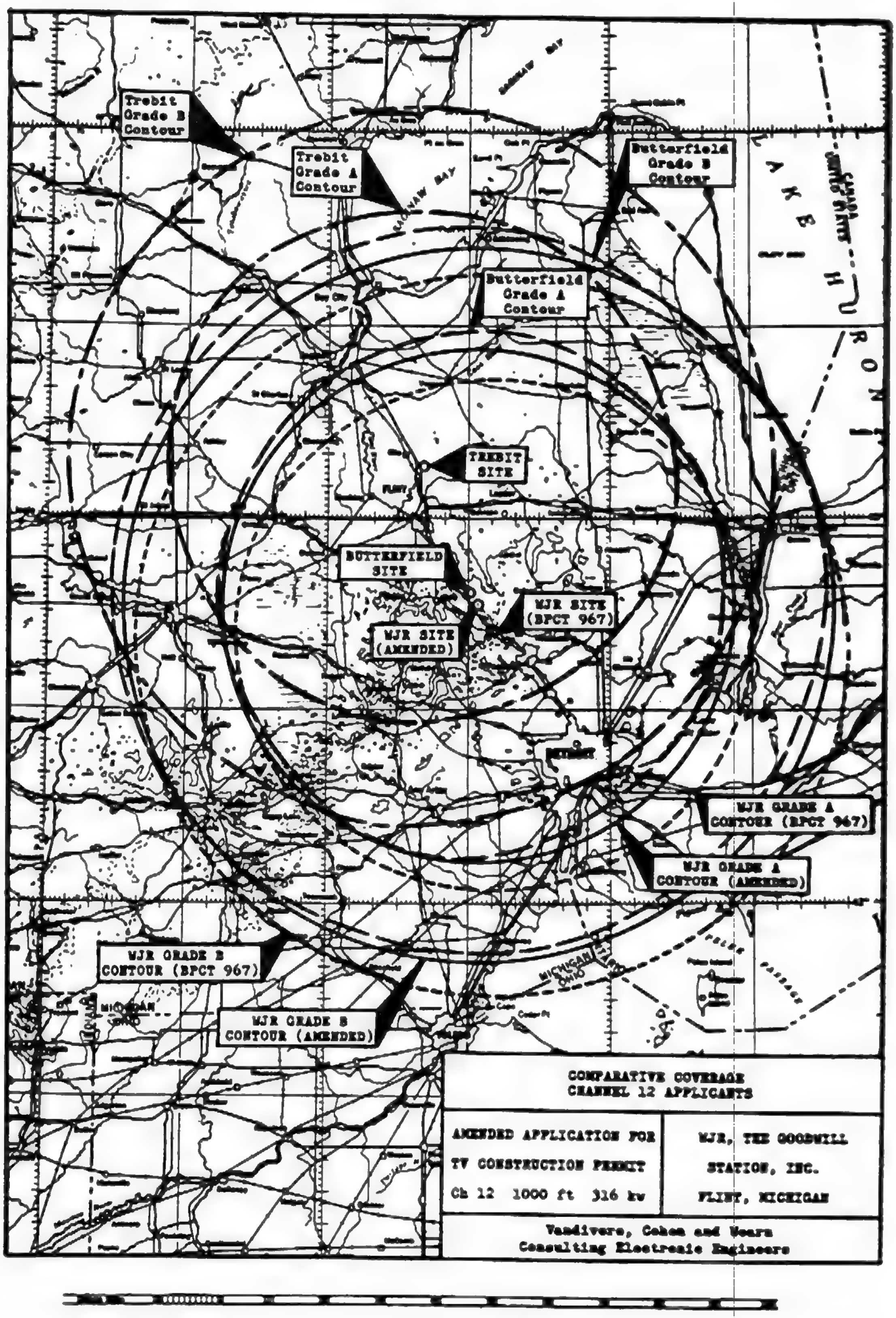
The distances indicated are in statute miles and were calculated in accordance with FCC Rules using pertinent geographic coordinates. For Flint and Detroit, the reference points given in the U. S. Department of Commerce Special Publication No. 328 were employed.

JULES COHEN.

Subscribed and sworn to before me this 22nd day of January, 1953

DOROTHY L. BARNES,
Notary Public, D. C.
My Commission expires:
April 30, 1954.

[SEAL]


Trebit Grade B Contour
Trebit Grade A Contour
Butterfield Grade B Contour
Butterfield Grade A Contour
TREBIT SITE
BUTTERFIELD SITE
WJR SITE (BPCT 967)
WJR SITE (AMENDED)
WJR GRADE A CONTOUR (BPCT 967)
WJR GRADE A CONTOUR (AMENDED)
WJR GRADE B CONTOUR (BPCT 967)
WJR GRADE B CONTOUR (AMENDED)
SAGINAW BAY
LAKE HURON
CANADA UNITED STATES
FLINT
DETROIT
MICHIGAN OHIO
PELEE PASSAGE
COMPARATIVE COVERAGE CHANNEL 12 APPLICANTS
AMENDED APPLICATION FOR TV CONSTRUCTION PERMIT Ch 12 1000 ft 316 kw
WJR, THE GOODWILL STATION, INC. FLINT, MICHIGAN
Vandivere, Cohen and Wearn Consulting Electronic Engineers

Federal Communications Commission, Jan. 26, 1953

Reply to WJR Answer to Petition for Review

On January 19, 1953, Trebit Corporation filed a petition for review of an order of the Examiner granting leave to WJR to amend its application in these proceedings. WJR filed an answer to said petition on January 23, 1953. This reply is filed for the purpose of clarifying a statement in the WJR answer and for the purpose of briefly commenting on certain cases therein cited.

1. Paragraph numbered 1 of the WJR "Reply to Petitions for Review" contains the following sentence:

> "Finally, at a conference on December 30, 1952, counsel for WJR established as its own arbitrary deadline the date of January 9, 1953 for filing the Petition for Leave to Amend, and *at the suggestion of counsel for Trebit,* it was agreed that the non-technical phases of the hearing, then scheduled to commence on January 7, 1953, be continued to January 26, subject to approval of the Examiner."

In order to avoid any possibility of misconception by the Commission through inadvertence in statement by WJR, petitioner desires to point out that the suggestion that lay testimony in these proceedings be commenced on January 26, 1953, after the establishment of the January 9, 1953 deadline for WJR's decision to proceed on its original application or seek leave to amend, was based entirely on the assumption of WJR deciding to proceed with its original application. It was agreed by all parties that a decision on Friday afternoon, the 9th, to go ahead on the following Monday, the 12th, would not give adequate time to the parties, particularly in view of the fact that by agreement two full working days were to be allowed for the parties to study the WJR exhibits prior to the commencement of taking of lay testimony and no delivery of such exhibits was to be made until after WJR decided what it would do with respect to amendment. As indicated by the Examiner's opinion, the week of January 19 (Inauguration week) for obvious reasons would not be an appropriate time to commence a hearing. Consequently, Monday the 26th seemed to be the earliest reasonable starting date on the assumption that WJR on Friday, January 9, decided it would proceed with its original application. Counsel for petitioner made it plain on December 30 and at all subsequent occasions when the matter was raised, that in the event WJR filed a petition to amend and that petition was either undecided or being considered on petition for review, the same objections to proceeding with the hearing which led to the postponement of the hearing from January 7 to January 26 would require a further postponement until the matter of amendment had been decided by the Commission.

2. WJR cites *Crescent Bay Broadcasting Company, et al.,* 7 RR 725, and the fact that in the *Simmons* case (*Simmons* v. *FCC,* 145 Fed. 2d 578), Simmons attempted to show that any hazard to air navigation from his proposed antenna structure could be eliminated by appropriate painting and lighting. These cases, if they have any bearing at all, seem to demonstrate that WJR's proper procedure is to prove that its original site, despite adverse CAA recommendation, does not in fact constitute a hazard to air navigation. (In the Crescent Bay case a further hearing was ordered for this purpose because at the time that case was heard Part 17 of the Commission's rules had not been adopted.) The entire burden of the WJR argument seems to be that it could readily prove in these pro-

ceedings that its original site would not constitute a hazard to air navigation. Whether the Commission accepts the view that WJR is free to do so or holds that WJR by its own action in the proceeding is estopped from making such proof, the WJR reply must be taken as an admission that there was no adequate

justification for its seeking to amend its original application after it had gone to hearing and all engineering testimony with respect to it had been completed.

3. *In re applications of On the Air, Inc. (WGBF) et al.*, 5 RR 558, cited apparently to show that the petition for leave to amend was timely filed notwithstanding it was withheld by WJR until after engineering testimony on its original proposal, is clearly distinguishable on its facts from the instant case. In the case cited by WJR, the amendment was made necessary by storm damage to the tower of the station during the progress of a hearing in which it was seeking authority to operate unlimited hours. The impossibility of proceeding with the original proposal in the cited case because of an act of God has no counterpart in this proceeding in which WJR concedes that it could have filed its amendment before the hearing commenced.

WHEREFORE, it is respectfully submitted that the Commission should grant Trebit's petition for review filed herein.

Respectfully submitted,

TREBIT CORPORATION,
By WILLIAM J. DEMPSEY,
Its Attorney,
938 Bowen Building,
Washington 5, D. C.

January 26, 1953.

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EXCERPTS FROM TRANSCRIPT OF HEARING

G. F. Leydorf,

called as a witness on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified

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as follows:

Direct Examination

By Mr. Rollo:

Q. State your name? A. G. F. Leydorf.

Q. Where do you reside? A. 15784 Sorrento Avenue, Detroit, Michigan.

Q. Are you employed by WJR, The Goodwill Station? A. Yes.

Q. In what capacity? A. Vice President in charge of Engineering.

Q. How long have you held that position? A. Since 1948.

Q. Is that an elective position? A. Yes.

Q. Are you also a director of the corporation? A. Yes.

Q. When were you first employed by WJR? A. March 1, 1942.

Q. What positions or position did you occupy between your first employment and your election as Vice President in charge of Engineering? A. Chief Engineer.

* * * * * * * * * *

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George P. Lohnes,

called as a witness on behalf of Trebit Corporation, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Mr. Lohnes, would you please state your name for the

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record? A. George P. Lohnes.

Q. And you are a member of the Craven, Lohnes and Culver— A. That is correct.

Q. —Consulting Radio Engineers in Washington? A. Yes.

Q. Are you employed by the Trebit Corporation? A. Yes.

Q. In connection with that employment, have you studied the pending television plans issued in this proceeding? A. Yes.

Q. And prepared exhibits for introduction in the record? A. Yes.

* * * * * * * * * *

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The Presiding Officer: Are there any further questions about the qualifications? Are they conceded by the Broadcasting Bureau?

Mr. Rollo: Conceded.

Mr. Lester Cohen: We concede.

Mr. Stanley B. Cohen: Conceded.

* * * * * * * * * *

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Mr. Dempsey: A stipulation has been reached by counsel for all parties which I think would be appropriate to have read into the record at this point. "It has been stipulated and agreed by and between the parties as follows:

"1. The Grade A and Grade B contours of the proposals of WJR, Butterfield and Trebit as shown on Butterfield Exhibit 1, Figure 3-A, are accurate.

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"2. The following area figures in square miles within the A and B contours of each proposed station as shown on Butterfield Exhibit 1, Figure 3-A, were computed as provided by Section 3.684-E of the Commission's Rules and Regulations are correct.

"The figures are as follows: For WJR, Grade A, 6,016 square miles; Grade B, 10,314 square miles; For Butterfield, Grade A, 6,514 square miles; Butterfield, Grade B, 11,340 square miles; For Trebit, Grade A, 6,320 square miles; for Trebit, Grade B, 11,640 square miles.

"3. The following population figures within the areas listed under Heading 2 of this stipulation are based on the 1950 census, equal population distribution within Minor Civil Divisions being assumed and no population being excluded. Such population figures are accurate within plus or minus 1.5 per cent.

"The figures for WJR Grade A, 3,577,871; Grade B, 4,236,993; Butterfield, Grade A, 3,612,602; Butterfield, Grade B, 4,319,986; Trebit, Grade A, 929,100; Grade B, 3,779,480."

Mr. Stanley Cohen: Due to the peculiar circumstances of the instant case the Broadcast Bureau does not object to the introduction of these figures on areas and population.

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G. F. Leydorf

a witness called on behalf of WJR, The Goodwill Station, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

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Cross-examination

By Mr. Dempsey:

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Mr. Dempsey: Would Mr. Leydorf be able to answer the question of whether WJR considered the filing of the application for Flint as an abandonment of its channel 5 application for Detroit?

The Witness: Yes.

By Mr. Dempsey:

Q. Mr. Leydorf, who was responsible for the selection of the site proposed by WJR? A. I was.

Q. And in selecting that site what consideration did you give to the coverage of Detroit which would be attained by the proposed station? A. The selection of the site was made, the coverage of Detroit being recognized. I believe the selection occurred with that as one of the very last considerations.

The Presiding Officer: Sir?

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The Witness: One of the very last considerations.

Mr. Lester Cohen: I did not hear that.

The Witness: One of the very last considerations. There are a number of requirements that came first.

By Mr. Dempsey:

Q. I note in your exhibit 3 the site you selected is approximately 110 feet higher so far as the terrain in the direction of Detroit is concerned as compared to the terrain in the direction of Flint. Is that a correct interpretation of your exhibit 3 or is it the reverse? A. If I understand your question, the average terrain in the direction of Flint is 110 feet higher approximately than the average terrain in the direction of Detroit.

Q. Did you give any consideration to the selection of a site which would not cover the City of Detroit with Grade A service? A. I believe each of the sites considered by us, and we numbered them on a topographic map, would give Detroit Grade A service to most of the city.

The Presiding Officer: Mr. Dempsey, I did not quite get the full meaning of the previous question; not this one but the one prior to that time, and I would like to clear my mind on this.

As a practical matter Detroit is 110 feet lower than Flint, is that right?

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Mr. Dempsey: Higher.

The Witness: Yes.

The Presiding Officer: So it would make no difference which site was selected, you would always have that 110-foot differential?

Mr. Dempsey: I am not certain.

Mr. Hancock: I am not clear in my mind which way the differential works.

Mr. Dempsey: The elevation with respect to Detroit is less than with respect to Flint. The Examiner pointed out that is a function of the nature of the terrain between Detroit and Flint.

The Presiding Officer: My understanding is that Flint is 110 feet higher above sea level than Detroit.

Mr. Dempsey: Lower.

Mr. Rollo: Could we have the witness answer the question?

The Presiding Officer: Let me ask Mr. Leydorf: Is Flint or the average terrain of Flint 110 feet higher above average mean sea level than the average terrain of Detroit?

The Witness: I would say at least 110 feet, more likely 150 or 170 feet. I have not made such a study but my general knowledge of the roughly 600-foot level of the large portion of Detroit and roughly 800-foot level of the largest

portion of the area of Flint, there would be more than 110 feet difference between the elevations above mean sea level.

The Presiding Officer: I think that explains it in my mind.

Mr. Rollo: These average elevation figures shown on Exhibit 3 are from two to ten miles, are they not?

The Witness: Yes.

Mr. Dempsey: Is that correct? Is that what those figures show, they relate only from 2 to ten miles from the transmitter site?

The Witness: Yes.

By Mr. Dempsey:

Q. Mr. Leydorf, from the site that you have selected the effect is that you get a greater elevation above Detroit than you do above Flint? A. Yes, of course.

The Presiding Officer: Let me make sure—that would be true, no matter what location were selected?

Mr. Dempsey: I do not think you can generalize on that point because, if you take another place behind the hill on which they locate the same result might not occur. It is a function of the site and the relative city limits from that site.

By Mr. Dempsey:

Q. Mr. Leydorf, did you consider in connection with the selection of a site the provisions of Paragraph B of Section 3.685 of the Commission's Rules and Regulations? I have in mind the second sentence of that section which reads "In general the transmitting antenna of the station should be located at the most central point at the highest elevation." A. Yes, I have come to know that statement.

Q. Now in what regard do you consider your proposed site centrally located? A. It is located within limitations centrally with respect to the highest ground available which is the plateau.

Q. As central as you can get with respect to Detroit and Flint, is that a fair statement? A. Will you repeat your question?

Q. Do you mean it is central considering the locations of Flint and Detroit? A. It turned out to be that way, yes.

Q. Would you say it is central with respect to Flint, the City of Flint? A. No.

Q. Or with respect to the Flint metropolitan area? A. No.

Q. Or with respect to the Flint trade area?

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A. No.

Mr. Dempsey: I have no other questions, Mr. Examiner.

The Presiding Officer: Trebit?

Mr. Dempsey: Trebit just finished, your Honor.

The Presiding Officer: Butterfield?

By Mr. Hancock:

Q. Am I correct in that you have no specified studio location in Flint? A. Yes.

Q. And that the exhibits which have been previously introduced describing by way of an artists drawing the studios are the studios that you propose to build on an undetermined site in Flint? A. Yes, sir.

Q. You testified in answer to one of Mr. Dempsey's questions that Grade A service to Detroit from your proposed operation was one of your last considerations. What did you mean by that? A. The first considerations were the mileage separations of stations on the same and adjacent channels, to as far as possible, avoid getting into the airways, in that area, to obtain high ground for the transmitter site, and then maximizing the population covered was the last consideration.

Q. Are we to understand from your testimony that one of the considerations, be it first or last, in connection

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with the selection of your site was the rendition of a Class A service to the City of Detroit? A. Yes.

Mr. Hancock: No further questions.

The Presiding Officer: Do you have any questions, Mr. Cohen?

Cross-examination

By Mr. Stanley Cohen:

Q. Although it can be ascertained from looking at the exhibits, I monder if you would hazard a guess as to the mileage from the transmitter site both to the City of Flint and the City of Detroit?

The Presiding Officer: What points in the Cities?

Mr. Stanley Cohen: The City limits would satisfy me.

The Witness: I would say they are approximately 25 and 35, respectively, for Flint and Detroit and that is approximate. I do not know those numbers.

By Mr. Stanley Cohen:

Q. I also take it from your answer to counsel that when you use the word "last" with respect to considerations as to Detroit, you did not mean it in terms of any descending scale of importance because it was, from the answers elicited, apparently of such importance that you did not consider any sites which would not provide service to Detroit?

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A. I can say that our decision to file for Channel 12 in Flint was made before we realized the amount of the Detroit coverage that would result; that was a subsequent discovery.

Then the study of where to place the transmitter revealed that Detroit could be covered with Grade A service from the site which covered Flint quite satisfactorily.

Mr. Stanley Cohen. No further questions.

Mr. Dempsey: If the Examiner please I have a question that was raised by one Mr. Hancock asked.

By Mr. Dempsey:

Q. Mr. Leydorf, I believe you said you had as one of the considerations the maximizing of population? A. Yes.

Q. Is there any method on that you know of for relating population to percentage of locations in a given area which can be determined from the Commission's curves? A. I should say this maximizing of population and area within certain signal contours was made for our information in reaching a decision, not in the manner prescribed by the Commission, but that much more thorough and complex manner by means of the methods for instance published by a man named Bullington in the proceedings of the Institute of Radio Engineers. We took steps to assure ourselves that the coverage would be what we believe it to be to the best of

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our ability to determine that.

Q. Am I correct in assuming that the Commission's approach to allocations of television has been to use a method of Iso-service contours which are contours that can be interchangeably described in millivolts, dbu's or percentage of locations received a given signal 90 per cent or more of the time? A. Yes.

Q. And is it true that there is no known method for relating percentages of location to actual population distribution that is recognized by the Commission? A. My mention of this has no relation to any established methods. We used the best way we had available, in our belief, to determine how these various things might be matched, how the best choice might be made——

Mr. Dempsey: If the Examiner please, I think it is important for the record to reflect the actual considerations used by WJR. I would like to object to any of Mr. Leydorf's testimony being taken as proving that there is a method for relating population to Iso-service contours.

The Presiding Officer: We will assume that the Examiner will not consider Mr. Leydorf's testimony as proof that any particular persons within that area would receive service or that the particular method is approved by the Commission.

Mr. Dempsey: Or that any given percentage of people

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within the area will receive service.

The Presiding Officer: That is correct.

This will be off the record.

(Discussion was continued off the record.)

By Mr. Dempsey:

Q. In listing the considerations that you did use in response to Mr. Hancock's question you did not make any reference to any consideration of rendering service, or to put it in a controversial fashion, of having your A or B contours extended into Zone 2. Did you in fact make any attempt to consider in the selection of a site whether or not Grade A or Grade B service in Zone 2 was a desirable consideration? A. We gave that consideration. I might say we plotted on a map the area in which the station could be located observing the mileage separation requirements on the same and additional channels and then took a transparent overlay with the A and B radio approximately and moved it around in all portions of that area and gave consideration to those possibilities. It was fairly early.

Q. It is true, is it not, that the further south you go from Flint the less area of either A or B contour will extend into Zone 2? A. Yes.

Q. In view of that fact did you consider it important

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to locate as far north as possible or did you consider that unimportant as compared to the maximizing of population which you mentioned? A. We considered the maximizing of population more important.

Q. And did you give any consideration to any loss of service because of adjacent channel interference?

Mr. Rollo: I object to the question.

Mr. Dempsey: I asked if he gave consideration to the fact. I believe that is a proper question.

The Witness: Beyond observing the mileage separation.

By Mr. Dempsey:

Q. Did it have anything to do with your conception of maximizing population? A. No.

Q. Are you familiar with the Commission's finding, Paragraph 157 o fthe Sixth Report in which a statement is made——

The Presiding Officer: Off the record.

(Discussion was continued off the record.)

Mr. Dempsey: The statement in the second sentence of Paragraph 157 of the Sixth Report reads: "We believe the record supports a zero db adjacent channel interference ratio."

By Mr. Dempsey:

Q. Did you take that into consideration at all?

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A. No.

Mr. Dempsey: I have no further questions.

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Redirect Examination

By Mr. Rollo:

Q. Mr. Leydorf, would you refer to Section 3.685-B of the Rules governing television stations?

The Presiding Officer: Off the record.

(Discussion was continued off the record.)

By Mr. Rollo:

Q. Page 184 of the document you have before you: You will recall that during your cross-examination there were some questions directed toward you concerning the phrase contained in this paragraph "the most central point at the highest elevation available." Will you describe if and how your

site complies with this particular paragraph? A. We sought the highest elevation available.

Mr. Dempsey: If the Examiner please, I would like Mr. Leydorf to say within how many miles of Flint or Detroit. There are many higher elevations available in the United States.

The Witness: Which provide adequate service at a minimum calculated——

Mr. Dempsey: Provide a minimum field intensity over the city.

The Witness: Provide more than a minimum, at least a minimum.

Mr. Dempsey: Is there a higher site available to provide the minimum?

The Witness: Conceivably, yes.

Mr. Dempsey: Do you know? Have you looked?

The Witness: I am making that assumption.

Mr. Rollo: May I suggest the witness be allowed to answer my question?

Mr. Dempsey: I beg your pardon.

The Witness: The greatest height available consistent with more than the minimum required field intensity over the City of Flint and with our understanding in keeping reasonably free of the airways.

Mr. Dempsey: Of what?

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The Witness: Of the airways.

By Mr. Rollo:

Q. And with those factors in mind is your site centrally located? A. It is centrally located in so far as such availabilities are concerned. It is one of the nearest sites to Flint which complies with those standards.

Q. Do you care to give a definition of what you understand this "most central point at the highest elevation available" to mean? A. I do not believe I am clear as to just what it means. I do not understand it to mean the center of the city limits of Flint or the center of the city or some such thing.

Q. In reading the entire paragraph do you believe that it means the most central points of the principal city to be served?

Mr. Dempsey: If the Examiner please, I think the witness has answered. I do not believe counsel should testify on the point.

The Presiding Officer: I believe that is leading the witness to some extent.

Mr. Rollo: I will withdrew the question.

By Mr. Rollo:

Q. What is your understanding with respect to the phrase "central points at the highest elevation" as it

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relates to the center of the principal city to be served?

Mr. Dempsey: The witness has already answered that question.

The Presiding Officer: Go ahead and answer it.

Mr. Dempsey: May I have a ruling.

The Presiding Officer: I said he may answer.

The Witness: I understand it to mean choosing a site in somewhat the way we did.

The Presiding Officer: Will you please read back the question, Mr. Reporter?

(The pending question was read.)

The Presiding Officer: Let me say that the witness has testified that he personally cannot explain what the language used in this section means. I will concede that it is a little bit difficult for me to understand exactly what it means as well. I think that the witness has already testified as to his understanding of the meaning and why he chose that particular location.

I doubt that a useful purpose would be served by going any further into this particular problem.

Mr. Dempsey: With all due deference to the Examiner, I think the witness indicated that he believed the most central point referred to the central point of the city to be served. I think a reading of the entire paragraph will show that statement occurs after the statement that 77 dbu should be put over the city and that that is a reasonable interpretation.

Mr. Rollo: I do not believe the witness testified to that. He testified just the contrary.

Mr. Dempsey: I would like to have the answer read.

Mr. Rollo: In response to your question?

Mr. Dempsey: In response to yours.

Mr. Hancock: I thought he said it did not mean the center of the city.

Mr. Dempsey: I thought he said it did mean the center of the city.

The Presiding Officer: To clarify it all over again would you ask him the question and we will consider this answer now.

Let me ask you, Mr. Leydorf, what in your opinion does this statement mean "In general the transmitting antenna of the station should be located at the most central point at the highest elevation available."?

The Witness: Am I to consider that statement of itself?

Mr. Rollo: May I ask that he answer the question in light of the entire language of the paragraph?

The Presiding Officer: I would be interested in knowing—strike that.

Did you read Section 3.685-B when you chose—and did you have that under consideration when you chose—the transmitter site?

The Witness: Yes.

The Presiding Officer: And at the time that you chose the transmitter site what was your understanding of the requirements of Section 3.685-B?

The Witness: My understanding was that this was more in the nature of a suggestion or advice rather than a requirement and that——

Mr. Dempsey: What was that?

The Witness: —suggestion or advice in site selection, and that a site such as we chose was consistent with this.

The Presiding Officer: What did you believe this section suggested?

The Witness: It suggested a proper compromise with height available terrain-wise and the population to be served and their location with respect to that height.

The Presiding Officer: And your answer is that the site which you selected provided a compromise meeting the suggestion?

The Witness: Yes.

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George Lohnes

a witness called by the Trebit Corporation, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—Resumed

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By Mr. Dempsey:

Q. Mr. Lohnes, I will ask you to examine what has been identified as exhibit 3. It is labeled WFDF but it is Trebit Exhibit 3 for the purpose of reference. It bears the title "Other Signals". Will you please describe briefly what this exhibit contains and how it was prepared? A. Exhibit 3 consists of two maps showing calculated Grade A for the different operations shown on here, Grade A signals, and another map showing the Grade B signals from existing and proposed operations.

Q. That is Grade A and Grade B contours? A. Yes, sir, contours from existing and proposed operations and the existing operations include outstanding construction permits or grants.

Figure 1 is a map showing the Grade A contours for the three proposed operations involved in this proceeding in addition to the other contours I have described.

The tabulation in the lower lefthand corner of Figure 1 shows the channel number for the contour shown on this

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report as well as the location and the identification wherever possible and the status of the operation, whether it is proposed, construction permit, or a licensed operation or pending application.

Also shown on the map of Figure 1 is a shaded line across the top of the map running from the lefthand side of the page to the right-hand side of the page. This represents the boundary of zone 1 and zone 2 as defined in the Sixth Report of the Commission.

I call attention to the location of the Grade A contours for the three proposed operations with respect to that boundary.

Figure 2 is a map showing the Grade B contours for the operations described and tabulated in the lower lefthand corner of the map. Again this map shows the boundary of Zone 1 and Zone 2.

Q. And the information which you used in preparing these contours was obtained how, Mr. Lohnes? A. It was obtained from the records and files of the Federal Communications Commission.

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Mr. Rollo: Did you in any instance use the actual contours either Grade A or Grade B that had been shown in the applications themselves?

The Witness: No, sir, we did not. We assumed here

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that the terrain was uniform. We used the effective antenna height given in the application or the construction permit and then the effective radiated power given in the construction permit.

Mr. Rollo: But you assumed flat earth?

The Witness: Uniform terrain, that is correct.

Mr. Rollo: That applies to both Figure 1 and Figure 2?

The Witness: Yes, sir.

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Mr. Hancock: Yes, sir, I do.

Would you turn to Figure 3 of Exhibit 4, please. What distances, Mr. Lohnes, did you use for the A and B contours of the Butterfield proposal there?

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The Witness: That, as accurately as we could produce it, are the contours shown in the Butterfield application.

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Mr. Hancock: Mr. Lohnes, in the preparation of this exhibit, did you give any consideration to a channel 13 assignment which the Commission has made at Cadillac, Michigan and for which there is no pending application at the present time?

The Witness: No, sir, I did not.

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By Mr. Dempsey:

Q. Mr. Lohnes, I will ask you to refer to what has been marked Exhibit 5 for Trebit.

(The document referred to was marked WFDF Exhibit No. 5 for identification.)

By Mr. Dempsey:

Q. It bears the label "WFDF Exhibit No. 5," and the title is "Comparison of service to Flint metropolitan and composite trade areas." Will you please describe the various maps and tabulations in that exhibit?

The Witness: This exhibit is another approach to a comparison of the three proposed operations involved in this

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proceeding. Figure 1 is a map with no contours on it, but it is shown for the purpose of comparing the signal strength of WFDF-TV's proposed operation with WJR-TV with respect to the Flint metropolitan area and the Flint composite trade area. This composite trade area again is the same one which has been shown in the preceding exhibits. The dashed line running diagonally across this composite trade represents a line of equal signal strength between the two proposed operations and is intended to show by relativity the area or the portion of the metropolitan area and the composite trade area over which the respective stations would have the strongest signal. To the north of this diagonal line, the WFDF signal would be stronger and to the south of that line the WJR-TV signal would be stronger.

It represents one other further thing from the standpoint of analysis with respect to the metropolitan area of Flint.

Q. Mr. Lohnes, at that point, let me ask you: Do you have figures showing the percentage of the trade area which lies north of the line and the percentage of the trade area which lies south? I am not going to ask you to state them at this time. They do not appear on the exhibit, but, if the exhibit is admitted, I am going to ask you to put them in the record. A. Yes, sir.

Mr. Rollo: I am sorry, but I didn't hear what you said.

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Mr. Dempsey: He has a percentage of the area north and a percentage of the area south of the line, but I am not asking him to state it now.

The Witness: Figure 2 is another map showing the same type of comparison between the proposed WFDF-TV operation and that of Butterfield Theaters.

Figure 3 is where we begin to show different field intensity contours for the three proposed operations. This exhibit, figure 3, shows fixed contours for the proposed operation of WJR-TV. The first contour represents a field intensity of 97 dbu for 99 per cent of the receiving locations for 100 per cent of the time.

That represents an area where the signal does not vary with respect to time and that is supported by comparison of the 50 per cent of the time curves and 10 per cent of the time curves—those are propagation curves contained in the Standards of Good Engineering Practice—out to a distance of somewhere between 10 and 15 miles there being no difference between these curves supporting the absence of variation of the signal with respect to time. The second contour is shown in the tabulation in the lower lefthand corner of figure 3 as representing a field intensity contour of 86 dbu for 99 per cent of the location for 90 per cent of the time.

This map, as well as the succeeding maps, has been broken down into two different areas for the purpose of the

comparison. The first area is within the first contour where the signal does not vary with respect to time. The second area lies outside of that contour and for the purpose of uniform comparison and analysis, we have assumed and taken signals exceeded for 90 per cent of the time at the per cent of receiving locations as shown in the tabulation in the lower lefthand corner of figure 3.

In accordance with the relationship between the field intensity per cent of receiving locations and percentage of time and signals exceeded at the location, these figures were determined in accordance with the procedures set forth in the third order of the Commission.

Figure 4.

By Mr. Dempsey:

Q. Before you get to figure 4, did you indicate what the difference between the dashed and dotted or dotted and dashed contours or boundary lines are? A. As shown on all these maps, the dotted or small dashed lines represent the outer limits of the Flint metropolitan area. The large dashed line represents the outer boundary of the composite trade area which has been used on previous exhibit.

Q. All right. Will you proceed. A. Figure 4 is another map showing the similar development, contours, for the proposed Butterfield operation.

Figure 5, the same thing for the proposed WFDF operation.

You may note some difference in contours and the reason for it is that we tried to get uniform distribution of contours on the map for reasons of statistical analysis; that is, measuring areas, and then we also put in some contours which represented end values or the signal over the most distant part of either the metropolitan area or the composite trade area. In these tabulations on the lower left-hand corner of figure 3, 4 and 5, I want to point out that the field intensity for the 77 dbu at 90 per cent of the receiving locations for 90 per cent of the time represents what the F. C. C. standards call or rules call city service and 31 dbu for 70 per cent of the receiving locations for 90 per cent of the time represents what is defined as grade A service.

Figure 6 is a tabulation which results from measuring areas on these preceding maps; that is, figures 3, 4 and 5.

In the tabulation of figure 6 the lefthand column is marked "F mv/m." That is the field intensity in millivolts per meter. The succeeding column or the next one to the right is "F sub dbu". That will represent the field intensity in dbu. It also represents the percentage of receiving locations and it represents the per cent of the time the signal exceeds that value and then the tabulations vertically on the WJR, Butterfield and WFDF. There is a typographical error there. WJR should read WFDF.

Q. The last column should be WFDF instead of WJR? A. Yes, sir.

That represents per cent of area involved.

Mr. Dempsey: If the Examiner will permit, I will correct the reporter's copy to show that correction.

The Presiding Officer: All right.

By Mr. Dempsey:

Q. Will you proceed, Mr. Lohnes? A. In the upper part of the tabulation of figure 6 it is pointed out the heading stating in parentheses "Flint Metropolitan Area."

The percentage figures under the three columns of WJR, Butterfield and WFDF represent the per cent of the given contour area which is within the metropolitan area of Flint.

For 87 dbu where the signal is 99 per cent of the location and 100 per cent of the time or in the area where there is no variation of the signal with respect to time, with respect to WJR, the area within that contour which is within the metropolitan area of Flint does not include any of the City of Flint in one per cent of the Flint metropolitan area. For Butterfield the area within that contour which is within the Flint metropolitan area and likewise does not include any of the City of Flint is 11 per cent of the Flint metropolitan area. For WFDF the area within that 97 dbu 100 per cent time contour is 53 per cent of the Flint metropolitan area and includes all of the

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City of Flint.

Going down the tabulation, the next one is noted to be 86 dbu contour for 99 per cent of the location, 90 per cent of the time.

Thirty-seven per cent of the area within the Flint metropolitan area lies between the first and second contours for WJR. Sixty-five per cent of the Flint metropolitan area lies within those two contours for Butterfield and 42 per cent for the proposed WFDF operation.

The same applies down through the other contours.

Q. The next line has dashes for both WJR and Butterfield and a number for Flint. for WFDF. What is the reason for that? A. That is the end value or the lowest signal from the proposed WFDF operation over the Flint metropolitan area.

Then the next one gives the recorded percentages of the area for both WJR and Butterfield and a dash for Flint because we have already covered 100 per cent of the metropolitan area for the Flint operation.

Q. WFDF operation? A. For the WFDF operation.

The lower part of figure 6 is the tabulation representing the same type of analysis with respect to the composite Flint trade area which has been shown on these and previous exhibits.

The Presiding Officer: Mr. Lohnes, just for my benefit, I will assume that the same general practice was followed——

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Mr. Dempsey: Yes, the second series goes to the trade area and the Flint metropolitan area.

The Witness: That is right.

By Mr. Dempsey:

Q. Will you turn to figure 7. A. Figure 7 is a tabulation of the results of an analysis leading up to showing the per cent of the receiving locations in the Metropolitan and trade areas which will get the corresponding signals in the proposed operations as shown here.

Q. Is the first row the same as on the preceding exhibit? A. Yes, sir.

Q. A hundred per cent of the time in both the top group after tabulations and the lower group? A. That is right.

Q. And the second group separates it into the 90 per cent of the time area as distinguished from the hundred per cent? A. That is right.

Q. Will you discuss please the group of tabulations below the first row? A. The group of tabulations with respect to the Flint metropolitan area before the first row which involves the field intensity for 90 per cent of the time of 86 dbu, 73 dbu, etc., represents the total number of receiving locations in the Flint metropolitan area which would get a signal of 73 dbu or more from the respective operations.

We will say that WJR's proposed operation would serve 94.6 per cent of the total receiving locations in the Flint metropolitan area with a signal exceeding the value for 90 per cent of the time. Butterfield's proposed operation would serve 97.7 per cent of the total receiving locations in the Flint metropolitan area.

Q. Those are the locations outside the hundred per cent of the time portion of the area? A. That is right, sir. Of the total receiving locations in the Flint metropolitan area. The WFDF proposed operation would serve 98.9 per cent of the total receiving locations in the Flint metropolitan area which are outside the 100 per cent of the time contour.

Q. And the same information is contained in the lower tabulation with respect to the composite trade area? A. That is correct.

Q. The figures under the first tabulation opposite the words "metropolitan area" represent what? A. It means that 99 per cent of the Flint metropolitan area for the proposed WJR operation lies outside of the area covered by the 100 per cent of the time contour.

Q. And it is in that area that 94.6 per cent of the receiving locations receive the signal? A. Yes, sir.

Q. And your comment is similar with respect to the other

numbers and the other applicants? A. That is correct.

Q. Mr. Lohnes, in preparing figure 3 through figure 5, how did you determine the location of the various contours? A. Those locations are based upon an assumed uniform terrain with an effective radiated power of 316 kilowatts and an effective antenna height of a thousand feet above average terrain for all three proposed operations. We did this in order to treat all proposed operations on the same basis for the purposes of comparison. Any deviation which might occur from contours shown on an application are going to be minor. They will average out, and such deviations would not affect the results shown in figure 6 and figure 7 more than one-tenth of one per cent.

Q. How did you determine the various areas or segments of area which for the metropolitan and the trade area you have used in making your tabulations? A. Those areas were measured on the map with a planimeter and the percentages taken by referring those readings to the total planimeter area for the respective areas.

Q. With respect to the utilization of a planimeter, is that a method provided by the Commission rules for determining square area and square miles? A. Yes, it is.

Q. It is referred to in the rules as an approximate method,

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is it not? A. That is correct.

Q. Within the limits of that approximation, is it your opinion that deviations which would occur if many radials were taken which took into account exact terrain would affect the result? A. As I stated, the result would be an effect of approximately one-tenth of one per cent.

Q. Mr. Lohnes, in your tabulation, both on figures 3 through 5 and on figures 6 and 7, you give under the "L" column and the "T" column—first, let's take the "F" and "T" columns. Are those provided by the curves, did I understand you to say, that are attached to the sixth report? A. The "F" and "T"?

Q. Yes. A. These are.

Q. They were taken directly from the curves in the Commission's rules? A. Yes, sir.

Q. The "L" column was taken from the curves, you said, in the third order? A. Yes, sir.

Q. Were those the curves which the Commission used to determine the grade A and grade B contours in terms of percentage of location?

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A. Yes, sir.

Mr. Dempsey: I have no further questions. I am now prepared to offer exhibits.

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George Lohnes

a witness appearing for and on behalf of Trebit Corporation, having been previously duly sworn, was examined and testified further as follows:

Direct Examintion—Resumed

The Witness: Exhibit No. 6 is a series of maps showing the individual Flint trade areas bearing the name under each trade area shown on a small map, and in the middle of the right-

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hand column on page 6 there is a trade area boundary which represents the outer limits of the composite trade area, which is made up of all the trade areas shown on the map.

By Mr. Dempsey:

Q. The metropolitan area and the J. Walter Thompson trade area are identical; is that correct? A. That is correct.

Q. The composite as shown in the lower map in the right-hand column differs in what way from the composite trade area that has been reflected on at least one figure of each of the exhibits so far either accepted in evidence or offered in evidence, that is, Exhibits 1 through 5? A. This revised composite trade area is larger in the direction south of Flint. The east-west boundary of the composite trade area shown on Exhibit No. 6 lies south of the southern boundary of the composite trade area shown on the other exhibits. The other directions remain substantially the same.

Q. How many additional square miles are added to the trade area in this composite figure as compared to the composite trade areas indicated on the previous exhibits? A. In a session after the last day of hearing, the revised or new boundary of the composite trade area was measured with a planimeter, and we found the additional area to amount to 165 square miles, which increased the total area in the composite trade area to 2,400 square miles.

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Q. The total square miles in the composite trade area, then, shown on Exhibit No. 6 is 2,400; is that correct? A. Yes, sir.

Q. And it represents 165 square miles more? A. Yes, sir.

Q. And those 165 square miles are included in an additional segment that was added to the south of the composite trade area boundaries in the earlier exhibits? A. That is right.

Q. And this trade area as indicated includes the Hearst trade area which had not previously been shown? A. That is right.

Mr. Dempsey: If the examiner please, all of the exhibits heretofore receievd or tendered on behalf of Trebit, that is, Exhibits Nos. 1 through 5, should be considered as corrected to reflect the trade area data shown on Exhibit No. 6. We are re-offering Exhibit No. 5, because we changed the percentages there, and it seemed best to redo it.

The Presiding Officer: Then you are withdrawing the proffered Exhibit No. 5?

Mr. Dempsey: I will withdraw Exhibit No. 5 as previously proffered, because there are so many changes required in that that I think it would be simpler to reoffer the exhibit. So Exhibits Nos. 1 through 4 should be considered as modified by the data included on Exhibit No. 6, and the miles that have been

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stated by Mr. Lohnes.

(WFDF Exhibit No. 5 was withdrawn.)

Mr. Stanley Cohen: Off the record.

(There was discussion off the record.)

The Presiding Officer: Back on the record.

(A document was marked as WFDF Exhibit No. 5-A, for identification.)

By Mr. Dempsey:

Q. Mr. Lohnes, I will ask you to refer to what has been marked for identification as WFDF Exhibit No. 5-A. Will you refer to the first map, Figure 1, in that exhibit? A. Yes, sir. Figure 1 is a map that was used——

The Presiding Officer: Off the record.

(There was discussion off the record.)

The Presiding Officer: On the record.

Mr. Rollo: I would like it to be noted that this is the first time that I have seen this exhibit, and I would therefore appreciate a description of it.

The Presiding Officer: Very well.

By Mr. Dempsey:

Q. Mr. Lohnes, Figure 1 of Exhibit No. 5-A? A. Figure 1 is a map showing the trade area for Flint. This is the same map that appeared in the old Figure 5 which was previously described, and since that time this map has not been photostated. The trade area shown on this map is to be

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revised in accordance with the composite trade area shown on Exhibit No. 6.

Q. Exhibit No. 6? A. Exhibit No. 6.

Mr. Dempsey: If the examiner please, I am not sure that I formally offered Exhibit No. 6. I would like to do so, if we are going to continue to refer to it.

The Presiding Officer: I will defer ruling on Exhibit No. 6 until such time as I rule on all of the exhibits.

Mr. Dempsey: Exhibit No. 6, I might say, is a correction that goes to certain of the exhibits already admitted. Exhibits 1 and 2, which were admitted, show trade areas.

The Presiding Officer: Let me ask this. Is there any counsel here who has an objection to Exhibit No. 6?

Mr. Rollo: Let me make it clear, I have no objection to the accuracy of the transposing of the contours from these trade area maps and metropolitan area maps to this exhibit. However, I have the same objection as to its relevancy as I expressed previously with respect to these trade areas.

Mr. Hancock: Butterfield has no objection.

The Presiding Officer: Does Commission counsel have any objection?

Mr. Stanley Cohen: At this time, it is our position that Exhibit No. 6 is relevant only if Exhibits Nos. 3, 4 and 5 are ultimately admitted.

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Mr. Dempsey: It refers to Exhibits Nos. 1 and 2 as well.

Mr. Stanley Cohen: With respect to Exhibits Nos. 1 and 2, again, the trade areas become relevant only insofar as they later serve as a basis for Exhibits Nos. 3, 4 and 5. Especially on Exhibit No. 1, no point was made of the trade area. I believe Mr. Rollo noted an objection to Exhibit No. 2 and not to Exhibit No. 1, because he did not think that in Exhibit No. 1 the trade area was of any significance.

Mr. Dempsey: If the examiner please, insofar as Exhibit No. 6.... corrects lines on exhibits which have been admitted, I think for at least that purpose it ought to be admitted now. Then as to what further weight or meaning may attach to it insofar as it correct Exhibits Nos. 3, 4 and 5-A, that turns on what you do with those exhibits. But it does nothing but correct lines on these other maps. It has no independent meaning.

Mr. Stanley Cohen: Off the record a moment.

The Presiding Officer: Off the record.

(There was discussion off the record.)

The Presiding Officer: On the record.

Mr. Dempsey, in view of the statements which have been made, I will admit Exhibit No. 6 in evidence, and I make the same ruling with respect to Mr. Rollo's objection that I made earlier in the proceeding.

Mr. Dempsey: Very good, sir.

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(WFDF Exhibit No. 6 was received in evidence.)

By Mr. Dempsey:

Q. Now, Mr. Lohnes, referring again to Figure 1, the trade area there shown should be corrected to conform to the trade area as shown in Figure 6; is that right? A. That is right.

Q. Now, what does that diagonal line represent? The same as in your previous discussion of Exhibit No. 5? A. That is right.

Q. How much of the trade area as corrected in percentage lies north of that line and how much south? A. 75 percent, or 1,780 square miles, lie north of the line, and the balance, or 26 percent, lies south.

Mr. Stanley Cohen: Off the record.

The Presiding Officer: Off the record.

(There was discussion off the record.)

The Presiding Officer: On the record.

By Mr. Dempsey:

Q. Mr. Lohnes, referring to Figure 1, this is similar to Figure 1 of Exhibit No. 5 which has been withdrawn, which you discussed the other day. The dashed diagonal line represents the line of equal signal intensity between WFDF and WJR-TV proposals; is that correct? A. That is right.

Q. South of that line, WJR has a stronger signal and

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north of the line WFDF has a stronger signal? A. That is right.

Q. Figure 2 contains comparable data with respect to Butterfield's proposal and WFDF's proposal, and the diagonal line on Figure 2 represents, again, a line of equal signal intensity, the area to the south of the line getting the stronger signal from Butterfield and the area to the north getting the stronger signal from WFDF; is that correct? A. Yes, sir.

Q. The trade area on Figure 2 should be corrected in the same manner as the one in Figure 1; is that correct? A. That is right.

Q. With that correction, can you state the percentage of the trade area lying north of the line and the percentage of the trade area lying south of the line? A. On the trade area, 64 percent is north of the line and 36 percent is south of the line.

Q. Now will you refer to Figure 3? A. Yes.

Mr. Dempsey: If the examiner please, as a result of discussion between the engineers for the applicants, it was agreed to strike in the legend on Figure 3 the numbers under the column headed "L" and the numbers under the column headed "T".

Is that correct?

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Mr. Rollo: That is my understanding.

Mr. Dempsey: And to state that the numbers under the column headed "F" are F(50,50) numbers. Does that represent it?

Mr. Hancock: That is correct.

By Mr. Dempsey:

Q. Mr. Lohnes, the contours reflected on Figure 3 which bear the numbers 1, 2, 3, 4, 5, and 6 are contours prepared in accordance with the Commission's Rules and Standards for television, and indicate where the lines of signal intensity under the colume "F" fall, expressing the signal intensity in decibels, or db.u.'s; is that correct? A. That is correct.

Q. Figures 4 and 5, Mr. Lohnes, should be corrected by striking out the "L" and "T" columns in the legend; is that correct? A. Yes, sir.

Q. And the "F" column in the legend of each of these figures is an F(50,50) value; is that correct? A. Yes, sir.

Q. And the iso-service contours shown on both these exhibits were prepared in the same manner for Butterfield and WFDF as the iso-service contours on Figure 3 were prepared for WJR; is that correct? A. That is correct.

The Presiding Officer: Mr. Dempsey, I take it that these various figures, 3, 4, and 5, are subject to the same correction for the composite trade area in Exhibit No. 6; is that correct?

Mr. Dempsey: That is correct. I was just going to ask him that.

The Witness: Yes.

By Mr. Dempsey:

Q. Now, Mr. Lohnes, will you refer to Figure 6? A. Figure 6 is a tabulation showing a comparison of the percent of the Flint metropolitan and composite trade areas lying within the iso-service contours shown on the maps, Figures 3, 4 and 5.

Q. Then that composite trade area is the composite trade area as corrected by Exhibit No. 6? A. Yes, sir. The left-hand column is the F(50,50) value, taken from the F. C. C. curves for 25 d. b. k. power and 1,000 feet effective antenna height. The next column, labelled 64(L,T)——

Q. Just a minute, before you get to the next column. That is Figure 6 of Appendix B to the sixth order, which you are referring to as the F. C. C. curve? A. Yes, sir.

Q. Proceed. A. The next column, labelled 64(L,T), applies to the figures bearing the time factor 90 percent below the dotted

lines running horizontally across the page on Figure 6. The next three columns represent, respectively, the percentage of the metropolitan and composite trade areas lying within the respective contours for the three proposed operations.

Q. Is that line within the respective contours or between the respective contours? For example, the figure 83 appears in the extreme left-hand column. Under WFDF, the figure 5 appears opposite that. Does the figure 5 represent the outer boundary or the amount between the 86 and the 83? A. If you please, I would like to correct that. I believe you are referring to 73 db. u. in the left-hand column, are you not?

Q. No, I am not. I am referring to 83. A. Yes, sir. That represents the percent of the metropolitan area lying between contours No. 2 and No. 3.

Q. Then in each of these percentage figures, the amount represents the amount between the contour shown to its left and the one shown immediately above that? A. Yes, sir.

Q. Very well. Shall we proceed? A. At the top of each section of Figure 6, I call attention to a horizontal line opposite the figure 79 db. u. under the "F(50,50)" column. The percentages shown there are for the area within the first contour shown on the maps, Figures 3, 4 and 5, and within that contour is represented what is for all practical

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purposes the area of no fading, where the signal does not vary with respect to time, and the figures 99-99 percent under the 64(L,T) column heading refer to the fact that 99 percent of the locations within that area will get that signal 99 percent of the time. The percentages for the respective proposed operations represent the percent of the metropolitan and composite trade areas within that first contour.

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Q. Very well.

Now, there are certain blanks in these columns; for example, under the column headed "WFDF," under "Metropolitan area," you have the number 42, the number 5, and then three blanks. What is the reason for that? A. The meaning of that is that the 83 dbu contour is the outer contour which covers all of the Flint metropolitan area.

Q. Now, opposite, or in the same row as the figure 4, you have a blank under "WJR" and a blank under "Butterfield."

I assume first that the blank at the bottom under "Butterfield" is explained in the same way as the three blanks under "WFDF." Is that correct? A. That is correct.

Q. What about the blank in the second row? A. That refers to the fact that the 83 dbu contour was previously described as an end value, or a contour which covered the most remote point of the Flint metropolitan district from the WFDF proposed operation, and was not shown in the contours for the proposed WJR and Butterfield operations.

Q. I think, Mr. Lohnes, you testified at our last session in explaining Figures 6 and 7 of withdrawn Exhibit No. 5 that for all the applicants, or all of the proposals, you had drawn contours on 71 dbu, which is the FCC Grade A iso-service contours; 77, which is the FCC city service contour for this

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frequency; and for 97, 86, and 82.5 for all proposals; is that correct? A. Yes, sir.

Q. And that the other intermediate values were values that turned on the end points found for particular applicants? A. Yes, sir.

Q. And had significance primarily for their proposal and not for the others; is that correct? A. That is correct.

Q. And that applies to this as well; is that correct? A. Yes, sir.

Q. Now, referring to the two columns under "64(L,T)", will you explain what they refer to and how they were obtained? A. First, opposite 97 dbu, the two figures representing locations and time, 99 per cent and 99 per cent, were obtained from a comparison of the FCC 10 per cent of the time and 50 per cent of the time contours, and reference to Figure 5 in the third report of the FCC.

Q. Mr. Lohnes, in computing these values, did you follow the procedure prescribed by Appendix B to the third notice, and particularly section V-A of Appendix B? A. Yes, sir.

Q. And the procedures in there for converting 50, 50 values to different values in terms of L and T were followed with respect to the column headed "99 per cent" for locations and

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also by the column headed "99 per cent" for time; is that correct? A. Yes, sir.

Q. And it is obvious, I think, but perhaps it should now be stated for the record, that under 64(L,T), the left-hand column represents "L" and the right-hand column represents "T"? A. That is correct. The figures below the dashed horizontal lines, for example, opposite the F(50, 50) curve of 86 dbu mean that 99 per cent of the locations will get Grade A field intensity or better 90 per cent of the time, and that applies to the other figures so on down the line shown on Figure 6 and to the column headed "64(L,T)".

Q. And you have indicated by certain footnotes significant items or items to which you desire to call attention in some of the columns? A. Yes, sir.

The Presiding Officer: The footnotes are self-explanatory.

By Mr. Dempsey:

Q. Will you refer to Figure 7 now, please, Mr. Lohnes? A. Figure 7 is a tabulation of the results of calculations showing the per cent of receiving locations within the Flint metropolitan area and composite trade area receiving the field intensity indicated in the first three columns on the left-hand side of the page. These percentages of receiving locations were revised to be in accordance with the revised

composite trade area. And in Figure 7, again, certain values shown on this tabulation bear a reference number relating them to the footnotes contained at the bottom of the page on Figure 7.

Q. Mr. Lohnes, do the columns headed F(50, 50) and the two columns headed 64(L,T) represent the same data, and are exactly the same columns as appeared in the previous Figure 6? A. Yes, sir, they are.

Q. Mr. Lohnes, I would like to call your attention to the row under "Flint composite trade area" above the dotted line. Will you explain why the figures under WFDF are 16.6 on Figure 6 and 16.4 on Figure 7, and for Butterfield are 12.5 on Figure 6 and 12.4 on Figure 7? A. Yes, sir. In the calculations made to determine the figures, that is, the percentages of receiving locations shown on Figure 7, we used only the area lying outside of the number one contour shown on the maps, Figures 3, 4 and 5.

Q. This is the area within the number one contour? A. Correction. This represents the area within the number one contour.

Q. Then why is it different on Figure 7 from what it is on Figure 6? A. The change in the trade area, plus——

Q. But it is changed for both the figures.

The Presiding Officer: Off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

By Mr. Dempsey:

Q. Should that be the same? A. Yes, that should be the same. That is correct.

Mr. Rollo: Which should it be?

The Presiding Officer: Off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

By Mr. Dempsey:

Q. Mr. Lohnes, the numbers on the first horizontal row under "Fint composite trade area" in Figures 6 and 7 are different for Butterfield and for WFDF, comparing one figure with the other, and that difference is accounted for by what? A. On Figure 6, we are considering area, and on Figure 7 we are considering percentages of locations, and they reflect the percentages of locations in the second vertical column on the page.

Q. In other words, the numbers on Figure 7 represent 99 per cent of Figure 6; is that correct? A. That is correct, with this qualifying statement. I did not go to the one-hundredth of one per cent. I rounded it off to the nearest tenth of a per cent.

Q. And that is why 5.5 remains unchanged under "WJR" in both exhibits; is that correct? A. That is correct.

Q. All right, sir.

Now will you explain how the other figures were arrived at? A. The per cent of receiving locations within the area between two contours was determined in the following manner. For example, we will consider the 36.6 per cent shown opposite 86 dbu, representing 99 per cent of the locations getting Grade A field intensity 90 per cent of the time for WJR. That was determined by taking the area in between the number one and the number two contours.

Referring that to that segment of the area between those two contours in terms of per cent of metropolitan area, times the average number of locations between numbers one and two contours, which is the average of 99 per cent and 99 per cent, gave the figure for that segment of the area representing 37 per cent of the metropolitan areas giving the indicated service to 36.6 per cent of the receiving locations within that segment of the area within the metropolitan area.

Q. Mr. Lohnes, is it correct to say that what you did was to take 37/95 of 99, and that is how you got 36.9? In other words, you took the number 37 from Figure 6; the number 95 from the bottom of the column on Figure 7, and you applied that ratio to 99, which is per cent of locations opposite? A. Can we go off the record a moment?

Q. Will you please explain in exact numbers just how you made your calculation?

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A. Considering the per cent of the metropolitan area lying outside the number one contour——

Q. That is 95 per cent? A. For WJR?

Q. Yes. A. That happens to be 99 per cent.

Q. 99 per cent on Figure 6; is that correct? A. That is correct. Then the figure 37 was multiplied by the 99 per cent to give the indicated percentage of receiving locations getting the Grade A field intensity or better in that segment of the metropolitan area.

The Presiding Officer: I believe that I understand the exhibit and I understand the purpose. I see no reason to belabor it further unless somebody wants to go into it further. However, I assume, Mr. Lohnes, that in Figure 7 under the column "WFDF" the second figure should be 34.3 rather than 84.3. Am I correct, on Figure 7?

The Witness: No, sir. That should be 84.3, as shown.

The Presiding Officer: I am sorry. That is right.

Mr. Dempsey: If the Examiner please, I am not at all sure that I understand this exhibit, and particularly that number. I would like to ask Mr. Lohnes to refer back to Exhibit No. 5 and tell me why he gets a different value in the metropolitan area on this Figure 7 than he did on that Figure 7.

Mr. Rollo: Are you referring to the Exhibit No. 5 that

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was withdrawn?

Mr. Dempsey: That is right. I am trying to get the thing explained, and I do not think that I am doing very well with it.

Mr. Stanley Cohen: Mr. Examiner, I wonder if there would be any virtue at this stage in going off the record for a while, and seeing if we can understand what is happening, and simplify the line of questioning.

The Presiding Officer: Very well. Let us go off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

In view of the statements made during this break, it appears that all parties desire an opportunity to recompute certain figures. We will accordingly adjourn for lunch, and in order to give the parties a few minutes' more time, we will reconvene at 2:15 sharp.

(Whereupon, at 11:15 a. m., a recess was taken to reconvene at 2:15 p. m. of the same day.)

AFTERNOON SESSION—2:30 p. m.

The Presiding Officer: The hearing will come to order.

Mr. Dempsey: If the Examiner please, as a result of conferences during the recess, certain revisions of Figure 7, the Exhibit which had been identified as 5-A have been made.

I would like to get permission to substitute a new Figure 7 for the one now attached to Exhibit 5-A.

The Presiding Officer: You have that permission.

Figure 7 which is not proffered will be considered as withdrawn——

Mr. Dempsey: (Interposing) I was going to say if we are going to discuss the exhibit I have new figures which would go on, so you would permit it to remain in the exhibit with the tabulations substituted for those that now appear. We could discuss the exhibit for any purpose of objection. The only reason for physically substituting a new page is just for convenience and neatness, really.

The Presiding Officer: Very well. You have leave to substitute a new page.

Mr. Dempsey: If the Examiner please, I have just handed you, to other counsel and to the reporter, a paper which is marked "Figure 7-A." If I may use this to describe how the revised Figure 7 will appear, I will do so as follows:

(1) The column F(50,50) will be unchanged.

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The two columns under the heading 64(L,T) will be unchanged.

The first horizontal row under the words "Flint Metropolitan Area" will be stricken.

The horizontal row under the words "Flint Composite Trade Area" will also be stricken.

Those are the rows which in each case have 97 dbu at the extreme left.

The nall of the numbers under the applicant identification, WJF Butterfield, and WFDF, which are found under the dotted lines in the two separate tabulations will be stricken and the numbers which appear in the same relative position on Figure 7-A will be substituted therefor.

There is one minor additional change. Footnotes two and three automatically go out with the striking of those horizontal rows and footnote four, would then be renumbered as footnote two.

As I say, I will physically present a new Figure 7 which meets this description, but I think from the standpoint of adequately describing what the revised Figure 7 is, I have just completed an accurate statement and I hope it was an intelligible one.

Mr. Dempsey: With the revision of Figure 7 that I have indicated, no party or engineer has any dispute with the computations involved.

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Whereupon,

George Lohnes

resumed the stand, and having been previously duly sworn was examined an dtestified further as follows:

Direct Examination—Resumed

By Mr. Dempsey:

Q. In order to describe Exhibit 5-A in line with the discussions had during the recess so as to eliminate any misunderstanding of the information it contains, will you please state for the record, reading from the paper that you have that has been submitted, to other counsel, the method in which you prepared this exhibit? A. In the preparation of Exhibit 5-A, Figures 1 to 5 inclusive are based on the curves of Figure 6, Appendix B, of the FCC Television Rules, except for, as appearing on Figure 1 to 5, the trade areas shown thereon. The First vertical columns in Figures 6 and 7 are based upon the curves of Figure 6, Appendix B, also.

The second and third vertical columns under the heading 64(L,T), are based upon Section V-A, Appendix B, of the FCC's Third Order.

The percentage figure shown on Figure 6 in the three vertical columns headed by the names of the applicants were computed by taking the raito of planimetered area within the trade or metropolitan area, as the case may be, from

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Figures 3, 4, and 5, which are lying within the No. 1 contour and between successive numbered contours to the total metropolitan or trade-area.

Q. You referred to the Third Order. You mean Third Notice? A. The Third Notice, yes, sir.

The data shown in the vertical columns headed by the applicant's name on Figure 7 were determined by computation.

Q. If the Examiner please, rather than put in what Mr. Lohnes has prepared, which is a detailed computation for each number appearing, it has been suggested that he select several of these values and show the computations for them, which will be sufficiently illustrative of the method used in computing all of them.

The Presiding Officer: Select one and see if that is sufficiently illustrative and then we will see if we need anymore.

The Witness: Take in the case of the WJR-TV contours, for the area between the No. 3 and No. 4 contours as shown on the map of Figure 3, the receiving locations within that area which get Grade-A field intensity for ninety percent of the time, is 28.4 percent. That is shown on Figure 7, the upper section of the page, in the horizontal line running from the left-hand side of the page, 77 dbu, horizontally across the page, and under WJR.

The 28.4 per cent of the receiving locations was calculated by taking the area in between the No. 3 and No. 4 contours as 30 per cent of the area in the metropolitan area, which is outside of No. 1 contour, or between the contours, divided by 99, which represents the per cent of the metropolitan area outside of the No. 1 contour, multiplied by 93.5, which is an average of the locations receiving that signal.

The 93.5 is an average between 90 and 97.

The Presiding Officer: So I understand that. I assume all the other computations were made on the same basis?

The Witness: Yes, sir.

The Presiding Officer: I do not believe a further explanation is necessary as far as I am concerned. If any counsel wishes it, he may certainly feel free to question.

You may continue, Mr. Dempsey.

Mr. Dempsey: That completes the description, then, of Exhibit 5-A as it will appear after substitution.

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By Mr. Eagan:

Q. Now, with reference to Exhibit No. 5-A, would you kindly turn to figure 6 and direct your attention to the statistics shown with respect to the Flint metropolitan area, and tell me whether or not it is accurate to say that this statistical group of figures shows that all three applicants cover 100 per cent of the metropolitan area with a grade A or better signal? A. That is correct.

Q. When we say "grade A," is it correct that we are referring to a signal of 71 dbu based on a 50, 50 curve? A. That is right.

Q. Would you tell me whether the Flint metropolitan area is based on the 1950 census?

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A. It is.

Q. Now, directing your attention to figure 6 relating to the Flint composite trade area, is it accurate to say that WJR covers 89 per cent of this area with a grade A or better signal? A. Yes.

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Q. And that it covers the remaining 11 percent of the area with a Grade B or better signal? A. Yes.

Q. Now, with respect to that 11 percent of the area, could you tell me from looking at Figure 3 of Exhibit No. 5-A the character of the area within that 11 percent, that is, as to whether it is rural, urabized, or what the character of the area is? A. Without some detailed study of the area, I am not qualified to say. My offhand opinion, based on what I have done, is that it is rural and not urbanized.

Q. And is it your understanding that a Grade B or better signal provides adequate service under the Commission's rules to such an area? A. That is my understanding, yes.

Q. Now, is it not accurate to say, Mr. Lohnes, that what we have just discussed should be borne in mind when you interpret the significance, if any, to be given to Figure 1 of Exhibit No. 5-A? A. I do not believe that I understand your question. Would you repeat that, please?

The Presiding Officer: The reporter will read it.

(The question was read by the reporter.)

The Witness: I think on the basis that Exhibit No. 5-A was prepared, that was explained. We did give consideration

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to that.

By Mr. Eagan:

Q. Now, Mr. Lohnes, would you turn to the substituted Figure 7 that was just handed to us this morning? Could you tell me why in this revised Figure 7 you deleted the first column with respect to both the metropolitan area and the trade area, the column being a horizontal row starting with 97 dbu.? A. I believe that was explained yesterday, that it would help assist in making the figures more clear and understandable. It was done in an effort to that end.

Q. Now, will you look at the first horizontal column on the Figure 7 which starts with 86 dbu.? Reading that across, it gives certain percentages with respect to the three applicants engaged in this hearing. Now, are those comparative figures? A. Yes, sir.

Q. Mr. Lohnes, is it not true that the base with respect to each is different, with respect to the area that you are talking of? For instance, I have 37 percent for WJR. Is that 37 percent of the same area that you are talking about when you refer to Butterfield and WFDF? There are different areas involved, are there not, for each of the three? A. Yes, there are different areas for each of the transmitter sites.

Q. But this says, "Receiving locations in the Flint

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metropolitan and composite trade areas." With respect to each of the applicants, you have a different portion of the metropolitan area and the trade area in each instance, do you not? A. That is right.

Q. So that is why I asked you if they are comparative in your mind. But you still think that they are comparative? A. I do.

Q. But you are comparing different things, are you not, in terms of the total area concerned with respect to each of the three applicants? A. No. We are comparing percents of receiving locations.

Q. But within different areas? A. Yes, within different areas.

Q. So how is it comparative? A. Because the three proposed operations have different transmitter sites, and that is what we are comparing.

Q. But the base area that we are talking about is the Flint metropolitan area in one case and the composite trade area in the other case, and that does not change with respect to your transmitter site, does it? No matter where you put a transmitter site, that area is still going to be the same area, is it not? A. That is right.

Q. Mr. Lohnes, I believe it would make the record much clearer if you would recompute each of these percentages with

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respect to the three applicants using in each case as a base the whole metropolitan area or the whole trade area.

Mr. Dempsey: If the examiner please, there was no such request made. These figures as Mr. Lohnes has explained time and time again are based on the part of the area for each applicant that receives 90-percent-of-the-time service. The comparison is based on that, which is uniform, as you can see, down the third vertical column, for all of these figures.

Mr. Eagan: Is that an objection to my question, Mr. Dempsey?

Mr. Dempsey: I object to asking for a recomputation. If you want to compute on the entire area, and if you confine it to computations which correctly assimilate 99-percent-of-the-time service and 90-percent-of-the-time service in one unit, offer it. We were not able to determine any such thing, and that is why we did not do it.

The Presiding Officer: With respect to your question, Mr. Eagan, it is my understanding that the engineers for the three parties and for the Bureau have worked jointly in checking the figures for this exhibit. Did you, prior to this question, raise the issue with Trebit?

Mr. Eagan: I personally did not. I have no knowledge as to whether Mr. Rollo did or not. I take it that he did not, from what Mr. Dempsey has said.

Mr. Dempsey: I have no recollection that he did. If he had, I would have told him, as I believe I told Mr. Leydorf,

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the reason why we did not do it was that we could not find the basis of comparing 90 and 99-percent-of-the-time service.

Mr. Eagan: I think it would be very simple. One thing would be——

Mr. Dempsey: Then why don't you prepare such an exhibit? I do not know how to do it, and I refuse to do something that I do not believe will correctly portray facts.

The Presiding Officer: Let me make this suggestion, Mr. Eagan: You have your engineer in attendance, and the other engineers are also present. I think that rather than encumber the record with an attempt to make computations on the record, you should use the assumptions that you wish, have them computed by your engineer, and have your engineer check his computations with the other engineers in the manner that Trebit did, and then take such further action with respect to putting those figures in as you wish. But I will not permit an examination at this time attempting to make computations on the record when it is unnecessary to do so.

Mr. Eagan: Very well. Let me ask one further question to clear this up.

By Mr. Eagan:

Q. Now, Mr. Lohnes, is it not true with respect to WJR, when you say the Flint metropolitan area, you are really talking about 99 percent of the metropolitan area, which is concerned in this exhibit?

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A. That is right.

Q. And with Butterfield, you are really talking about 89 percent of the area? A. That is right.

Q. And with Trebit, you are really talking about 47.5 percent of the area?

Mr. Dempsey: 47.

Mr. Eagan: I believe that I have the wrong exhibit.

Mr. Dempsey: Look at Figure 6.

By Mr. Eagan:

Q. 47 percent? A. That is correct.

Q. And the same pertains to the composite trade areas?

Mr. Dempsey: Not the same figures.

The Witness: The same percentages do not apply.

By Mr. Eagan:

Q. The percentage with respect to WJR is 94.5 percent; right? A. That is right.

Q. And with respect to Butterfield it is 87.5 percent? A. It should be 87.6, I believe, based on the area.

Mr. Dempsey: Figure 6.

The Witness: Figure 6? 87.5. Correct.

By Mr. Eagan:

Q. And with respect to Trebit, which is labelled here

"WFDF," it would be 83.4 percent? A. That is correct.

Q. So is that not one explanation as to why the Trebit percentages are higher, because you are comparing as a base less of the metropolitan area than we are concerned with and less of the trade area than we are concerned with? A. We are comparing percentages of reciving locations in that remaining area outside——

Q. Is not the remaining area smaller in the case of Trebit, and therefore the percentage is higher because of that fact? A. (No response.)

Q. Do you want it read back? A. No.

The Presiding Officer: Do you gentlemen want to have a recess?

Mr. Eagan: You will have to ask Mr. Dempsey.

The Presiding Officer: Let us take a five-minute recess.

(At this point a short recess was taken after which the hearing was resumed.)

The Presiding Officer: Very well, gentlemen.

Would you read the last question, please?

(The last question was read by the reporter.)

The Witness: That is partially the answer, but the reason that the percentages are higher, the principal one is that we

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have a stronger signal over that area, and as shown on the tabulations, when you get in closer with the signal stronger, you have a greater percent of the locations.

By Mr. Eagan:

Q. You do not mean by that that you have a stronger signal where your 86 dbu. falls than the other two applicants where their 86 dbu. falls? A. Yes, I do mean that.

Mr. Dempsey: What was that answer?

The Witness: Yes.

Mr. Dempsey: You mean that our 86 is stronger than their 86?

The Witness: Correction.

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By Mr. Eagan:

Q. Mr. Lohnes, will you turn to Exhibit No. 6, please? In the upper left-hand corner of this exhibit is shown the Rand McNally Flint trade area. Do you know as of what date Rand McNally made up this trade area? A. From any date given on the map, I cannot tell you that.

Q. The same question with respect to other trade areas shown here, Hearst, Hagstrom, and J. Walter Thompson?

A. The same applies to the Hagstrom map. The date on there more or less referred to the date that the Hagstrom Company went in business, or something like that. There was no date with respect to when those trade areas were complied. We purchased the map in the last three years.

Mr. Dempsey: If the Examiner please, may I ask the purpose of these questions? This exhibit has been admitted. The lines are agreed to by all the engineers as being the appropriate lines to reflect the various trade areas. Now, if there is some purpose that is proper, I do not want to object. But if it is just a question of redescribing an exhibit that was based on a concession——

The Presiding Officer: Mr. Dempsey, I think that the question is perfectly proper. He wants to find the dates on which these maps were drawn and the trade areas were computed.

Now, continue your answer.

By Mr. Eagan:

Q. In other words, Mr. Lohnes, you have no knowledge as to the dates of any of them, as to when they were prepared; is that correct? A. That is not correct, because checking with another local office on the J. Walter Thompson area, I understood that that is a more recent map, and complied with preliminary census studies of around 1948. That happens to agree with the standard metropolitan area defined in the 1950 census, and that is why I

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checked on that date.

Who was it that told you that it was prepared in 1948 based on a preliminary census? A. The research department of the NARTB.

Q. They are not associated with J. Walter Thompson in any way, are they? A. I do not know whether they are. I do not believe so.

Q. Do you know the criteria that any of these organizations used in drawing up what they term the trade area? A. No, sir.

Q. Do you know what they purport to reflect? What meaning is to be ascribed to these boundaries? What is it that is confined within them? A. Other than the trade area as such, I do not know.

Q. Do you have any particular meaning that you give to the words "trade area"? A. No particular meaning.

Q. Does it have any particular relationship one way or the other to the question of serving Flint, Michigan, with a television signal? A. I have assumed, as I previously stated here, that the Flint trade area is involved in Flint.

Q. Does it have anything to do with Grade A or Grade B signals? A. It all lies within the Grade A signal contour.

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Q. What relation is there between the trade area and the Grade A contour? A. With respect to the three applicants, that is shown in the exhibits that we have prepared.

Q. Suppose there is just one applicant, for the purpose of this question. What meaning is to be ascribed to the relationship of a trade area boundary and a Grade A contour boundary? Is there anything in the Commission's rules that would relate the Grade A 77 db or the Grade B contours to trade area boundaries? A. No, sir, there is nothing in the rules on that.

Q. Do you have any reason for relating contours to trade areas? What is the relationship? A. The reason for relating them is that from our proposed operation—that is, the proposed operation of the Trebit Corporation—the Flint trade areas, as we have shown them here, all lie within the Grade A contours.

Q. Without knowledge of the population density, does it mean anything one way or the other whether you get a Grade A or a Grade B signal in a trade area? A. (No response.)

Q. It does not bear on the question as to whether the Grade A or the Grade B will provide service, does it, the fact that it is or is not in the trade area? A. No, it does not relate to the ability of the signal

to render service.

Q. And the trade area boundaries have no particular relationship to population density? A. As I stated, I do not know the criteria which they used in determining the boundaries of these trade areas.

Q. So, so far as you know, it has no particular relationship to population density, because you do not know what criteria to use? It may or may not, so far as you know? A. So far as I know, that is correct.

Q. But you have no knowledge that it does relate to the population density? A. No specific knowledge.

Q. Do you have any reason to believe that it does? A. Yes, sir.

Q. What is that? A. Well, certainly the population density within the City of Flint is going to be greater than it is in the rural areas surrounding Flint.

Q. But that has nothing to do with the trade area, does it? A. Some of the rural area surrounding Flint is within that trade area.

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Mr. Rollo: I would like at this point to hand to the reporter a list of the witnesses who are to appear today, showing their names, their identity, and a brief summary of the nature of their testimony. Copies of this list have been supplied to the Examiner and to all counsel. I

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would like to have it copied into the record.

The Presiding Officer: That will be done.

(The document referred to, listing WJR witnesses, giving the identity and nature of testimony, is as follows:)

John F. Patt: Principal executive. Will identify his community activities, past experience in radio and television and will cover policy questions.

F. Sibley Moore: Vice President and a Director. Will testify concerning education and business experience and will cover extent to which he will participate in operation of proposed television station.

Selden S. Dickinson, Esq.; Director and General Counsel of application corporation. Will testify concerning his activities with applicant corporation and his intentions to continue such activities.

George F. Leydorf: Vice President in charge of Engineering and a Director. Will testify concerning education and experience, cost of the proposed station, duties with respect to proposed station, plans for staffing proposed station, methods of relaying programs to be originated at locations other than Flint and field strength of WJR in Flint.

William G. Sieberg: Secretary-Treasurer of corporation. Will describe duties, testify concerning education, business experience and community activities, resident of stockholders

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and financial plans.

Worth Kramer: Vice President, General Manager and a Director of applicant corporation. Will testify concerning education, business experience and community and civic activities, duties at WJR, personnel of WJR, personnel plans for the proposed station, biographical sketches of important personnel not appearing in person, experience in television, estimates of operating costs, rate card, estimated revenue, network affiliation plans, listener survey results on WJR in Flint, Michigan and facts and disposition concerning a recent complaint against WJR filed with the FCC.

Dr. Donald R. G. Cowan: Professor of Marketing, University of Michigan. Will testify concerning nature of area proposed to be served.

The remaining witnesses will cover past programming of WJR, program representations and fulfillment thereof and proposed television program service. Their names and order of appearance will be submitted prior to the time they are reached.

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John F. Patt,

called as a witness on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rollo:

Q. Mr. Pratt, will you state your name, please? A. John F. Patt.

Q. Where do you live? A. 2718 Landon Road, Shaker Heights, Ohio.

Q. Are you connected with WJR, The Good will Station, Inc., applicant in this proceeding? A. Yes.

Q. In what capacity? A. President and director of the licensee company.

Q. Are you also a stockholder? A. Yes.

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Q. Have you determined upon a program schedule which

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provides a television outlet for local Flint community activities? A. Yes.

Q. What methods were used in arriving at such a program structure? A. Our first step was to make up a check list of various human interests, various community interests and activities, which our previous experience in operating radio stations led us to feel would be a good list to pursue in approaching and inviting representatives of Flint organizations to participate on local Flint programs. This check list took in all manner of civic activity—religious, educational, fraternal, sports, adult education, and numerous other classifications with which you are familiar—agricultural, of course.

Then we gave this check list to a task force, you might call it, people in our executive organization, and our program department, public service field, to go to Flint and to find out what organizations were active there and to meet them, to tell them of our plans for a television station, and to invite their participation.

Q. And a later witness will discuss that matter in detail? A. Yes.

Q. What they ultimately arrived at?

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A. Yes.

Q. Have the results of that work that you have just described been incorporated in your program plans that will be presented later on? A. To a large degree, yes. I think it would be impossible in the compass of the typical or sample week to indicate all of the community interests that would be carried in the scope of a full year of casting.

I have in mind that some of these are seasonal in nature, such as Community Fund, Red Cross Week, United Nations Day, Navy Day.

In fact, a very large number of the activities are limited to one day or one week or one month.

Q. That type of thing has not been put into the proposed typical weekly schedule? A. It couldn't be.

Q. Have representatives of the Flint community testified by deposition? A. Four of them have, yes.

Q. Did your people have discussions with Flint civic and community leaders before the taking of depositions? A. Yes, principally Dale McIntyre.

Mr. Dempsey: I have no objection to that question being answered, but I think the rest of it is probably hearsay, and might as well be stopped before it starts. He asked if

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McIntyre went to Flint. I have no objection to that.

By Mr. Rollo:

Q. Do you know how many people were contacted?

Mr. Dempsey: I object, if the Examiner please. If we are going to have a witness on to testify about it, why not wait until we have the witness on the stand?

Mr. Rollo: I will withdraw the question.

By Mr. Rollo:

Q. Did you attend a meeting at Flint at which the people with whom discussions have been held were present? A. Yes.

Q. Do you know how many people were present at that meeting? A. About 25.

Mr. Lester Cohen: Would you identify when that meeting was held?

By Mr. Rollo:

Q. Would you state for the record when the meeting was held? A. I don't recall the exact date. It was about the 10th of December, 1952.

Q. Can you recall whether or not it was on the day the deposition proceeding commenced? A. It was.

The Presiding Officer: Off the record.

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(Discussion off the record.)

The Presiding Officer: Back on the record.

By Mr. Rollo:

Q. I understand that the depositions were actually taken, commencing on December 17, and that that is the date at which you attended the meeting to which you testified. A. Yes.

Q. Do you accept that correction of your testimony? A. I accept that correction.

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Q. Do you have any comments you wish to make, Mr. Patt, concerning the fact that your proposed station, although being a Flint station, will cover Detroit? A. Only that we regard that as an opportunity to serve a maximum number of people. And as one of the considerations in developing our plans, we have found that we could serve

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approximately four and a quarter million people through this application if it is granted.

We feel that we have had some 26 years of experience in serving the general region or area between the Saginaw Bay and the Detroit River. There is a great homogenuity of interests in the area, in the people, their ethnological background, their employment, having similar manufacturing plants and farms. The area is well integrated by highways, and they have common interests in the University and Michigan State College, which lie within the general area of southern Michigan.

I think that broadly states our purpose and interests.

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Q. Your detailed programs will be covered by later witnesses? A. That is right.

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Cross-examination

By Mr. Hancock:

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Q. Who made the determination as to the selection of that original site? A. Mr. Leydorf recommended it, that we purchase the site, after giving study, as he told me and other members of the board, to various factors which involved availability of utilities, high ground, being away from air hazards, if possible, nearness to highways, communications. Did I mention availability of utilities? And maximizing of population to be served in the area.

Q. Then do I understand as far as you were concerned the selection of the site here was based in part at least upon considerations of service to the city of Detroit? A. Yes, that was a factor to the extent that the population of Detroit added up to a greater total of people to be served.

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Q. Are you also not familiar with the programming that you propose from Detroit and any other matters in connection with operations out of Detroit for this station? A. Well, I know we have discussed what programs might be carried from Detroit, and the only one that I can recall is "In our opinion".

Q. I understand, of course, Mr. Patt, that that programming will be presented later, and that witnesses will discuss that. A. Yes.

Q. Am I to understand that you are only generally familiar with this, and specifically only with respect to the one program? A. I am generally familiar with it, and have read the exhibit. I have discussed it very briefly in a group discussion with our program director and our public service director.

Q. Then, is your characterization of the service you propose to Detroit as incidental, based not on the costs you propose to expand in connection with the Detroit service or the specific programs which you propose for

Detroit, but rather upon a general characterization of what you consider it to be?

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A. Based on a general characterization of what I consider it to be.

Q. Then, am I to understand that you have only general knowledge of the matters contained in the application and in these exhibits, that you have in fact delegated specific parts of them or the responsibility therefor to others in your organization? A. That is right. I made clear to certain of our program personnel that I thought certain program types should be carried out, and it has been their function and job to get the program schedule together.

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Cross-examination

By Mr. Stanley Cohen:

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Q. Are you, as a result of that, in any way familiar with the peculiar needs of the city of Flint? A. I wouldn't qualify personally as an expert on the subject of the needs of the city of Flint.

Q. The reason I asked that, sir—you stated that the Flint and Detroit areas are basically homogenuous and that you—inferring the station, I assume—had considerable amount of service to that area, and therefore could make that statement. Now, I would think— A. I was not trying to qualify myself as an expert witness on the characterization of the population of that area, but I was endeavoring to make the observation that people in that region from Saginaw-Bay City and to Detroit River have a great many common characteristics, and I believe a later witness may be able to develop that.

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Mr. Dempsey: Mr. Patt, in answering some questions from Mr. Cohen about wage rates, you referred to averages. You weren't stating, as I understood it, that Detroit as compared to, say, New York had a higher wage rate on 50 kilowatt stations, but compared to an over-all national average only?

The Witness: That was the question he asked, was average.

Mr. Dempsey: I just wanted to clear that up. If the Examiner please, Mr. Rollo has indicated that Mr. Patt will be available later and because of a desire not to get into the problem of anticipating further testimony on programs, which may not involve any further testimony from Mr. Patt at all, unless a policy question comes up and another witness says that is his department or Mr. Patt's department, we have no further questions, and I would like to say now we have no objection to the introduction of those two exhibits, 16 and 17.

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The Presiding Officer: All right. Now I have a number of questions, Mr. Patt.

I understand that at the present time WJR is a CBS affiliate?

The Witness: Yes, radio affiliate.

The Presiding Officer: Do you plan to keep that CBS radio affiliation?

The Witness: Yes.

The Presiding Officer: Did you attempt to get the CBS-TV affiliation?

The Witness: No.

The Presiding Officer: Would you attempt at some later date to get the CBS-TV affiliation?

The Witness: I can't say. It is our plan to affiliate with the DuMont Network.

The Presiding Officer: It is your plan at the present time to affiliate with the DuMont Network, I understand?

The Witness: Yes.

The Presiding Officer: What is the reason for your affiliation with the DuMont Network rather than the CBS Network,

in view of your present CBS-AM affiliation?

The Witness: Well, the three VHF television stations serving in the Detroit area currently are affiliated with CBS, NBC and ABC, the latter being owned by the American Broadcasting Company.

The Presiding Officer: And do you consider Flint to be in the Detroit area in the sense of the statement that you have just made?

The Witness: I consider Flint, Pontiac and Detroit to all be in the same area. There is a very sizable number of receiving sets installed in the homes in the Flint area now which are tuned, I assume, to Detroit and Lansing.

The Presiding Officer: Would I be corrected in inferring that the reason why you have chosen DuMont rather than one of the other networks is because the three other major networks are already affiliated with VHF stations in Detroit?

The Witness: Yes. We intend to offer, so far as we can, a different and exclusive network service. We have not negotiated a contract with any network.

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The Presiding Officer: And it is also my understanding that although you at the present time have no expectation of immediately attempting to obtain a CBS affiliation in the area, you can't commit yourself for the future.

The Witness: No.

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The Presiding Officer: Now let me ask you a question, now that you brought that up. Supposing that the problem came up as to whether you were going to broadcast the Detroit Tigers or the local Flint team, and both of them played on approximately the same day and you would have schedule conflicts, which one would you choose?

The Witness: I think we would have to make the decision at that time on the basis of how many people in our audience would be interested in one or the other.

The Presiding Officer: Well, I am asking you to make the decision at this time, assuming that we have people in Flint who are interested in the local Flint baseball team and we have people in your whole audience, the larger percentage of which obviously live in Detroit and may be interested in the Detroit major league team.

The Witness: I don't know what the answer would be.

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Mr. Dempsey: May I ask one more.

Mr. Patt, you stated in answer to one of the questions that the Examiner asked you, that you would decide a question of Flint versus Detroit programming on the basis of how many people in your audience would be interested relatively in a program. Is that correct?

The Witness: Yes.

Mr. Dempsey: And is that a fair test of it, in your opinion, for deciding how you should program your station?

The Witness: Yes. I would like to add further that the number of people in the city of Flint and immediately contiguous to Flint, their opinions would be very carefully considered in arriving at a decision in that respect.

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F. Sibley Moore,

called as a witness on behalf of WJR, first having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rollo:

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Q. Are you connected with WJR, the Goodwill Station? A. I am.

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Q. In what capacity? A. Vice president and member of the board of directors.

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Q. Have you made any visits to Flint in connection with the application? A. Yes. I made three trips with Mr. Cushing and Mr. McIntyre, as well as a fourth trip for the luncheon which was previously mentioned.

Q. Did you accompany those gentlemen in discussions that they had with people in Flint? A. Yes. We were meeting citizens and people that had different interests in the community up there.

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G. F. Leydorf

Cross-examination

By Mr. Dempsey:

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Q. And does that mean that there will be exactly the same equipment at both studios in terms of these items? A. In terms of these items I pointed out in the last group from 19 through 24 that there may be an error here or a debate going on that I am just getting aware of as to what is proper equipment. I am still of the opinion that this should be portable equipment. It is indicated here that the studio equipment I think would certainly do the job, but it would be a greater convenience to make it portable, in which case there would be a slight difference in price, but there will be two cameras in the Detroit studio. They may not be studio cameras. They may be field cameras.

Q. Take studio camera or film camera, that would certainly be the same, wouldn't it? That wouldn't be portable. A. That is correct.

Q. And there is a debate going on, as you suggest, about which you haven't heard, as to whether this is the proper equipment for the Detroit studio? A. Yes.

Q. And depending on the resolution of the debate, you might not get this equipment as specified here, which is the same as that proposed for Flint, for Detroit; is that a correct statement? A. Yes, this may be portable.

Q. Now, for lighting equipment and general equipment,

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general equipment we can ignore since it is only $83. The lighting equipment I assume you either have on hand or will get lighting equipment for the Detroit studios? A. Yes.

Mr. Lester Cohen: Item 27.

By Mr. Dempsey:

Q. That is the same amount you have added in on Item 27. Now on remote equipment I think you have testified that that will be available for Lansing or Ann Arbor or other places, so it cannot be ascribed to a Flint studio any more than to a Detroit studio? A. Except that it will be based at Flint.

Q. You mean you will house the mobile unit, if you have one, in a garage in Flint rather than in Detroit? A. Yes.

Mr. Dempsey: I have no other question.

The Presiding Officer: Do you have any objections to Exhibit 21?

Mr. Dempsey: I have no objections except that I would like to raise this one question. If this exhibit describes equipment that, as a result of a debate, may not be used, I am not entirely sure that it is appropriate in this proceeding to offer it.

The Presiding Officer: Well, let me attempt to clarify that. As I understand it, the only debate at the present time is whether you are going to have what is stated here as studio

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cameras in the Detroit studio or portable cameras, is that correct?

The Witness: That is correct.

The Presiding Officer: Is that the only item on which you have any question?

The Witness: Yes.

The Presiding Officer: What is the difference in price between a studio camera and a portable camera?

The Witness: Very little. I am not familiar with it at the moment, but the difference can be obtained from the previous book of exhibits.

Mr. Dempsey: My point is, I think, a little deeper than that. What I question is this: There is a proposal prepared and presented based on a site which has since been changed, which provided for the Detroit studio equipped in every way in the same manner as the Flint studio.

If as a result of Mr. Patt's testimony this morning that proposal is being changed, I think the record ought to reflect a definite change in policy based on his testimony this morning, which is at variance with this proposal basically.

The Presiding Officer: I am sorry, I can't follow you. I believe that the testimony of Mr. Patt this morning and this afternoon was that they were going to have a Flint studio, and that they were also going to have equipment in Detroit at apparently a Detroit studio.

Mr. Stanley Cohen: But Mr. Patt specifically stated that the

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Detroit studio would be an incidental expense, and Mr. Dempsey has demonstrated that the studios will be, to all intents and purposes, equal.

Mr. Dempsey: They were twins in so far as equipment is concerned, up until this morning.

Mr. Stanley Cohen: If it is proposed to have an incidental studio at Detroit, that presents one picture. If it is proposed to have two equal studios, that certainly presents a different picture.

Mr. Rollo: I think the gentlemen are overlooking Mr. Leydorf's direct testimony. As I recall his direct testimony, he stated that it was his understanding, as Mr. Patt testified, that the equipment in the Detroit studio would be portable in nature, and that being the case, the estimates for equipment shown in Exhibit 21 for the Detroit studio were high, because the portable equipment is less expensive than the studio equipment.

The Presiding Officer: Let me try to clarify this. As I understand it, there is nothing that is going to be portable in the Detroit studio on the list that you have in here, with the exception of the film cameras.

You certainly aren't going to carry $3674.30 worth of lights around in a truck, and I see little use for the purpose of carrying a film camera around or a film projector. Am I correct on that? That is going to be fixed whether you have studio

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cameras or portable cameras. The only item which is going to be portable is going to be the cameras, is that correct?

Mr. Lester Cohen: Certainly the installation cost of $25,000 is hardly portable.

Mr. Rollo: That is as I understood the witness.

The Presiding Officer: Let me try to clarify this on the record now. Is it my understanding that the only item about which there is any question at the present time being portable or not is Item No. 20 for $37,730?

The Witness: Yes.

The Presiding Officer: Which is listed here as studio camera, Detroit studio, and you are now discussing whether that is going to be a studio camera or a portable camera, or a portable set of cameras, is that correct?

The Witness: Yes.

The Presiding Officer: The other items in so far as they appear here from Items 18 to 27 are not portable equipment but are fixed equipment which are going to be used as fixed equipment, no matter what happens with respect to the cameras, is that correct?

The Witness: Yes.

Mr. Dempsey: If the Examiner please, the witness also testified that the truck containing the necessary remote equipment to make the portable cameras workable, is going to be garaged in Flint.

The Presiding Officer: No, he did not. He stated that there

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is going to be some portable equipment in Flint, and that is going to be garaged in Flint. Nobody has asked him the question of where the portable equipment in Detroit is going to be garaged.

Now let me ask you where is the portable equipment, assuming that you get portable equipment, in Detroit going to be garaged?

The Witness: It will be in the Fisher Building.

Mr. Dempsey: If the Examiner please, a portable camera is a camera which, as I understand it, can be used either in a studio or on an outside location.

The Presiding Officer: That is correct.

Mr. Dempsey: All the witness has said is that he is going to order a different type of camera than is specified on this list. There has been no testimony that he was going to buy extra equipment to make it workable outside the studio, and it is not listed anywhere here, unless he is talking about the stuff that will be in the garage in Flint. There is just no item on this list that refer to it.

The Presiding Officer: I would suggest that you attempt to develop that further on cross-examination.

Mr. Dempsey: I think it is clear on the record. I don't think any further questions are necessary.

Mr. Rollo: Mr. Leydorf, will you clarify the situation with respect to this portable equipment?

The Witness: There are two field camera chains and all

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associated equipment on which we have already taken delivery, not shown in these exhibits. They were mentioned in my testimony in November.

Those are the ones which I indicated would be garaged in Flint and kept in Flint as the base of operations. They are not the two cameras here which in my mind were intended as additional reserve portable equipment that could not only be used here in the Detroit studios but also as field equipment elsewhere.

Mr. Dempsey: Mr. Leydorf, is there any place on this exhibit that you have shown any equipment to make those cameras usable outside of the studios in Detroit, except by associating with the truck that you are going to have in Flint?

The Witness: No.

Mr. Dempsey: I have no other questions.

Mr. Rollo: What additional equipment is necessary to make the portable equipment work?

The Witness: I assume this is automative equipment and power supply equipment, again which is on hand.

The Presiding Officer: Which is on hand where?

The Witness: In Detroit.

The Presiding Officer: In connection with your WJR-AM operation?

The Witness: Yes:

The Presiding Officer: In other words, is it your testimony at the present time that you can take those two cameras and put

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them in the truck which you already have for WJR, and that you have therefore the truck and the power supply?

The Witness: Yes.

Mr. Dempsey: Is that truck equipped with a sync generator?

The Witness: There is a sync generator down below.

Mr. Dempsey: Is the truck equipped with it?

The Witness: No.

Mr. Dempsey: The sync generator listed here is to be installed in the studio in Detroit. As I understand it, your testimony up to this minute is that only the cameras would be remote or portable. Is that correct?

The Witness: Well, the camera chains.

Mr. Dempsey: You have separately listed a sync generator and you have answered the Examiner by saying that that is not an item which would be portable. It is not now in your truck, but a sync generator would be necessary to make the cameras workable, is that true?

The Witness: Sure.

Mr. Dempsey: I have no other questions.

The Presiding Officer: Butterfield.

Cross-examination

By Mr. Hancock:

Q. Mr. Leydorf, do you also have available microwave links for this portable equipment you propose to buy? A. Yes.

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Q. You have those available? A. Yes.

Q. What about your switching units? A. The portable equipment?

Q. Yes. A. We have already taken delivery on it. Is that correct?

Q. No, that you would use with this portable equipment. A. Well, I believe I must have misunderstood some question.

Q. What about the monitors that would be required? Do you have those available or is any provision made for them? A. If I understand your question, you are referring now to the Items 19 through 24.

Q. That's right, in the event that you decide rather than to have this equipment in the studio but to have the portable and use it as portable. A. Then those items would change in an appropriate manner.

Q. That's right, but you have no provision for your microwave or for your switch units or for your monitors, as I understand your testimony? A. No.

Q. I believe you testified, Mr. Leydorf, that you heard the testimony of Mr. Patt this morning with respect to the use of the Detroit studios. A. Yes.

Q. In view of that testimony, just what use do you propose

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to make with the film equipment listed for the Detroit studios on page 2 of Exhibit 21? A. Whatever use would be shown in the program showing that is forthcoming. I will not attempt to detail. Wherever film equipment is needed, then it would be available.

Q. And what about the projectors, the film projectors? A. The same thing.

Q. In other words, it is your understanding that those are to be used for the television of film programs from Detroit? Is that your understanding? A. Where the film is incidental to the programming that is being done at Detroit, yes.

Q. How many technical personnel do you believe or do you propose to employ in Detroit for the operation of the Detroit studio? A. I expect one or two.

Q. One or two? A. Additional personnel on the staff there would permit the programming that is anticipated in Detroit.

Q. In other words, some of your present technical personnel in Detroit will double in brass and assist in the television operation of the Detroit studio? A. Yes, that staff would be commanded by one or two people.

Q. And they will do all the Detroit work. How many persons do you propose to employ permanently at your transmitter, technical

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persons? A. Nine or ten.

Q. And at the Flint studio? A. I believe it would be eleven, approximately eleven. I am giving you approximate numbers.

Q. You don't propose to move to Flint, I take it, in the event of a grant of this application? A. Well, I do expect to move somewhere in the halfway between point.

Q. Do you know whether or not portable cameras cost more or less than the camera you have specified here for the Detroit studio? A. I beg your pardon?

Q. Do you know whether or not a portable camera costs more or less than the camera which you have specified here, Item 20, page 2 of Exhibit 21 for the Detroit studio? A. I am not certain. The most recent data I have is in the previous WJR book of exhibits, I believe under Exhibit 8 or in that vicinity of Exhibit 8, where two prices as quoted by RCA are given.

Q. Mr. Leydorf, are you prepared to testify as to just what physical facilities will be available for the operation of the Detroit television studio, or will somebody else testify as to that? A. I believe I have already testified as to that in part.

There were a number of photographs shown.

Q. I recall those photographs, but can you tell us for the record just what you propose for your Detroit studio? A. There are two WJR studios in the order of 20 by 30 feet in floor plan dimensions, which will be available.

Q. And are those studios now in use by WJR? A. Yes.

Q. Yet you propose, do you not, Mr. Leydorf, to spend substantially the same amount of money for studio equipment at Detroit as you do at Flint where you propose the installation, or the construction rather, of a studio costing about three-quarters of a million dollars? A. Yes, with the explanation that we have already had about what that equipment is.

Mr. Hancock: No further questions.

The Presiding Officer: Mr. Cohen.

Cross-examination

By Mr. Stanley Cohen:

Q. Mr. Leydorf, why are you now recommending portable cameras in the Detroit studio? A. Merely to keep clear what I believe our plans are. This equipment is to be used not only at that studio, was intended originally to be used not only at that studio, but elsewhere, and we might procure used portable equipment rather than the equipment indicated in the exhibit in a Detroit studio and for the other

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purposes.

Q. Are you intending to indicate, sir, that the Detroit studio will be the subsidiary studio? By that I mean, you don't intend to put the portable cameras in Flint? A. No.

Q. And obviously you are distinguishing between one and the other and giving one a primary place and the other a secondary place. Am I correct, sir? A. Yes.

Mr. Dempsey: I think the question was, was he trying to.

The Witness: The contemplated use of the cameras in Detroit would not in my opinion justify studio cameras. There are, of course, portable cameras intended for Flint. They are not shown.

By Mr. Stanley Cohen:

Q. But that is in addition? A. That is in addition.

Q. May I ask, sir, on what ground is there opposition to your proposal? You indicated that the subject is now under debate. A. Yes.

Q. I realize what I am asking for in essence is hearsay, but I suspect perhaps we might save time. What is the opposition? A. I haven't fully explored it. I believe perhaps the opposite opinion is that this is a more flexible arrangement than the one I have in mind. I have not explored it.

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Q. This was a permanent— A. Yes, I think the proposal as you see here, without any alterations in Exhibit 21 as far as equipment is concerned, may turn out to be the most flexible arrangement of equipment. It may not always be in the same numbers in the same places, but it might make the best purchase in the aggregate of equipment. It might be able to fit into the program plans better.

Q. To what extent, sir? I mean, superficially at least it would appear that when you have mobile equipment, you also have flexibility of that mobile equipment. I wish you would amplify your statement just a bit further. A. I was giving what I think is the opposite view. Mine is concurrent with yours. I believe the greater flexibility is with the portable equipment in the Detroit studio.

Q. I just wanted you to amplify the other argument. I couldn't follow it as yet. A. Well, now I haven't completely reviewed the other argument. I am anticipating what I think it will develop to be. I don't believe this is a serious point. I believe you can go either way with substantially the same amount of money involved in either case.

Just for completeness of our showing, that flexibility is indicated there. It will not affect the amount in dollar, but it will affect such types of equipment.

Q. From the fact that we were presented with an exhibit in

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which the equipment was not portable, apparently yours is a later viewpoint. A. I am not sure whether mine is a later viewpoint or an earlier viewpoint, whether what I have indicated I believe is an earlier viewpoint.

Q. Regardless of whether you have the portable camera or not, it would appear that your Detroit studio is as well equipped as a studio in Flint. Am I correct, sir? A. Well, I don't feel that it is.

Q. I wish you would point out the differences, then, sir. A. The studio in Flint will have normal accessibility to the lighting facilities, studio facilities, not one but several, staff, a design specifically for television, portable equipment and studio equipment and substantially a larger plant. In Detroit there are two cameras. In Flint they are garaged in Flint or even in the studios may be four cameras.

Q. With what you have in Detroit, sir, with two cameras and the studio space that you plan to make available, however, is there any program that you could conceive of now which could not be handled by the equipment you have in Detroit?

I am not referring to any specific program in your plans. What I am attempting to say, sir, is that you have sufficient equipment in Detroit to cover most every conceivable type of program, and that having extra equipment is not a virtue in being able to do an acceptable job. Am I correct, sir?

A. Well, I believe that we would fall short in some circumstances. One could not program with the Detroit studios and the equipment proposals. I believe you can do that in Flint with the equipment proposed there.

The Presiding Officer: Mr. Leydorf, is the essential difference between the Flint studio and the Detroit studio not in the technical equipment but in the studio rooms and the studio non-technical equipment?

The Witness: Yes.

The Presiding Officer: However, both of the studios are substantially identical as far as technical equipment is concerned, and by technical equipment, I mean cameras and the other interesting array of figures that you have over here. Is that correct?

The Witness: In so far as page 2 is concerned, yes. It is not shown on page 2, I will point out again, another two camera chain set of equipment whcih is already delivered.

The Presiding Officer: Does that clarify the point you were talking about?

Mr. Stanley Cohen: Yes. I would like to refer, sir, to Exhibit 21, page 3.

Mr. Rollo: Before going to that, may I call the Examiner's attention to the fact that already in the record is Exhibit No. 8, which was identified by Mr. Leydorf, and he also testified concerning it, which shows the equipment that they already have on hand.

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I would also like to make the comment that in so far as this whole question of Detroit studios is concerned, the ultimate fact is what programs are going to be broadcast out of those studios, and that subject matter will be covered by later witnesses.

Mr. Dempsey: If the Examiner please, in view of Mr. Rollo's statement, I think the record ought to also show that the equipment on hand, while garaged in Flint, will be accessible for use in Detroit. If there is any dispute about it, I would like to ask some questions.

The Presiding Officer: Well, I think we will assume that the equipment garaged in Flint would be accessible to Detroit, and such equipment as may be garaged in Detroit may also be accessible to Flint.

Mr. Dempsey: That is correct.

The Presiding Officer: O.K., now let's go on.

By Mr. Stanley Cohen:

Q. As a matter of fact, sir, before I go on to the exhibit I would like to continue one moment on a point. The Examiner was able to focus attention upon the fact that the distinctions between the Detroit setup and the Flint setup were non-technical studio space. I believe you answered in the affirmative to his question. A. Yes.

Q. Is it not true, sir, that a day-to-day operation could be carried on very satisfactorily in a room approximately this

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size or slightly larger, by the use of different sets in different parts of the room?

In other words, sir, I can elaborate on that. We can have one set here, have the cameras focused here, and then when the next program comes on, have the cameras focused on the other side.

The Presiding Officer: Let me see if we can cut down some of this going around in circles. As I understand it, you can probably produce almost any kind of a program in Detroit that you can produce in Flint, but you can produce it better in Flint because you will have a newer building set up for that kind of operation.

The Witness: Yes.

Mr. Stanley Cohen: That eliminates the necessity of going further.

By Mr. Stanley Cohen:

Q. Sir, I just wish you would offer some explanation of your figures here with respect to acquiring or constructing buildings. You state some figures with respect to the cost and indicate some estimates. On what basis were those estimates arrived at? I mean, square feet at $15 a foot, cubic feet at $1.50 a foot? A. Those are obtained from recent past costs of construction.

Q. Have you entered into any negotiations with respect to the actual costs in Flint? Have you consulted any contractors with respect to building this new studio?

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A. We have not gone beyond the architect who prepared these drawings shown in the first book of exhibits, and this is his estimate.

Q. And the same with respect to the transmitter building? A. Yes.

Mr. Stanley Cohen: With the Examiner's permission, there is one other point I would like to raise. However, I would like to raise it off the record first.

The Presiding Officer: Off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

Mr. Stanely Cohen: No further questions.

The Presiding Officer: Are there any further questions on cross-examination?

Mr. Hancock: I just have one more on cross-examination.

Further Cross-examination

By Mr. Hancock:

Q. With respect to Exhibit 21, page 2, Mr. Leydorf, is the switching console specified under the Detroit studio a permanent or a portable console? A. It is intended primarily for a permanent setup. I think it could be used transportably.

Mr. Hancock: No further questions.

Mr. Dempsey: If the Examiner please, I think the record shows that no property has yet been purchased in Flint for the

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construction of this building which will offer better spacial facilities. If that isn't clear, I would like to ask Mr. Leydorf the question that it is conceded that nothing has been done yet about buying it or at least it hasn't been bought.

The Presiding Officer: I think we can asume that what has been shown so far is a proposal to build a three-quarter of a million dollar building, which will have certain facilities.

Mr. Rollo: At a site to be determined.

The Presiding Officer: At a site to be determined.

Mr. Rollo: Within the city limits of Flint.

Mr. Dempsey: I have no further questions.

Redirect Examination

By Mr. Rollo:

Q. With reference to this debate that you mentioned which is going on with reference to the Detroit studios, is it correct or incorrect to state that Mr. Patt would resolve that dispute or debate? A. No, he would not.

Q. He would not? A. It is purely a matter of proper equipment to follow through on the program plans.

The Presiding Officer: Who would resolve it?

The Witness: Oh, if it came to a point where someone had a very definite preference, yes, but in the absence of some specific reason, why, I think that would be purely a technical matter and

I would resolve it.

The Presiding Officer: Let me make this suggestion. It is now Wednesday and I expect that WJR will continue to put on some more of its case.

Exhibit 21 will not be admitted in evidence until such time as somebody makes up his mind as to what is going to happen with respect to Exhibit 21, and give me a correct exhibit with something firm as to what kind of camera they are going to use and why.

Mr. Dempsey: If the Examiner please, I would like the exhibit to be admitted as showing what in pre-debate days was the proposal. I think it is important that this record reflect it.

Mr. Hancock: I think so, too, if we are going to go that way.

The Presiding Officer: Let me say until such time as a new and amended exhibit is offered in evidence, I will take under consideration you two gentlemen putting this old exhibit in evidence. Now we aren't going to let this exhibit in evidence and can't decide the problem here, so let's get on to something more proper.

Mr. Dempsey: May I ask when this debate started? I think the record ought to show it.

The Witness: It started when I saw the specifications.

Mr. Dempsey: Didn't you prepare the specifications?

The Witness: No. It was prepared under my direction.

Mr. Dempsey: When did you see them?

The Witness: A month ago, I would say.

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Mr. Dempsey: But not withstanding there was some debate about them, they were put in and supplied as being what your proposal would represent, until Mr. Patt testified this morning?

The Presiding Officer: I think that this is self-evident, so let's go on.

Mr. Rollo: That completes my redirect examination.

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Worth Kramer

was called as a witness by and on behalf of WJR, The Goodwill Station, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rollo:

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Q. Are you connected with WJR? A. I am.

Q. In what capacity, please? A. Vice president, general manager, and director of the corporation.

Q. You are also a stockholder? A. Yes.

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Q. Can you recall the television stations that you have visited? You mentioned that you had visited many cities and television stations in those cities. Can you name them specifically? A. I could certainly attempt to.

Q. I wish you would.

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Q. Could you approximate the total number of stations rather than detailing them? A. I would judge a dozen stations; that is a good round number.

Q. In your visits to these stations, have you been able to obtain information to assist you in arriving at operating cost estimates? A. We certainly tried to ascertain that information. I think we have gotten some quite good information from these visits, information concerning the network schedules, information concerning the national spot situation, local advertising picture in these various markets. We have gotten information concerning the departmental work in these operations as well as the general ideas as to the qualifications of men in various departments of these operations.

Q. Have you also been able to learn of the number of employees that they used in these various stations in the various departments? A. Yes, we have.

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By Mr. Dempsey:

Cross-examination

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Q. Now, Mr. Kramer, in your application as originally filed you specified Columbia Network programs, didn't you? A. Yes, I believe that is correct.

Q. And when did you decide to shift from Columbia programs to Dumont programs? A. Well, generally speaking, that decision was made prior, obviously, to the amendment which was filed and the reason was simply that our consideration was that using Dumont and proposing a new and unique service on the part of our non-network activity, that we would have a completely new and unique service to offer listeners in the area.

Q. And when you speak of the listners, you are talking

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of the Detroit listeners getting a new and exclusive service because they already have Columbia? A. Yes, they already had Columbia.

Q. It was not your intention, I take it, from what you say, to give them anything new or exclusive in the sense of local service in Detroit? A. If you are referring to programs especially beamed to Detroit, that is correct.

Q. Perhaps I should ask you what you mean by "especially beamed"? A. There are certain programs that are designed, presented, as a specific community interest program. That is what I mean by beaming a program to a specific community.

Q. Then what you are saying is that you plan no programs of a community or local nature for the people of Detroit. A. That is correct.

Q. Notwithstanding that, you thought the prime consideration on network was to give the people of Detroit a network that they didn't have. A. Actually, they have some Dumont programs as you undoubtedly know, in Detroit. Our concept was simply that this network affiliations plus the programs which we are proposing in total represents a new service.

Q. Mr. Kramer, is it your view that the people of

1158

Flint are now receiving adequate NBC, Columbia, and ABC television network programs? A. I am not in a position to state how good the reception is from all of those networks.

Q. Did you give any consideration to that fact when you decided that the important thing was to give Dumont programs? A. We did not give consideration to all of those networks as they apply to Flint. We could only affiliate with one.

Q. Why do you say you could only affiliate with one? A. That is normal.

Q. You mean that you can only affiliate with one at a time? You were not intending to say that you couldn't have picked ABC, Columbia, or NBC? A. I am not saying that at all.

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By Mr. Hancock:

Q. Do you know what stations carry Dumont programs in Detroit at the present time? A. I believe that two out of three stations occasionally carry Dumont programs.

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Q. Do you know how much of the available Dumont program schedule is now carried by those two stations? A. No, I do not.

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A. There will be 53 full-time employees of the Flint television operation.

Q. In addition to that, the officers and directors listed on page one, with the exceptions of those two, pages one and two, which you indicated would be full-time, will be available on a part-time basis for the operation? A. That is correct.

Q. Now, does this also include your transmitter personnel? A. It includes the transmitter personnel.

Q. Mr. Kramer, Mr. Leydorf testified that it would take one or two men probably on a part-time basis to operate the technical end of the Detroit studios. I believe I am correct in that. What other personnel do you propose for the Detroit studio? A. No permanent personnel for the Detroit studio.

Q. And how will that be handled? A. No doubt on a "as-required" basis.

Q. From existing AM personnel? A. It might well be.

Q. Now, in determining the number of persons which you have listed on this exhibit, which you believe are necessary to operate your proposed station, did you assume that all of the facilities that you have would be manned on a full-time basis,

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that is, in accordance with the number of hours which you propose to operate? A. You mean all the remote points full-time?

Q. I mean your Flint studio and your transmitter. A. Yes, we propose that.

Q. You propose that. Did you actually figure up how many persons it would in reality take to man those facilities? A. That is our estimate of the number required to handle the program schedule that is proposed.

Q. What do you consider to be a typical staff in a two-camera studio? A. There are several definitions of such a staff. Obviously, you can use a lot of people or you can use few people. I can't tell you offhand.

Q. Do you have any idea of the minimum number of men you would need to operate a two-camera studio? A. No, but I believe somewhere on the basis of 110 hours a week, I am not——

Mr. Rollo: If the Examiner please, there is no such proposal here before the Examiner. This is a network operation and I think that counsel's question is directed to the total hours on the air, isn't it? In other words, we are not proposing to operate 100 percent of our time live studio programming and that is what was implied by his question.

Mr. Hancock: No; on his program showing. It does not matter. I am asking him how many men he considers are necessary to operate this two-camera studio that he proposes.

Mr. Rollo: Under his program schedule?

Mr. Hancock: Yes.

Mr. Rollo: That is a different question.

The Presiding Officer: Do you understand the question?

The Witness: I do not.

The Presiding Officer: Will you rephrase the question so that the witness and you understand each other and let's get an answer.

By Mr. Hancock:

Q. Maybe I can get at it in a different way. In considering the preparation of Exhibit No. 26, and in determining the number of people that you would have to have to operate your station, did you in any way analyze the operation which you propose program-wise and base this exhibit on the number of people, actual numbers, that you would need in that studio to put on those programs? A. I personally did not study each program and decide how many people were going to be required to place it on the air, that function rests with our program and technical staff and I am sure that they have made sure that the proposed schedule can be handled by the staff proposed.

Q. In other words, later you will have men to testify

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about that point?

Mr. Rollo: As to the programming, Mr. Leydorf is responsible for the engineering phase.

Mr. Hancock: I understand that he said he had ten or eleven men out at the transmitter. Now I am asking about the studio.

Mr. Rollo: The program will show that.

The Presiding Officer: According to this statement which I have here, Mr. Kramer is supposed to be familiar with the personnel plans for the proposed station other than in view of Mr. Leydorf's testimony of the strictly technical engineering personnel and I believe that Mr. Hancock's questions are well within the scope of what you proposed Mr. Kramer for.

My understanding is that you have checked over the personnel which is necessary to program and to carry this proposed programming into operation, is that correct?

The Witness: Yes.

The Presiding Officer: And the question I believe that Mr. Hancock asked you is just how did you reach the figures that you did with respect to the number of people you have for other than purely engineering personnel.

Now, I wonder if you could answer that question. I believe that it does come within what purports to be your range of testimony and I would be interested in getting an answer to

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that myself, particularly in view of Mr. Rollo's statement that other witnesses would testify concerning programming but not strictly personnel.

The arrival at the number of people felt to be required was made through conference with programming people. They will indicate how they propose with this number of personnel to present the schedule.

By Mr. Hancock:

Q. In other words, I believe as the record now stands you indicated that in the reality, the way you arrived at the personnel which would be required to operate this station was based on the estimated operating expense which you thought you would have and that was estimated at some $530,000. Then I believe, you testified that you estimated on the basis of $10,000 per employee and by dividing that out you got 53 employees? A. No, I did not testify to that in that manner.

The Presiding Officer: I think your testimony was, estimated.

Mr. Dempsey: I think Mr. Hancock has stated it differently than it was testified to. I think further testimony bears out his conclusion that that is the way it was reached.

The Presiding Officer: As I understand the testimony, it is that they decided that they needed 53 people and times $10,000 was $530,000. Now, if you are attempting to show

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that it was reached by a different way, go right ahead, but I don't think that——

Mr. Hancock: I did not mean to put it in another aspect or another light.

The witness: I understand. We did arrive at 53 people at an approximate cost of $10,000 per employee. I also testified that if we found that the number of employees was found to be short, that we planned to hire more, and if this number of employees was more than appeared necessary, we would obviously cut our staff.

By Mr. Hancock:

Q. Am I correct that you personally do not know just how many persons it would take to perform any of the functions of this station operation in detail? A. Yes, you may.

Q. That is a correct statement? A. Yes.

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Q. With respect to a prospective network affiliation in response to cross-examination, I believe by Mr. Dempsey, you stated that in the opinion of WJR DuMont would provide a new service to the listeners of Detroit. May I ask, sir, what consideration did you give with respect to the listeners in Flint who do not have any network affiliation at present?

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The Witness: In all of our considerations there has been a primary consideration of the needs of the community of Flint. As respects the network affiliation, certainly that would be a part of the new service, and I believe it will be most interesting to the citizens of Flint. In addition, there is the phase of newness to a great segment of the rest of the area which is proposed to be covered by this station.

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Further Cross-examination

By Mr. Dempsey:

Q. Mr. Kramer, are you familiar with Section 3.658(b) of the Commission's rules and regulations governing the operation of television stations? A. Not as to the number. I think perhaps I am generally familiar with it.

Q. Perhaps I can describe it in terms more familiar to you. It is parallel to the provision in the Commission's AM network regulations governing territorial exclusivity with respect to network affiliation agreements. Are you familiar with that? A. Generally, sir.

Q. The regulation of both AM and television contains this provision:

"This regulation shall not be construed to prohibit any

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contract, arrangement or understanding between a station and a network organization pursuant to which the station is granted the first call in its area upon the programs of the network organization."

In view of that provision of that rules and assuming that the Detroit network contracts give to the affiliates the protection of that provision, would you have the opinion that you could get a primary affiliation with any network who had an affiliation with a Detroit television station? A. Certainly not while that contract was in force.

Q. In connection with your determination to specify DuMont programs, was that determination based on your view that DuMont television network programs are superior to those of Columbia? A. Some of the DuMont programs are quite good. When you come into an area of determining which are best, you have quite a job on your hands.

Q. Is it so difficult that you didn't even attempt it, Mr. Kramer? A. We consider that the DuMont program schedule is a good schedule, sir.

Q. Is it comparable in terms of number of hours of programs with Columbia? A. No, it is not.

Q. But you considered the number of hours provided it compares favorably or unfavorably or is equal to, better or worse

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than the Columbia programs on an over-all basis? A. The CBS network has, as you have mentioned, a greater number of hours sold commercial, I feel quite sure. I think also NBC has a greater number of commercial hours. I wouldn't be surprised but what ABC does, too. Is that your question?

Q. No. I thought you had answered that before, but I had intended you to include sustaining as well as commercial. What you have said about commercial is equally applicable to sustaining programs, is it not? A. The judgment of the quality of sustaining or commercial programs does not rest with me.

Q. Who decides in your organization, on what programs, on a quality basis, should be accepted or preferred? A. Our people, our executives, our staff people.

Q. Would you name the name of the man or group of men who make that decision? I assume you have disclaimed any responsibility— A. No. If I have, I erred. I certainly have that responsibility.

Q. How do you discharge it without having any opinions? A. By using my best judgment, sir.

Q. But in your best judgment, will you please answer the other question?

Mr. Rollo: Would you mind repeating the question.

By Mr. Dempsey:

1204

Q. Is it your best judgment that DuMont is superior to CBS or NBC or ABC as a source of network programs to an affiliate? A. It is not superior.

Q. So that no considerations of superiority affected your decision to specify DuMont? A. It is a good network, as I have stated.

Q. Would you mind answering the question when you finish the statement. A. I felt I had answered the question.

The Presiding Officer: Let's stop some of this sparring around and let me ask you one basic question. Is the fundamental reason why you chose DuMont the one of primarily availability as against the availability of the other three networks in view of their present contracts?

The Witness: That is certainly one.

The Presiding Officer: Is it the fundamental reason? If it isn't, what is the fundamental reason, or what are the other reasons?

The Witness: Obviously, one reason is the availability.

The Presiding Officer: What else do we have——

The Witness: Another reason, as I have stated, is that with this proposed operation an affiliation with DuMont will provide a service to the area which we propose to serve which is in effect largely a new service.

The Presiding Officer: Mr. Kramer, I do not want to badger

1205

you and I do not want to stop desirable cross-examination, nor do I want to put you in any corner, but I think I know what everybody is driving at, and I think it is perfectly clear. We might as well get it on the record. As I understand it, you are familiar with this question of territorial exclusivity?

The Witness: Yes, I am.

The Presiding Officer: Have you ever checked the ABC, NBC and CBS agreements with the Detroit television stations?

The Witness: No, we have not checked those.

The Presiding Officer: Do you have any idea as to what they consider or construe in respect to their areas as used in section 3.658(b)?

The Witness: I would judge it is perhaps Grade A area.

The Presiding Officer: Would you say, then, that the Grade A area would cover Detroit?

The Witness: That is our proposed Grade A area?

The Presiding Officer: No.

The Witness: Theirs.

The Presiding Officer: The Grade A area of the three Detroit stations with NBC, CBS and ABC affiliates.

The Witness: Certainly.

The Presiding Officer: Assuming that to be true, then is it your opinion, or what is your opinion as to whether those other three networks were or were not available to you at the present time in view of their present affiliation and in view of

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the language of section 3.658(b)?

The Witness: I feel sure that they are not available at this time.

The Presiding Officer: Therefore, the primary reason why you got DuMont was because that was the only one that was available at the time?

The Witness: That is a good assumption.

The Presiding Officer: Now that we have that, let's get on to something else.

Mr. Dempsey: I would like to ask one other question.

By Mr. Dempsey:

Q. Had the networks been equally available in the sense that none were now affiliated with any Detroit station, would you have selected DuMont?

Mr. Rollo: I object to the question. It is purely conjecture based upon facts which are not in existence.

Mr. Dempsey: If the witness prefers not to answer it, I will not press the point.

The Presiding Officer: I think that the question is pertinent, and I think the witness is sufficiently experienced in the field and can qualify, at least as an expert in the picking out of programs and of networks as an executive, so that he can either make his guess now or say he doesn't want to make his guess. I think the question is pertinent.

Mr. Rollo: If you wish to have his conjectural statement,

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I will withdraw my objection.

The Presiding Officer: If he wishes to make a conjectural answer, he may do so.

The Witness: Just repeat the question.

(The reporter read the question.)

The Witness: Assuming that all networks were available, we would make an attempt to get the best service possible.

The Presiding Officer: That doesn't answer the question.

The Witness: I have said that DuMont is not superior. Very probably we would not have selected DuMont.

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Mr. Dempsey: If the Examiner please, with respect to the last questions, I would like to call attention to the fact that there is an exhibit in the record which shows the contours of the Detroit stations and indicates that none of them hit more than marginal Grade B in Flint in the way of service, and I would like to make the further observation that in view of the testimony that has previously been given by Mr. Kramer as to eligibility for network affiliation, in view of the Grade A overlap in Detroit, the WJR proposal would not be eligible for one, much less several networks, if they were also affiliated in Detroit.

Mr. Hancock: I object to that. That is argument by counsel based on what he interprets the rule to be and what he guesses the networks will do.

Mr. Dempsey: I based it strictly on what the witness testified.

The Presiding Officer: That will be interpreted as argument.

Mr. Dempsey: I would like it to be considered in the nature of an objection and a motion to strike the testimony as to the extent that it is accepted without those restrictions.

The Presiding Officer: We will consider the whole record in reviewing the testimony of Mr. Kramer.

There is one more question I want to ask you, Mr. Kramer, I asked this yesterday of Mr. Patt. You testified, in answer to

a question from one of the counsel, to the effect that the present plans are not to affiliate with a network other than DuMont.

The Witness: Yes.

The Presiding Officer: What are the possibilities at some later date of your changing affiliation?

The Witness: I cannot speak as to the possibilities, Mr. Examiner.

The Presiding Officer: What is your state of mind at the present time with respect to the possibility at some future time, or with respect to taking affirmative steps at some future time of changing the affiliation from DuMont to one of the other networks?

The Witness: May I answer it this way. Certainly we will always attempt to make any improvement in any phase of our business that we can see, whether it be in our local program or in our change from one representative to another or what it will be. We will always try to improve and give the best possible service that we can.

The Presiding Officer: And by saying "improvement", you will also attempt to improve your competitive position to the fullest extent possible?

The Witness: Certainly, sir.

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1238

Dale B. Hornung,

called as a witness on behalf of WJR, first being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

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Q. Are you known professionally by another name? A. I am Dale MacIntyre.

Q. Mr. MacIntyre, are you associated with WJR, one of the applicants in this proceeding? A. I am.

Q. In what capacity? A. Public service director.

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Q. In connection with your proposed duties as public service director of the television station, what if anything, have you done to ascertain the public service programming requirements of Flint, Michigan? A. Some months back I visited the Chamber of Commerce in Flint and obtained from them a list of civic agencies, governmental agencies, social service organizations, and from that list I prepared a list of calls which I made and interviewed these people, talked to them, tried to find out what their interests are in the community, and, of course, asked for their cooperation in the event that we were successful in this application.

Q. When you referred to the Chamber of Commerce, were you referring to the Flint Chamber of Commerce?

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A. The Flint Chamber of Commerce, that is right.

Q. I direct your attention to what has been marked for identification as WJR Exhibit 43, and ask you to briefly describe the nature of this exhibit, the first four pages. A. This exhibit is defined technically as the list of contacts in Flint with whom personal discussions have been had regarding specific programs.

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Cross-examination

By Mr. Dempsey:

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Q. You mentioned one program that you carried from the Mott Foundation. When was that program carried? A. If my memory serves me correctly, I believe it was in October.

Q. Of last year? A. October of 1952.

Q. What was the program? A. It was the program "In Our Opinion," which we moved to the school itself through Mr. Frank Manley, the director of the Mott Foundation. He told of the Foundation's interest in the public school system in Flint and what they are able to make available to the citizens of Flint in these public schools outside of the normal school hours. People who are involved in various classes that are subsidized by the Mott Foundation were interviewed or demonstrated what they were doing under the auspices of the Foundation. It was a half-hour program.

Q. Do you believe it was of interest to the listeners

1277

in the area covered by your AM station? A. I would say, yes, very definitely.

Q. And that is the only time that you carried a program of a Flint local agency, to your knowledge, on your AM station? A. It would be difficult to testify one way or the other, to my knowledge, I do not recall others.

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1283

George F. Leydorf,

a witness called for and on behalf of Station WJR, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Mr. Rollo: Pursuant to understanding reached by counsel, I offer in evidence at this time an exhibit which has been marked "Corrected Exhibit No. 21".

The Presiding Officer: I understand this exhibit has been prepared by Mr. Leydorf, or under his supervision; is that right?

The Witness: Yes, that is correct.

The Presiding Officer: Are there are any objections to the admission of this exhibit?

Mr. Hancock: We are talking about which one?

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The Presiding Officer: The "Corrected No. 21".

Mr. Lester Cohen: 21-A.

The Presiding Officer: For the purposes of identification, this exhibit will be marked "21-A". Are there any objections to the admission of Exhibit 21-A?

There are apparently no objections. Exhibit 21-A will be admitted in evidence.

(Exhibit No. 21-A (WJR) was received in evidence.)

The Presiding Officer: It is also my understanding that there are no objections to the admission of an exhibit marked for identification as Exhibit 21. Am I correct on that?

Mr. Rollo: No objection.

Mr. Stanley Cohen: No objection.

The Presiding Officer: Exhibit 21 with also be received in evidence.

(Exhibit No. 21 (WJR) was received in evidence.)

The Presiding Officer: I have also requested that a short statement be furnished me and be incorporated in the record indicating the differences between Exhibit 21 and Exhibit 21-A, and such exhibit will be identified as Exhibit 21-B; at such time as Exhibit 21-B will be made available, I will hear objections, and if no objections are presented, it will be admitted in evidence.

(Exhibit Number 21-B reserved.)

The Presiding Officer: Let's get on.

Mr. Rollo: That is all I have for Mr. Leydorf.

1285

Cross-examination

By Mr. Hancock:

Q. Mr. Leydorf, which of these exhibits, 21 or 2-A, reflects the equipment which you ordered from RCA and which is reflected in WJR Exhibit 8? A. There is no change in the equipment ordered or reflected in Exhibit 8. The equipment specified there in Detroit, where the substantial changes have been made, is not on order. I think all other items are on order with minor exceptions.

Q. What about the cameras, aren't they on order, specified for Detroit? A. No.

Mr. Hancock: No further questions.

The Presiding Officer: Any other questions of Mr. Leydorf?

Mr. Leydorf, you are excused.

(Witness excused.)

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1324

Franklin C. Mitchell,

called as a witness on behalf of Station WJR, first having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

Q. Will you state your name and address? A. Frank C. Mitchell, 1011 Emmons Boulevard, Lincoln Park, Michigan.

Q. Mr. Mitchell, will you state what connection, if any, you have with WJR, The Good Will Station, Inc.? A. I am program director.

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Q. Mr. Mitchell, what connection, if any, will you have with the television station in the event that WJR is successful in this hearing? A. Program director.

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By Mr. Ockershausen:

Q. On page 1 of Exhibit No. 53, under the program "This You Should Know," which is classified as "educational," would you explain your classification on that program. A. We have classified that as "educational," because we expected, as Mr. McIntyre testified, that it would give information concerning telecasts put on by the educational organizations throughout the state with the thought of promoting them, calling the listeners' attention to them, and would also include activities on the campuses of the various schools, and that this information would supplied to us by the various educational institutions, Michigan State College, The University of Michigan, and so forth.

Q. Is this one of the programs you contemplate doing by remote? A. Not necessarily.

Q. I note that, referring to your proposed schedule for the typical week, Monday through Friday, you list a program from 12:30 to 12:45 by the Mott Foundation of Adult Education. What assurances do you have that Mott can put on this program every day in the week? A. I personally have not had the assurances. However, Mr. McIntyre is in contact with representatives of the Mott

1406

Foundation and has had their indorsement of the ideas that were discussed with them. And he told us that they would be happy to cooperate with us.

Q. I object to the statement of what they told you. But what is your understanding as to how they are going to do their program every week, every day in the week? A. Well, I think that would possibly be answered better by Mr. McIntyre than by myself.

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1418

By Mr. Cohen:

Q. In planning the program did you make any effort to ascertain the needs of the community you intend to serve? A. You mean in planning our television schedule?

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Q. Yes, sir. A. I did not personally. What we have done in that area has been done by Mr. McIntyre, who has been the contact man for representatives of the Flint civic and charitable organizations. His contacts and his conversations have been given consideration in setting up our specific schedule and the specific programs. I think that there are exhibits to show that that has been done.

Q. Did you attempt to ascertain in any way the recreational needs of the community? A. Well, what do you refer to as "recreational needs"?

Q. I am thinking now in terms of the desires with respect to programs you would call entertainment. A. No; I don't think we made any specific surveys to determine what their entertainment likes are. It seems to me that entertainment is something that is offered, and you attempt to keep it good, on a high plane, and it is either accepted or rejected by the community. But as to ascertaining what those requirements are in terms of the amount of entertainment required, that is a question which each person answers for himself, I believe.

Mr. Cohen: I have no further questions.

Mr. Dempsey: If the Examiner please, I have just one question which was raised in response to a question by Mr. Hancock.

1420

Cross-examination

By Mr. Dempsey:

Q. Mr. Mitchell, on your Exhibit 26, which is the proposed staff of the television station, there is a breakdown showing 24 people in the Program Department, and you answered Mr. Hancock about advising Mr. Kramer as to the number of employees that would be necessary. Is it correct to say that you told him 24 people would be enough for the Program Department? A. I don't believe I made that statement.

Q. Is it correct that you so advised Mr. Kramer? A. No.

Q. You didn't tell him 24 people would be enough? My recollection is that Mr. Kramer testified that he had gotten that from you.

Mr. Rollo: If the Axaminer please, I think if you will read the record you will find that he said that after discussions with the Program Department the figure of 24 was arrived at.

Mr. Dempsey: Well, I thought he made it plain that it wasn't his own estimate, that it wasn't Mr. Kramer's estimate, but that it was an estimate that he had got from the Program Department as he had gotten the estimate on engineering from Leydorf.

Mr. Rollo: The transcript will disclose it.

The Presiding Officer: The record will show it.

Mr. Dempsey: I don't have any intention of arguing it, but I just wanted to get the facts.

By Mr. Dempsey:

Q. You did not advise Mr. Kramer that you from your study of the program proposal 24 people would be enough or not be enough, or make any recommendation as to how many people would be necessary; is that right? A. I personally did not make any recommendations.

Q. Were you requested by Mr. Kramer to give any estimate of the people that you would need in your department to carry out this proposal? A. Not specifically; no.

Mr. Dempsey: I have no further questions.

The Presiding Officer; Any further questions?

Mr. Hancock: I have some that I omitted.

Cross-examination

By Mr. Hancock:

Q. How long have you been in the Program Department with WJR? A. I have been employed by the station, it will be 17 years in March, and I have been in the Program Department as such all of that time in one capacity or another.

Q. How much programming for Flint, that is local programs for Flint, has WJR done in the past?

1422

A. Specifically aimed at Flint?

Q. Or originated in Flint, or talent from Flint. A. It covers a long period of time. I don't believe I could give you that.

Q. Do you recall any specific programs which were so originated or aimed at Flint or were talent from Flint? A. Well, I can give you some very recent ones which were originated from Flint.

Q. And what were they? A. Two sports programs, one in December and one in January.

Q. What program was that? A. I think that was "Bob Reynolds Sports Time" from 11:15 to 11:30 p. m.

Q. What type of program was it? A. It was a sports program originated from Flint, and was in connection with personal appearances as the principal speaker at the inter-fraternity banquet of the General Motors Institute.

Q. And what other programs have you had for Flint? A. I can't recall any specific incidents. It would all be conjecture on my part.

Q. Then in your 17 years you only recall of one program from Flint or— A. I said two.

1423

Q. I beg your pardon. Two. What was the other? A. They were both the same program. They occurred in different periods, one in December and one in January.

Q. I see. One last question. To what extent if any do you propose in your programming of the television station you propose here to use simulcasts in connection with WJR broadcasts? A. I think our previous testimony has borne out quite clearly that we don't ancipate doing a lot of simulcasts, because we feel that a simulcast naturally lowers the quality of one or the other of the two mediums. The only specific program that has been mentioned as a possible simulcast has been "In Our Opinion."

Q. Am I to understand that you have not determined whether it will or will not be a simulcast? A. Well, by not determining whether it will or will not be we have left the door open to do a simulcast, we will say. It is possible that it might not be.

Q. Are there any other programs in your proposed schedule here which will lend themselves to simulcast? A. I think that would be a conjecture on my part. I don't know.

Q. You don't know? A. No.

Mr. Hancock: No other questoins.

1424

Mr. Dempsey: May I just ask one question about the sports program?

Cross-examination

By Mr. Dempsey:

Q. Do I understand that your regular sportscaster appeared at a banquet in Flint and you picked him up there because he happened to be thereon business unconnected with his program? A. He went up there to speak at the banquet. And in order to accommodate his broadcast, since his banquet carried him late into the evening, we originated his program broadcast by a direct line from Flint on that night. And a representative of the General Motors Institute appeared on his program to discuss the recreational activities that the Institute engages in.

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1427

Cross-examination

By Mr. Cohen:

Q. What purpose would be in having an important person who was visiting in Detroit come to the Flint studio when you have a Detroit studio available? A. I think the simplicity of having it within the studio rather than to have to do it as a guest appearance to cut someone in from a remote place—certainly there would be additional cost involved in activating the Detroit studio for such an occasion. And this is pure conjecture on my part, but if an outstanding personage was in Detroit the request would no doubt be made initially, "We would like to have you

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on our Flint TV station, do you have the time to make the trip and appear on the program?" And in the event he did not have the time, that it was impossible to make the arrangements for him to appear in Flint, that we could then, as it became appropriate or suitable to his needs, to originate him from the Detroit studio; or we might not originate him at all, it depends.

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1493

Lester W. Lindlow,

a witness recalled for and on behalf of Trebit Corporation, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Dempsey:

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By Mr. Dempsey:

Q. One other factor with respect to this matter of foreign language programming: Is there in the Flint metropolitan area or in the city of Flint, to your knowledge, any substantial neighborhood, community or geographically integrated area where preponderantly one national group lives? A. No, sir; not in the nature of a Hamtramck or some such place.

Q. Is there any such area where the language commonly spoken in the streets and in the stores is foreign? A. No, sir.

Q. Mr. Lindow, I am going to ask you to state what considerations led you to decide on the transmitter site that has been selected in this proposal, and whether or not you considered other sites, and how you arrived at a determination to specify this one. A. I went into the transmitter site question with very extreme care because it seemed to me to be highly important.

I based that, not on my own feeling alone, but that of the other members of our board of directors and the advice of our consulting engineers, as well as our legal counsel.

We studied this problem for some time. Our first thought, of course, was the obvious one of utilizing the property the corporation already owned that is now occupied by our AM

1559

transmitter. It was sufficient in size to carry—the property was sufficient in size to carry—the tower. It had the obvious advantages of economy of operation because it would have enabled us to make substantial savings in personnel and also building.

Q. I think in view of your statement of the advantages being obvious, we can go on to the next consideration. A. We also considered a point that seemed to be an excellent one from the point of view of its location and its accessibility in the coverage that it would afford. It was just on the western edge of the city.

Q. You say a point, you mean another possible site? A. Another possible site; yes, sir.

However, we found, in investigating that, that we would be putting a tower right in the path of the airways and, consequently, it was necessary that we discard that possibility.

Q. Airways or location to an airport? A. Well, it was the approach to the Bishop Airport which serves the city of Flint.

We also were very much concerned with the area which would be covered by this transmitter and the broadcasts emanating from this antenna, and we found that our AM site would not give us the sort of coverage that we felt would most effectively serve our community in the area where service was most needed.

Q. Where approximately with respect to the city of Flint

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is your present AM antenna site? A. It is somewhat south and a little bit east.

Q. Roughly, in miles, would you say how far it is from your studio building? A. Oh, I guess it is about five or six miles; I can verify those figures, but that is my impression.

We considered the possibility of a site midway between Flint and Saginaw, feeling that by locating there it might be highly desirable. However, in looking into that matter we found that we would not be able to deliver as good a signal to the southern part of the city and the southern part of Genesee County.

Mr. Rollo: I hesitate to keep interrupting, but the witness is now in the field of engineering conclusions and I do not believe he has been qualified.

The Presiding Officer: Let us say that the witness' testimony will be considered in the light of my question: This is all with respect to your opinion as to what it would do?

The Witness: I believe I stated that, sir.

The Presiding Officer: We will take into consideration the fact that the witness is not an engineer, and that he just took into consideration certain subjective matters that came to his mind. It will not be considered as evidence as to whether it would or wouldn't produce that kind of signal.

The Witness: We found—and this was based upon the advice

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and recommendations of our engineering counsel in Washington and our legal counsel—that the best possible location they recommended in order to give us coverage of the area that we knew from experience was the Flint trading area, would be somewhat north and a little bit east of the city, and take into consideration the airline problem, somewhat north and a little bit east of the city.

We then canvassed the possibilities, Mr. Bitner, Jr., our consulting engineer from Washington, Mr. Holland,

and myself, and we got into a car and actually drove around the whole area to look at possible locations and picked a site, and went after it. We were successful in obtaining it, and that is the site that we have specified.

By Mr. Dempsey:

Q. Did you give any consideration to the question of accessibility in terms of travel to and from the site? A. Yes, we did, and I went into that quite deeply myself, and I consulted with the County Highway Superintendent of Roads as to projected plans for development of highways, and that sort of thing.

He was very cooperative and gave me access to his advanced planning, and we found that the road running north and south past the property was black-topped, paved—black-top is an expression we use out there; it was paved—to the corner of the property. That pavement was completed last summer.

Beginning as soon as the spring break-up—we have a lot of trouble with the roads out there at the springtime because of the flood situation—the spring break-up concluded, this spring they are going to complete black-topping on past our property for a distance of about a mile and a half or two miles to the north, and we have complete paved roads now as of this moment right from the city to our transmitter site.

We also checked with Consumers Power—I did that jointly with Mr. Holland together—and we found that they can deliver those utilities that we require.

Q. With respect to the programming of the station was it your intention or hope or expectation to have a network? A. Yes, sir; we felt we could give the best service carrying the facilities of a network.

Q. Did any considerations with respect to the availability of such service and the location of the site enter into your decision to select this site? A. It very definitely did.

Q. What were the views you held in that regard which had to do with the selection of the site? A. Well, as a businessman, I found that sometimes in considering a problem you have to put yourself in the other fellow's position in trying to anticipate his objections or his ideas on a subject in order to obtain your end.

From my knowledge of network operations they had shown me

1563

that it would be very difficult to obtain a network affiliation if a substantial portion of the coverage area of your station was in direct competition with the affiliates of networks in another nearby city.

Therefore, I felt that was a point that we must consider in our efforts to bring network service to the area we were interested in, and a point would also be the location of our transmitter and the area that we would serve as a result of that location.

Q. What city did you have in mind as indicating the desirability on this view of going north rather than south? A. Well, we had in mind the city of Detroit where the networks had affiliations.

Q. Did you have any opinion as to whether a network would be more inclined to favor a Detroit affiliation or a Detroit affiliate as opposed to a Flint affiliate? A. I should think they would have; yes, sir.

Q. Did you think so? That was my question. A. I very definitely did.

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Mr. Dempsey: This is the last question.

The Presiding Officer: Last question? Let us finish it up, then.

(The pending question was read by the reporter.)

The Witness: Prior to our acquiring the station, they have had a local news-gathering organization established for a number of years. Our company is very much interested in the matter of gathering and broadcasting news. Many of us have been associated with the news-gathering business for many years. We found that in view of the fact that this news organization had already been developed it was only necessary for us to expand it and further develop it.

By Mr. Dempsey:

Q. The news organization is an organization that is

devoted to gathering local news? A. Gathering local news and preparing it for broadcast.

Q. Do you also have available wire news, international news? A. We have the Associated Press radio wire.

Q. How many news reporters or news gatherers do you have on your staff? A. Two and a half.

Q. What is the half? A. The half is a part-time employee who relieves Mr. Jack Lewin, our outside leg man on his time off, week ends, when he is off. Lewin is usually on week ends, but he takes some week ends off.

The Presiding Officer: I thought, perhaps, someone who gathered news of no importance was the one-half men.

The Witness: No, indeed; the news gathering is very important. I think it might be significant to point out in connection with my discussion of this news operation of ours is why we were particularly interested in Flint. There is only one newspaper in the city of Flint, one daily newspaper; that is the Flint Journal.

The Flint Journal's final edition—it is an afternoon paper—the Flint Journal edition goes to bed shortly before 2:00 p. m. each afternoon. It is on the streets by 2:30, so it can hit the men in the plants as they come out when the first

1572

shift starts leaving.

They do not put out later editions. Their last edition for the week end goes to bed approximately 11:00 p. m. on Saturday night. There is no Flint newspaper published again until Monday afternoon at this time I have referred to, around 2:00 o'clock, so there is a great void in the coverage of local news, and we felt it was necessary to supply news in order to serve our community properly.

By Mr. Dempsey:

Q. These two and a half men you have referred to, do they do the broadcasting of the news or— A. No, sir.

Q. (Continuing) —are they confined to news-gathering? A. News-gathering.

Q. How is the news prepared for broadcasting? A. It is the wire which is rewritten and integrated with the local news.

Q. And it is read by members of your announcing staff? A. It is read by members of the announcing staff, that is right.

Q. Your plans for news programs on television are to follow generally that procedure? A. We have been very successful in it, and we intend to follow it.

Mr. Dempsey: I have no further questions.

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Q. News, you have the two and a half men we referred to earlier; you do not expect to add any, but those two and a half will be available for proposed television as well as AM? A. The same plan at this time.

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Q. At the time you were considering sites and at the time you determined upon your site now proposed. That runs from a period of October, 1951 to February of 1952, does it not? A. Well, our thinking was changing during that period of time, when from November through the time we purchased the site, at the end of February of 1952, we were trying to find a site that would accommodate a thousand-foot tower.

Q. Can you recall what power you had in mind at the time? A. I don't recall that offhand.

Q. Did you give any consideration to moving further north in order to serve additional area north of Flint other than in connection with your site between, midway between Saginaw and Flint? A. We looked at quite a few sites north of the City of Flint, quite a number of them.

Q. Well, in considering those sites, did you give any weight to serving the area north of Flint? A. Oh, yes, that has always been a very important factor

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In our consideration, the service to the area.

Q. Then why didn't you go further to the north instead of keeping so close to the city of Flint? A. Because it was the opinion of our consultants, both in the engineering and legal fields, that it was very important to stay as close as possible to our home city as possible, and still serve that area to the north, Saginaw——

Q. Those conclusions were given before the issuance of the Sixth Report and Order, were they not? A. I believe so.

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Edward J. Penny,

called as a witness for and on behalf of Trebit Corporation, having been first duly sworn, was examined and testified as

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follows:

Direct Examination

By Mr. Dempsey:

Q. Mr. Penny, will you take the stand please. Will you please state your full name for the record? A. Edward J. Penny.

Q. You are the Executive Secretary of the Flint Chamber of Commerce? A. Yes, sir.

Q. Mr. Penny, how long have you lived in Flint? A. All my life.

Q. And how long have you been with the Chamber of Commerce? A. Eighteen years.

Q. Are you associated with any other civic groups or activities? A. Yes. I am Secretary of the Community Music Association in Flint, and member of the board of Rotary Club.

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Q. Mr. Penny, in what way do your duties with the Chamber of Commerce require you to be familiar with the activities of the City of Flint, first from the standpoint of business in the city? A. Well, our job is to promote the economic and social welfare of the community, and in doing that we work with business and industry to build our trading area, and, of course, in atttracing new business, why, we work with the City of Flint in

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making it attractive for business to come to Flint, better highways, better schools, streets, traffic.

Q. And are you familiar with the area in which the Flint merchants advertise in an endeavor to draw trade? A. Yes. Our trading area is considered in area not more than 25 to 30 miles surrounding Flint, but our largest trading area is to the north and to the east, simply because on the south there is Pontiac and then Detroit. We go west to Owosso, and east to Lapeer. We have a large trading area to the northeast in the thumb district of Michigan.

Q. And is that the area in which your experienced Flint merchants have sought to attract customers? A. That's right.

Q. And have conducted advertising campaigns? A. Advertising, that's right, to attract that trading area.

Q. And what is the principal business activity in Flint? A. Automobile manufacturing and automobile parts. We are at present going through a $100 million expansion in the local manufacturing plants in Flint, and I think we have the largest pay roll and the largest employment in General Motors plants in any of the cities of the country.

We expect that our population in the next few years, with the added manufacturing facilities, will go to three to four hundred thousand, but where these plants are located, they are

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being built mostly north of Flint, and our population, the building, homes are going up in the north, northeast, west, and eastern part of the city.

Q. From the standpoint of the financing of local businesses in Flint, are the Flint banking institutions normally used? A. Yes.

Q. Are they branches of Detroit banks? A. No, sir; they are all owned in Flint, with one exception. There is one branch bank with headquarters in Lansing, Michigan. Other than that, they are locally-owned banks.

Q. And from the standpoint of the conduct of business financing, operation, so on, is the Flint business activity confined to Flint? It is reasonably self-contained? A. Yes, sir.

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Cross-examination

By Mr. Eagan:

Q. Mr. Penny, do you know the ownership of Trebit Corporation, whether anybody in Flint has an stock ownership in the corporation? A. I do not know that.

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Q. In other words, you have never been told that it has been stipulated and it is a matter of record with the Commission that there are no Flint people that have any ownership whatsoever in Trebit Corporation? A. Nobody has told me that. I didn't know that they had, or not.

Q. Mr. Penny, did you at any time ever have any conversations with Mr. Dale MacIntyre, also known as Mr. Hornung, of WJR? A. I have talked with Mr. MacIntyre.

Q. Did he discuss specific program proposals of WJR with you? A. Yes.

Q. You realize, of course, that only one of the three applicants in this proceeding, if any, will be successful in getting the construction permit?

Mr. Dempsey: I think we can all stipulate the "if any" can be stricken from the question.

The Presiding Officer: Let us asusme on the basis of the stipulation before us one will win.

Mr. Eagan: I think that assures all of us.

By Mr. Eagan:

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Q. In any event, only one of us will be successful in this proceeding, and there will be but one station operating on Channel 12? A. That's right.

Q. If WJR is the successful one, will you cooperate with them in programming? A. Yes, we would cooperate with them to the extent that they served our trading area.

Q. Have you read the record, Mr. Penny, with respect to the engineering aspects of this case? A. No, I have not.

Q. But you have had specific discussions with Mr. MacIntyre with respect to specific programs? A. Yes.

Q. And you would cooperate with WJR in connection with those specific programs and other specific program proposals that they may have? A. That's right; we would cooperate with the station that gets the franchise. As I say again, I would like to reiterate that we probably would cooperate to a greater extent with the one that served our trading area, and we feel that our trading area is not south of Flint. It is north and east.

Q. But you will agree as to whether the area north and east of Flint is or is not served is an engineering conclusion, and you are not an engineering witness?

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A. I am not an engineer.

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Cross-examination

By Mr. Hancock:

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We feel that our trading area does not go more than ten or fifteen miles south. It stops there because of Pontiac, and then on in to Detroit, and our trading area comes from west, north, but particularly the northeast.

Q. How far to the northeast? A. 25 to 30 miles, or farther. It can be 50 miles they come in from that trading area into Flint.

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Further Cross-examination

By Mr. Eagan:

Q. Mr. Penny, on this serving of what you call the Flint trading area, I take it that you have no knowledge as to whether WJR's proposal will or will not serve that trade area? A. I haven't any engineering knowledge to that effect, but it is my understanding that the transmitter will beam a certain distance, and if it goes further into the northern and eastern area, that is our trading area.

Q. Is it your opinion that Trebit's signal will cover only the Flint trade area? A. No.

Q. You understand that it might go beyond that? A. I suppose it will. I can't answer you technically.

Q. You seem to have some understanding that one of the applicants will serve Flint and the other two will not. What is that based on? A. Again I am not an engineer, but my understanding is

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that a transmitter located in our trading area, that if it is placed north of Flint, why it will go into our trading area better than one placed between Detroit and Flint.

Q. But you have no knowledge as to whether or not from the other two transmitter sites proposed in this hearing, whether there will be coverage or will not be coverage not only of the Flint trade area but others as well? A. That is right.

Q. I neglected to ask you before, Mr. Penny, if you recollect being at a luncheon on December 17th, held by WJR? A. Yes, I do.

Q. And at that time did you hear Mr. Patt and other executives of WJR discuss their proposals for the Flint television station? A. Yes, I did.

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By Mr. Dempsey:

Q. Now Mr. Penny, with respect to the merchants in the Ciyt of Flint, would you say to the extent they draw any busines from Saginaw and Bay City, that that is more or less than the business they would draw from Pontiac or Detroit? A. Well, the business they draw from Pontiac and Bay City is exceptionally more.

Q. Saginaw and Bay City? A. Saginaw and Bay City, because they are smaller towns than Flint, and there is a tendency that the people may come as far as Flint, and some of them do go on from Flint to Detroit, but people south of Flint trade in Pontiac, and if they go into a larger city, they will go to Detroit. We can't expect to pull much farther than 15 to 20 miles at the most from the south.

Q. What views do you have, Mr. Penny, with respect to the portion of the service area of a station designed to serve Flint that would lie below a line some 10, 15 or 20 miles south

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of the city? A. I didn't get the first part of your question, Mr. Dempsey.

Q. I wanted to know what your views would be about the utility from the standpoint of the city of Flint and its merchants of having a station designed to serve Flint render service beyond 20 miles to the south of Flint. A. Well, we feel that we want a Flint station. We want to build up Flint as a natural trading area for the city.

Q. Would you feel that the merchants would have any interest in advertising in an area more than 20 miles south of Flint? A. No, they wouldn't. They would be wasting their advertising dollar.

Q. And would you have any opinion as to whether rates based on coverage to the extent that that coverage was beyond 20 miles south of Flint would not be attractive to Flint merchants? A. That's right.

Q. One other question, Mr. Penny. With respect to the residence of the people who work in the Flint plants, from what area generally do people who work in those plants and who do not live in the city reside? A. They come from the north and the east and from the west, but very few from the south because those people again

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work in Detroit.

Mr. Dempsey: I have no further questions.

Recross-examination

By Mr. Stanley Cohen:

Q. Mr. Penny, to your knowledge, sir, how many major department stores are there in Saginaw? A. Not over two.

Q. And Bay City? A. Bay City, probably only one.

Q. And in Flint? A. In Flint, four.

Q. What is your own particular occupation? A. I am executive secretary of the Flint Chamber of Commerce.

Q. No, sir, I meant do you have any business connections? A. No, I do not. That is my work.

Mr. Dempsey: That is a full-time paid position?

The Witness: Full-time paid executive secretary.

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The Presiding Officer: You are excused. Oh, one minute, please. Let me ask you one question, sir. Am I correct in my understanding, however, that regardless of who gets the grant, the Chamber of Commerce will attempt to cooperate with them fully?

The Witness: We will.

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William Osmund Kelly,

a witness called on behalf of Trebit Broadcasting Company, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Would you please state your name for the record, Mr. Kelly? A. William Osmund Kelly.

Q. You are Postmaster of Flint at the present time? A. Yes, sir.

Q. You are not appearing here in that capacity or in any sense representing the Post Office Department? A. That is correct.

Q. You are also President of the Red Feather Fund in Flint? A. Yes, sir.

Q. You are not appearing on behalf of that organization? A. No, I am not.

Q. Mr. Kelly, you were at one time Mayor of Flint, is that correct? A. Yes, from 1940 to '44.

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Q. Now, how is the Mayor elected in the City of Flint? A. We have a commission manager form of government, and the mayor is elected from the commission.

Q. And the commissioners are elected by the voters? A. One from each ward, nine wards.

Q. And they in turn elect the mayor? A. That's right.

Q. And you were Mayor for four years? A. Yes, sir.

Q. How long have you lived in Flint? A. All my life.

Mr. Dempsey: If the Examiner please, I have asked Mr. Kelly to come principally because I think the statement of his background indicates that he has knowledge of the community, and I am willing to make him available particularly to Commission counsel to have on this record a description of the City and its interests in terms of foreign languages and these other matters that have been raised.

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Q. Mr. Kelly, in the event WJR is succesful in this hearing, will you cooperate in connection with their public service programming to the same extent you have just stated you

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would with respect to WFDF? A. Yes, sir, I would.

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Cross-examination

By Mr. Stanley Cohen:

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Q. To your knowledge, sir, how many majort department stores are there in the Flint area, in Flint proper? A. Four, I would say.

Q. And will you agree with the characterization of the Flint trade area as being primarily to the west, east and basically to the northeast? A. I would agree with that.

Q. You would estimate, sir, that the area south of Flint up until the City of Pontiac is not within that trade area? A. It is not. It is outside of it.

Mr. Stanley Cohen: No further questions.

The Presiding Officer: I don't think that last question was too clear. Let's take the area to the south of the city limits of Flint, between Flint and Pontiac. Would you say that that is part of the Flint trading area or the Pontiac trading area, or is it split?

The Witness: Well, probably the latter would be split there, but it certainly could be considered part of the Flint trading area.

I would say the part immediately south of our community, but the closer you would get to Pontiac, the more it would diminish as far as the potential for the merchants in our community is concerned.

By Mr. Stanley Cohen:

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Q. Sir, how does Pontiac compare in size to Flint? A. Well, Flint, is around 168,000 and I would say Pontiac would be less than a hundred thousand.

The Presiding Officer: Pontiac is contiguous with Detroit, is it not?

The Witness: Eighty thousand. Well, I wouldn't say that is exactly true. It is pretty much built up from Pontiac on down, but there are some communities in between. It wouldn't be contiguous to it, certainly not like the difference between Pontiac and Flint.

You have open areas and farms in between there as you drive along, and the distance from Flint to Detroit is about 65 miles, and from Flint to Pontiac, about 35.

By Mr. Stanley Cohen:

Q. Can you explain, sir, since Flint is the larger city, why is it that the area to the south of Flint to some extent falls within the Pontiac trading area rather than the Flint area? A. Well, I corrected myself when the Examiner asked me the question. I would say that it would be only in direct relation to getting closer to Pontiac. That area immediately south of us would be a Flint market, I would say, but if you got within five miles of Pontiac, by the same reasoning it could be assumed that that area would be theirs.

Nothing I wouldn't think from Pontiac south would ever come to Flint, because they have their stores and many of them, in

Detroit where they can go to and where they are being enticed into Detroit with their mediums there.

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Q. Would you have any objection, or would the Flint merchants have any objection if you could increase what you call your trade area in a southerly direction, in other words enlarge it? A. I think they are striving for that all the time.

Mr. Eagan: That is all, sir.

The Witness: To increase it not only south but every other way.

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Harding Mott,

a witness called for and on behalf of Trebit Broadcasting Company, having first been duly sworn, took the stand, was examined and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Mr. Mott, would you please state your name for the record, sir? A. Harding Mott.

Q. You are a resident of Flint, Mr. Mott? A. Yes.

Q. How long have you lived there? A. I came to Flint in 1907 and went to school in Flint. Then after graduating from college, I moved to Detroit and worked in the Chevrolet Motor Division. Then I later had a dealership in Trenton, New Jersey, and I have been back in Flint since the end of the war in 1945.

Q. Mr. Mott, you are at the present time President of the Chamber of Commerce? A. Yes.

Q. But you are not appearing here in that capacity? A. No.

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Q. Is it your view, Mr. Mott, that Flint is sufficiently isolated geographically and sufficiently different socially and

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politically and from a business standpoint, from the City of Detroit, to permit such an experiment? A. Yes, I do, and actually in Flint all the agencies are autonomous that we apply our program with.

Q. And in answering that question, I take it you are relying on your experience and residence in Detroit as well as your knowledge of Flint? A. Well, I am relying more on my residence in Flint. I wasn't too closely associated with the actual civic life in Detroit when I was there.

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Cross-examination

By Mr. Stanley Cohen:

Q. Mr. Mott, you indicated that to your mind there were certain differences between the Flint area and Detroit. I wonder if you would care to characterize those differences. A. The Flint area is basically a one-industry town and largely influenced by one corporation. As you heard previously, the General Motors Corporation has its biggest pay roll in Flint.

By the very nature of this condition, we are able in Flint to integrate the community quickly by seeing one or two key people in industry and getting their approval to programs which affect the community in the way of welfare activities. This is a great time-saver.

I daresay in Detroit they have to have endless meetings to coordinate and get their programs rolling. In Flint we are able to isolate the community and make a demonstration as to worthwhile projects. At the moment we have a community school program going. The School Board in Flint designed community buildings especially set up for this program for which we provide a budget which involves after-hours activities for adults and children, as well. It would be very difficult in the City of Detriot to get such a program going because of the momentum it

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takes. A big body moves slowly, and it would almost be impossible to pioneer in a community as large as Detroit.

Q. I take it, sir, then the word "differences" as you use it is limited particularly to the needs of pilot studies such as the Mott Foundation? A. That's right.

Q. And is not characteristic of the backgrounds of the various peoples in Flint? A. No; I would say that the problems in Flint are probably magnified and multiplied in Detroit, like your foreign language people. We probably assimilate people more quickly than they do in Detroit, but we have various foreign elements that come from various sections, the same as Detroit does.

Q. Sir, in view of the industralized character of Flint, do the labor unions play a significant part in community life? A. They are well represented in most community activities, and the automobile plants are highly organized, as I understand it. However, the labor unions, as such, don't run the city. They run their labor relations problems and our City Commission, for instance, is represented by two members out of nine that are directly affiliated with the CIO.

Q. Have you had an opportunity, sir, to consider the program proposals of the three applicants? A. No. The only program proposal I have seen is the one submitted by WFDF in this community service meeting that I

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attended.

Q. I wonder, sir, from your experience—using that as an example—whether you believe that it meets what you consider the outstanding needs of the community? A. The program as presented seemed quite exhaustive. I don't know where it could be strengthened. Certainly, just as a casual observer, it would seem that they have covered the waterfront.

Q. You cannot offer us any suggestion as to any significant needs of the community which are not covered and which ought to be covered, in order to provide a well-rounded service to the Flint area? A. No, sir.

Mr. Stanley Cohen: Thank you.

The Presiding Officer: Mr. Mott, in view of your position as director of the board of the Mott Foundation, or as a trustee, would you cooperate as fully with either of the other two applicants, should one of them be successful in obtaining this grant?

The Witness: Absolutely. We have no particular favorite station insofar as the individual is concerned. We are primarily interested in the same problem the Commission is, of giving Flint the best possible service for its television station.

The Presiding Officer: Thank you.

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Are there any further questions?

Mr. Dempsey: Yes, I have a question or two, if I may.

Redirect Examination

By Mr. Dempsey:

Q. Mr. Mott, in answer to a question from Mr. Cohen, you said that you viewed Flint primarily as a proving ground for the Mott Foundation work. Did you intend to indicate that the city was not socially, economically and politically integrated as an independent community for other purposes? A. No. It is a small metropolitan area. We have 165,000 people within the city limits. We have our fringe area which encompasses about 270,000 within the county limits. We have the makings of a truly small metropolitan area within ourselves.

Q. Mr. Mott, are you familiar with the operations of any commercial enterprise, such as department stores, in the City of Flint? A. The Mott Foundation happens to own all the stock of one of the leading department stores in Flint.

Q. And with respect to the problems of advertising and spending money for the purpose of inducing people to trade with the store, would you consider it feasible to spend money to advertise in the area south of Genesse County? A. I did not come here as an expert in the merchandising field. We have an investment, but as one of the owners, I would very much question largely expenditures in for instance Detroit

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metropolitan papers, because I think the dividends would be very small. We know that the people from the Flint area go to Detroit. There is very little flow of business back to Flint.

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Lester W. Lindow

A. That's right. Now these people and the 46 employees which are enumerated in Exhibit E make a total of 51 representing additional employees engaged or to be engaged because of television activities.

Our present AM staff consists of 42 employees, one of whom is a part-time employee and one of whom is on military leave. The part-time employee is Mr. Rex Williamson. The man on military leave is Captain Ted Mattson. The total number of employees for AM and television is 93.

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Mr. Dempsey: Mr. Examiner, I think the testimony has been that the staff under discussion of two full-time and one part-time employee are news gathers, they are not the people who put

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the news on the air. We do not expect to have any substantially additional amount of news when we go on the air with television. The same number will still gather.

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Teresa A. Farrell

was called as a witnes by and on behalf of Trebit Corporation and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Miss Farrell, will you state your full name, please, for the record? A. Teresa A. Farrell.

Q. Miss Farrell, what is your position? A. I am the Executive Director of the Council of Social Agencies.

Q. In Flint, Michigan?

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A. Flint, Michigan.

Q. Would you describe what that Council of Social Agencies is, how it is formed and how it operates? A. Well, the Council of Social Agencies is an organization created for the purpose of planning and coordinating all the health and welfare activities in the community, the city and now it is out into the county. We are concerned with government as well as private agencies.

There are 79 participating agencies that send two delegates, appoint two delegates to the Council of Social Agencies, and that is the official body and from that membership we elect a board of directors.

The Council of Social Agencies elects six members to the budget committee of the Community Chest which is the organization that raises the money for the local private agencies, so that we have, the Council has, let me say, the controlling interest of the planning, at least they have the welfare of the community at heart rather than the money that is raised.

Q. How large an organization do you have in the Council? A. What do you mean?

Q. An operating organization. A. The staff?

Q. The staff.

A. There is the managing director, who is also the director of the Council. I am the executive director for the work of the Council; and we have four other people on the staff, one professional.

Q. Miss Farrell, you are appearing here voluntarily today, at the request of Trebit? A. Oh, yes.

Q. And does the Board of Directors know that you are here and have they sanctioned and authorized your appearance? A. Yes.

Q. I am going to ask you, if you will, please, to refer to certain pages of that binder in front of you which is identified in this proceeding as Exhibit 7, and ask you to turn to 7-H, page 31. A. Yes.

Q. Have you had an opportunity to read that over and are the facts in it true and correct? A. Yes; I looked that over last night. That is correct.

Q. Would you turn, please, to Exhibit J, page 36? A. Red Feather in Action, yes.

Q. Is the discussion there a correct one in terms of the facts stated? A. Yes; we don't have a person that is directly responsible for publicity. I have to take charge of that,

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particularly in the fall when the Red Feather campaigns are in prograss, with the cooperation of the staff of the radio station; that is the reason I am able to carry on without a paid publicity person on the staff. I think that is why I made those statements there.

Q. Will you turn, please, to Exhibit "O" and refer to page 10. The page numbers in this exhibit are on the bottom of the page. A. Yes.

Q. At the top of the page, there is an excerpt there from a letter which purports to have been written by you. A. Yes.

Q. Did you write that letter? A. Yes.

Q. And the statements there are your opinion? A. Yes.

Q. Would you turn to page sixty of that same exhibit? A. Yes.

Q. I am going to ask you to start at page 59 rather than 60, and glancing down pages 59, 60, and 61, are the various agencies listed there agencies which are for the most part members of your Council? A. Yes, there are a great many here. Do you want me to enumerate them as I go down?

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Q. I don't think that will be necessary. A. All of these that are public or private agencies are member agencies of the council.

Q. With the possible exception of the University of Michigan Extension Service and the U. S. Coast Guard?

A. There is, we have the social science project in the University of Michigan which is housed in our building and does a great deal of our research and statistical work. That division is a member agency of the Council.

Q. Then you would say you are familiar with most of the agencies listed there? A. Yes.

Q. And with the fact that the station has carried, perhaps without asking you to say whether the numbers are correct, and spot announcements for these agencies? A. Yes, that is right.

Q. Will you turn, please, to page 1 of Exhibit P? A. Yes.

Q. That page is a list of the members of the WFDF public service committee? A. Yes.

Q. Your name appears on that list? A. Yes.

Q. And is it correct that you are a member of that committee?

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A. Yes, I am.

Q. And that you have attended the meetings of the committee? A. Yes.

Q. And the statements in the following pages of that exhibit which purport to reflect the actions of the committee meeting or the discussions of the committee meeting? A. Yes, we get them.

Q. They are in accord with your recollection? A. Yes; I have copies of those.

Q. Will you turn, please, to Exhibit R, page 5? A. Yes.

Q. Now, that refers to certain activities outside the field of broadcasting in which the staff or the Trebit Corporation has taken part? A. Yes, I recall that very clearly. That was a great service to us when we were in a dilemma as to know how to get these messages across. I went to Mr. Knopf and asked him if it were possible for the station to arrange for that taping of Dr. Sherwood's speech so it could get out to all the employees of AC Spark Plug, General Motors Division. Yes, I recall that very much. That did something very good for us.

Q. Miss Farrell, you referred to the fact that certain statistics or statistical work for your organization is done through the University of Michigan? A. Yes.

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Q. At least a branch office in the research field is maintained in your building? A. That is right.

Q. In the field of statistical research, are you interested in statistics for Genesee County or the City of Flint or just what area? A. Well, Flint and the Genesee County, since all of our agencies cover the county we are county-wide in our interests and most of them, of course, are housed within the city limits. But the statistics and any research matter are concerned primarily, not primarily but entirely with the agencies of Flint and Genesee County. That is where we collect those statistics for a matter of comparison and the matter of watching the expansion and development of our services.

Q. How long have you lived in Flint? A. Since June first, 1942.

Q. Have you been engaged in similar work in other parts of the country or other cities prior to that? A. All my working life.

Q. Miss Farrell, do you of your personal knowledge of conditions there and your familiarity with the statistics on which your work is based, is it your opinion that Flint

1816

and Genessee County constitute pretty much an independent segment of the State of Michigan or one that is dependent and subsidiary to Detroit in the field in which you are active? A. Very definitely it is concerned with Flint and Genessee County, very definitely, because I have come from parts of the country where we have been considered suburban but not in Flint. Even the communities outside of the County are so autonomous in their outlook—no, that is very definitely a unit.

Mr. Dempsey: If the Examiner please, I think I have covered generally the area in which Miss Farrell has particular knowledge and I will, as I have with the other witnesses, turn her over for cross-examination so that, particularly for the benefit of Commission Counsel and yourself, you can find out what you want to know in this area about Flint.

Cross-examination

By Mr. Eagan:

Q. My name is Eagan and I am attorney for WJR, another one of the applicants in this proceeding. In that connection, Miss Farrell, have you ever had conversations with Mr. MacIntyre otherwise known as Mr. Hornung with respect to proposed television programs that WJR proposes in the event they are successful in this hearing?

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A. Yes, he was in to see me.

Q. Did you have discussions with him concerning specific programs like "Flint Spotlight" and "This Is Flint" do you recall? A. Yes.

Q. In that connection, will you in your capacity as executive director of the Council of Social Agencies cooperate with WJR in the event they are successful in this hearing? A. Yes, of course we will.

Q. To the same extent you would cooperate with any of the three that are successful? A. Yes, of course.

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Redirect Examination

By Mr. Dempsey:

Q. Miss Farrell, in connection with your work in the ten years you have been in Flint, have you ever been approached by any representative of WJR either offering or requesting cooperation in connection with the programming of its AM station?

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A. No.

Q. In your discussions with Mr. MacIntyre, did he ever suggest to you or request any cooperation for the future operation of WJR AM station? A. That means radio?

Q. Yes. A. No.

Q. And you said that about a year ago you became a member of the advisory committee for WFDF? A. Right.

Q. Before you became a member of that committee, had you had any occasion to work with any of the people at the station in the matter of interpreting the work of your organization? A. Oh, yes; constantly. Mr. Young there that writes all the scripts and the history of—I think it is "Know Your Flint" or "Know The Town" he is very familiar with all of our organizations and of course comes to our office because we are the central focal part, point there, for the programs and the services of the agency, and Mr. Knopf and several of the people over there; I think that is an illustration about the taping for the AC, the feeling of cooperation that exists when we have a problem. We just don't hesitate to call up and say, can you help us out on this. I don't know whether this is something you can do or

1835

not. They always do. The lighting of our Christmas tree they tape and broadcast it at a later time. There are several things that I would have to have them here to remember them all.

Q. You were at a meeting of the advisory committee and a number of other people that was held on December 30? A. I was not present at that meeting.

Q. You were not present at that meeting? A. No, I was away. That was Christmas time.

Q. In connection with your discussions with Mr. Knopf and Mr. Lindow, did they solicit suggestions from you as to the type of programs that might go on television? A. Yes.

Q. And were there any suggestions that you made that they rejected? A. No, sir; as a matter of fact, we have a time keeping up with their requests to get our staff people to prepare the scripts and so on because, as I have said before, we do not have a publicity person on our staff, so that when we get the material, the factual material, it has to be rewritten for the purpose of television by the staff of WFDF, so we are giving it to them more than they can get from us as far as the material ready for the televising.

Q. And your recollection of the meetings at which you were present and other occasions when you talked with

people from WFDF, have you found that they have tried to find among the various agencies in Flint the best way of serving all the needs of the city? A. Yes.

As a matter of fact with the cooperation of the University of Michigan, the Mott Foundation and with WFDF, they have entered into a course in television and they have asked us to get as many of our staff people to participate, which I am trying to do because it is a real opportunity for us in this new field as far as we are concerned.

Q. Would you have any opinion as to the probability of the station carrying any programs such as those you have discussed with Mr. Cohen if the agencies involved desire or conceive it to be feasible? A. Well, based on the experience we have had, I am sure that any requests that would come for additional programs would be granted if time is available.

Mr. Dempsey: I have no further questions.

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1958

Ola B. Hiller,

called as a witness for Trebit Corporation and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Miss Hiller, will you give the reporter your full name, please? A. Ola B. Hiller.

Q. Miss Hiller, what is your position? A. I am director of radio education for the Flint Public Schools.

Q. And in appearing here as a witness this morning, are

1959

you speaking in any official capacity for the schools, or in your own individual capacity so far as the school system is concerned, in order to give the Examiner and Commission counsel such information as they may like to have about the system? A. I was authorized to come by the Superintendent of Schools who represents the Board of Education.

Q. Miss Hiller, with respect to any other organizations and the school system or Board of Education, do you appear in any representative capacity? A. The Mott Foundation program, of course, is integrated with the school system, and at a recent meeting all radio and television responsibility of the Mott Foundation was delegated to my department, so I suppose I speak for that agency, too.

Q. What about the Parent-Teachers? A. I am the radio-television chairman for the local council, and also for the Michigan council of Parents and Teachers.

Q. League of University Women? A. It is the Flint branch of the American Association of University Women. I am their radio chairman.

Q. Miss Hiller, how long have you lived in Flint? A. Four years. This is the fourth school year.

Q. And did you go there to assume the position of radio director for the public school system?

A. That is right.

Q. Before you lived in Flint, where had you lived? A. Pontiac, Michigan.

Q. For how long had you lived in Pontiac? A. Twenty-three years.

Q. During that time did you have a similar position with the Pontiac School System? A. Yes. I was director of radio education there. However, the responsibilities were not as great, programming was not as great, as they are in Flint.

Q. For how many years did you occupy that position in Pontiac? A. About 11 years.

Q. Miss Hiller, there has been mentioned a course that is to be instituted which was described in a brochure which has been identified as Exhibit 71 in this record. Have you had anything to do with the starting of that course? A. Well, I think that I have been in on the planning of it from the beginning, which was last spring.

Q. And you are familiar with the general plans for the course? A. Yes.

Q. Who is going to teach it? A. Mr. Stasheff, of the University of Michigan.

Q. What is Mr. Stasheff's function at the University. What courses does he teach? A. He teaches the television techniques courses. I think he teaches some radio, too; writing, some of the television writing.

Q. And where is the course going to be held? What is going to be used as a classroom? A. It will be held in the studios at WFDF, and the station has granted us the use of their two cameras.

Q. Miss Hiller, I would like you to refer to certain pages in this large book which has been identified as Exhibit 7. If you will turn to the subdivision of that exhibit following the tab G, and in particular to page 3 of Exhibit 7-G, on that page do you find any of these so-called closed-circuit programs in which you participated? A. Yes, I find two.

Q. And for what purpose were these programs put on? What purpose did you take part in them? A. We know we are going to have some television facilities in Flint one of these days, and the schools are very anxious to get a little practice and know-how on what works and what doesn't work, and when we were offered the chance to do some closed-circuit work, we accepted it.

Q. Who wrote the script for the programs? A. In both cases, WFDF wrote the script with materials which we provided.

Q. Would you turn, please, to the next exhibit, Exhibit H, page 15, starting on page 15, and running over to page 20, is a discussion headed "Mott Foundation Program." Have you read that portion? A. Yes, I have.

Q. Are the facts in it true to your knowledge? A. Yes.

Q. Turning to page 20, starting on that page, and running over to page 25, that is through page 24, there is a discussion under the heading "Flint School System." A. Yes.

Q. Are you familiar with the facts in that? A. Yes.

Q. And are they correct? A. Yes.

Q. I believe that is your picture on page 24? A. Sad to say.

Q. Exhibit J, Miss Hiller, on page 14—that describes a program which is listed on the proposed schedule of WFDF entitled "School Workshop." Are you familiar with the facts in that partciular section? A. Yes, I am.

Q. And in your opinion are they correct? A. Yes, sir.

Q. Turning to page 18 of the same exhibit, I believe the

program at the foot of the page, "Imagination Unlimited," is also one with which you are familiar. A. That is right.

Q. Is the description there correct? A. Yes.

Q. At the top of the page there is a reference to a puppet project at the Roosevelt School. A. Yes.

Q. Are you familiar with that project and the discussion concerning it? A. Yes.

Q. And did you make any suggestions with respect to the station as far as television program material is concerned? A. I did suggest that we would have many projects out in the schools that at times would be very worthwhile to show our community. This is only one of them.

Q. In that connection, Miss Hiller, have you suggested any other projects which are available and that the station has indicated it will not carry? A. I have never made a suggestion to WFDF that it hasn't had consideration, and we have usually gone ahead with the program series.

Q. With respect to your suggestions on television, have there been any that have not been accepted? A. Not any.

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Q. Miss Hiller, will you refer to Exhibit R, on the second page of the exhibit? Are the statements on that page in so far as activities in connection with the Flint Public Schools are concerned accurate? A. Yes, they are.

Q. Miss Hiller, in connection with the problems that you had as radio director of the Flint Public Schools and of the Mott Foundation and of the other organizations you have mentioned, will you describe briefly the nature of the joint actions that you have had with the station in the various work in which you are directly interested? A. Well, of course, we have been concerned primarily with building an in-school listening service for our classrooms, which means that we had to have times that would be compatible with our schedules in the schools, and that has sometimes been a problem when we have to depend on commercial outlets to help us in that respect. I have had extremely fine cooperation from WFDF, not only in the granting to us of time, but in giving us personnel. We have not had any engineering help other than student help in the past until very recently.

We have not had any recording facilities. We have not had a record library until recently. I can go to WFDF and make sure of getting anything I ask for. They have made recordings and have done delayed broadcasts. Anything I have asked for, they have always done.

Q. Thank you. I would like to ask you whether in your experience at Flint in your present position and in your past experience in Pontiac in a similar position you have come to any view with respect to whether the areas and their problems are the same, and whether the communities are considered as more or less integrated or whether they are considered as distinct by the people who live in each place. A. I have found a great difference in the Flint community from the Pontiac community. Pontiac has always been considered a sort of part of Detroit and the whole pattern of living there is geared to that idea.

But when I went to Flint, I found a very, very different situation. Detroit is out of the picture as far as Flint is concerned. It is a community by itself, and they want to be autonomous. They want to build their own cultural patterns.

1970

They do not want to be fitted into the patterns that exist in the metropolitan area around Detroit.

Q. Are there occasions in which meetings are held of the various people interested in the public school education in various sections of the State? A. Yes. I have noticed that there seems to be a line just north of what we know as Clarkston Road, which is about ten miles north of Pontiac, and all of the teachers go in the southerly direction for any meetings, and beyond that they come north to Flint.

I notice the same thing in relation to our school programs. When I was in Pontiac we had people using our in-school listening programs in 126 schools in our area outside of the Pontiac system. The Dearborn schools used our programs. Highland Park, also; all around that area. North, no. Now that I am in Flint, I think we are having better programs, but the people south of us do not use our programs.

People north of us do, and over in the thumb.

Mr. Dempsey: I have no further questions of Miss Hiller at this time, if the Examiner please, but I would like to say with respect to Miss Hiller and with respect to Mr. Lott, who will follow her on the stand, we asked her to appear here primarily in order to permit you and Commission counsel to get information directly from people in the City of Flint who are not connected with any of the applicants.

1971

The Presiding Officer: Mr. Eagan.

Cross-examination

By Mr. Eagan:

Q. Miss Hiller, as you may know, my name is Eagan, and I am attorney for WJR. You realize that there are three applicants in this proceeding that are applying for a Flint television station. A. Yes.

Q. May I ask you in the event that WJR is successful in this hearing, would you cooperate with them in programming in connection with the schools? A. We surely would cooperate.

Q. For example, one of the programs I recall proposed by WJR is a program entitled "Junior Town Meeting." Generally speaking, the format is that through cooperation of the school system in Flint, they would get students in a panel to discuss certain problems of interest to the students, and have a question-and-answer period and have an address by, say, a principal of the school.

Would you cooperate in such a program with WJR? A. Yes. We have already had a junior town meeting radio program, so I would surely have them on television.

Q. You say you have? A. Yes, we have.

Q. In connection with WJR?

1972

A. Not in connection with WJR. We have done our own in Flint.

Q. You understand the type of format and you would be interested in cooperating with them in that type and any other educational program? A. Yes.

Q. I believe you referred to a puppet show that would be part of a program that you discussed with WFDF. Did you discuss with them who would be a sponsor of such a show? Did you understand that it would be a commercial sponsor in connection with that show? A. No, the schools would not participate as a school in a sponsored show. That would not be our policy.

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1973

Cross-examination

By Mr. Stanley Cohen:

1974

Q. As a result of your experience, are you familiar with the recreational needs in the community of Flint? A. I believe I am.

Q. Have you had any experinece in television? A. In television?

Q. As opposed to radio. A. I have not had any experience in television.

Q. Have you taken any means for familiarizing yourself with any of the problems of television as opposed to radio? A. Yes. Some four years ago I spent some time at Schenectady, the Schenectady station, trying to learn a little about television, but we have had no opportunity in our community to put anything that I learned to work.

Q. You may recall off the record yesterday, after I suggested to you that you glance through the program proposals of some of the applicants with a view toward determining whether as a group they had what you considered met the outstanding needs of the community—I wonder if you had the opportunity to do that? A. I have only seen WFDF's program schedule.

Q. Using that as an illustration, would you suggest that it meets the outstanding needs? A. I think so. We would probably have suggestions from time to time as we developed new things in Flint, but I think on the whole they have done a pretty thorough job of thinking

1975

of our needs.

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1978

R. C. Lott,

having been previously sworn, was called as a witness on behalf of Trebit Corporation and was examined and testified as follows:

Direct Examination

By Mr. Dempsey:

Q. Mr. Lott, will you please give the reporter your name? A. My name is R. C. Lott, and I am the County Agricultural Agent of Genesse County.

Q. Mr. Lott, where do you reside? A. I live near Mount Morris.

Q. I think that has been identified in earlier portions of the hearing in connection with the engineering proceedings, but would you state how it is located with respect to Flint? A. Mount Morris is seven miles north of Flint. We live two miles outside the city limits.

Q. How long have you lived in Genesse County and been County Agent? A. For the past seven years.

Q. Before that where were you located and what were you doing?

1979

A. The same position for Lapeer County for seven years.

Q. That is immediately to the east of Genesse County? A. Joins Genesse on the east.

Q. Before that? A. Two years on a farm near Lansing.

Q. Just what are your duties as County Agent? A. Our work is adult and youth education in the agriculture, home economics, and 4-H Club work, extending the services of Michigan State College into Genesse County.

Q. And what portion of your work as County Agent involves publicizing the work of the University Department of Agriculture in the Department? A. That is one of the means we utilize in educational work, through radio, newspapers, through bulletins, through meetings, through demonstrations, achievement days, and such.

Q. At the present time, have you a program carried on WFDF? A. Yes.

Q. Will you describe, please, sir, how you came to get that program on the station and generally how it is conducted? A. We were solicited by WFDF to cooperate in a farm program.

The Presiding Officer: When was that, Mr. Lott?

The Witness: Approximately three years ago.

The Presiding Officer: Three years ago?

The Witness: Yes. They installed a transmitter in our office.

By Mr. Dempsey:

Q. You say a transmitter; you mean a microphone? A. A microphone and a transmitter device that will bring us in connection with the control room so that we can cut recordings in our office with farm people who are specialists who come from Michigan State College, and made it convenient for us to make recordings for our farm programs.

Q. And your office has microphone equipment that is connected with a line to the WFDF studios? A. Yes.

Q. Do you have any other equipment in your office that was furnished by the station? A. They have supplied us with a tape recorder that we use for cutting records outside of the office at meetings, at fairs, at various occasions that we want to get out on a farm using successful practices that we feel that we can use good teaching methods.

Q. If you will direct your attention to the program itself, how often is it carried? A. We have our agricultural program on Monday, Tuesday, and Wednesday. The 4-H Club work is on Thursday and Friday. Home economics is on Saturday.

Q. Has that schedule been in effect for approximately three years? A. Approximately.

The Presiding Officer: How long are each of these programs?

The Witnes: Our part of it is approximately ten minutes, and goes sometimes to fifteen.

By Mr. Dempsey:

Q. Mr. Lott, in connection with the type of information which it is your duty to get to the public, you discussed the type of information which it is your duty to get to the public, you discussed the purely agricultural aspects. Is home economics also one of the functions that you are supposed to discharge there? A. Research programs of Michigan State College involve home economics and agriculture, and therefore it is our duty to transfer the latest findings in research through the Extension Service.

Q. Do you have any portion of your program that would be directed to urban dwellers or deal with problems that they would have? A. We have a full-time home demonstration agent for the City of Flint. She and the rural home demonstration agent cooperate in sustaining the home economics programs. They find that the programs are adapted to the urban area as well as to the rural areas. They are just as well received in one

place as in the other.

Q. What about the problems of lawns and shrubs and shade trees, and so on? A. In agriculture we have considerable requests from the urban people for information regarding lawns, care of shade trees, problems that are connected with flowers, insects, disease control.

Q. Mr. Lott, is there any area contiguous to Genesse County that is more or less integrated from an agricultural standpoint? A. Integrated with?

Q. With itself. Does the Thumb area, for example, have a particular agricultural interest? A. The area north of Flint, up in the Thumb area, the very fertile soils are known as the breadbasket of Michigan. It is in this area that a lot of our cash crops are produced, such as beans, and wheat, and sugar beets. It is characteristic to that fertile land.

Q. Is the same general type of agriculture also found in Oakland County to the south of Genesse? A. Not to the extent of cash crops—sugar beets and beans, I believe.

Q. What are the agricultural products in Oakland? A. To my knowledge dairying predominates. Cash products there would include potatoes to quite an extent; some wheat.

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Q. Mr. Lott, in connection with acquainting yourself with the potentialities of television for furthering your work, I believe you were a participant in one of these closed-circuit television demonstrations.

Would you describe that demonstration and state what conclusions you have reached as a result of that in terms of television as a medium for the promotion of your work? A. In our participation with WFDF and over television, they have requested that we call the extension officers together, the employees of Michigan State College who will be in the service area, and put on a trial program, which we did, utilizing our 4-H Club agent, our two home demonstration agents, and the County agricultural agent, and we got the reaction from the group present that they would be glad to cooperate, that they felt television offered a great medium for education, that they could do many things with television and do it much more effectively than with radio in teaching.

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1993

Redirect Examination

By Mr. Dempsey:

Q. Mr. Lott, in view of Mr. Eagan's question, have you ever been approached by WJR to put on any programs that in your view relate to Genesse County farming and agriculture on its AM radio station? A. No.

Mr. Dempsey: I have no further questions.

Recross-examination

By Mr. Eagan:

Q. Do you ever listen to the WJR agricultural programs? A. Sometimes.

Q. Do you know if they are of interest to the people, agricultural people in your county? A. What I have heard is of general interest.

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2122

Noran E. Kersta,

called as a witness on behalf of W. S. Butterfield Theaters, Inc., and first having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hancock:

Q. Will you state your name, residence and occupation, please? A. Noran E. Kersta, 143 Meadow Street, Garden City, New York.

2123

Q. Are you presently employed by Butterfield Theaters? A. Yes, I am.

Q. What is your occupation? A. Consultant; television management consultant.

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Q. Mr. Kersta, during your testimony you will testify with respect to various exhibits relating to the Butterfield proposal and also with respect to plans and policies of the applicant in the event they are successful in receiving a grant of their television application, will you not? A. That is right.

Q. Were these plans and policies prepared under the direct supervision of Mr. Gowthorpe, President of Butterfield? A. Yes, they were. Well, first, we made a rough plan and went over every detail, with Mr. Gowthorpe and his other officers of Butterfield, staff members, and gradually molded the entire plans on program scheduling, financial and economic aspects, to fit the outlook and the policy of Butterfield.

Then, the entire plan was also gone over with the entire Board of Directors.

Q. Now, in connection with the preparation of this plan what did you do of a general nature in connection with it and in cooperation with Mr. Gowthorpe and his officers? A. Well, I consulted Mr. Gowthorpe and other members of the staff on occasion and looked over the entire city and buildings, the transmitter sites, and then discussed it at great length, the situation at Flint with members of the Butterfield organization that lived there and worked there for years; and also went to Flint a couple of days and talked with a cross-

2137

section of the civic and governmental leaders there.

In addition to that I studied the various statistics and market data sources that were available and taken as the authentic representations of the area in the industry.

Q. Did you visit any other communities in Michigan? A. Yes, Ann Arbor and East Lansing; and of course called around generally to see what the market was.

Q. And did you make contacts with the university located at Ann Arbor? A. Yes. That was the function of the visit there.

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2229

Cross-examination

By Mr. Egan:

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2252

Q. Now going back again to this Michigan Choir Groups. You mentioned you talked to three religious people, plus the mayor. Could you tell me when you talked to them? A. Yes, if I may refer to——

Q. The month is satisfactory. The day isn't necessary. A. Let me be sure.

Q. Yes, sir. We won't press you on that. A. In the week of December 16th, whenever that would appear.

Q. So that was after this program schedule was made up? A. That is right.

Q. Did you talk to anybody in Flint with respect to this program schedule before December 16? A. With the people in the Butterfield organization that lived there and worked there for years.

Q. Did you talk to anyone outside of the Butterfield Corporation outside of that before December 16? A. No, not specifically on the program.

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By Mr. Dempsey:

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Q. Now on the trip to Flint you looked over the Roxy Theatre? A. Yes.

Q. And did any of the people about whom you testified in connection with programs talk to you on that trip, or was that all on the December trip? A. That was on the December trip.

Q. So you talked to no one in Flint about any

2291

programming problems on that automobile ride on or about the tenth of November? A. Only among ourselves.

Q. In the car, on the way up and back? A. Yes, and people we met in Flint of the organization.

Q. All right, I think you have said that you don't remember what changes you recommended in the old program proposal as compared to the present one; but that you did recommend some of them? A. Yes.

Q. And those recommendations were based on no information gained on your trip to Flint, except the discussion in the car with the members of the organization? A. Yes, that lived there and worked there, worked with these people.

Q. Which ones who have worked there and lived there rode up with you? A. Well, Mr. Seippel met us there.

Q. In Flint. A. Yes, I believe he was in the Capitol Theatre with Mr. Earl Barrett, Manager of the theatre.

Q. Now Mr. Seippel had been a member of the Butterfield organization before they employed you, had he not? A. Yes.

2292

Q. Do you know whether or not he participated in the original proposal? A. I do not know.

Q. So that, it might have been that they called him in to consider changes in the proposal quite apart from calling you in to consider the matter? A. They might have; I don't know.

Q. In your discussions with them was there any indications that he had ever heard the original proposal? A. I don't recall that it was ever brought up, specifically.

Q. Well you talked with Mr. Seippel? A. Yes.

Q. Did you get the opinion that he had never heard of it and he suggested a lot of new ideas, or that he was suggesting modifications?

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2300

The Presiding Officer: Now when you went out to Detroit, did you have a program format with you that you suggested?

The Witness: A proposal, yes.

The Presiding Officer: And when you went out to Detroit

2301

did you have a proposal with you with respect to the number of people you suggested they hire and as to what the expenses would be?

The Witness: Yes.

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The Witness: By the same token, all of these people I don't think would be fully aware of the functions or the flexibilities and the potentials of television.

I think we will have to live with this board for some time, and do a lot of indoctrination in terms of television, before they can become really effective.

I have been talking with people out of the industry, and regardless of how prominent they are in their particular fields, there are many areas that they have no way of commenting even within the law and regulations of the FCC.

Now in regard to the concept of the programs as presented here, they were done prior to talking to these people. They were done in conjunction with people that have lived and worked and participated in many activities of Flint, and to me talking to these people was in reality an affirmation of their judgment and concept of the requirements of Flint, because in no instance could I find contention or anything else from all of these people that we talked to about this. It just affirmed to me and to the group that went up there that the concept of this thing was pretty dog-gone good and valuable to the area.

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2362

Redirect Examination

By Mr. Hancock:

Q. Mr. Kersta, on cross-examination, I believe by Mr. Cohen, you were asked a question relating to this subject. Assuming that no network was available—and that was an assumption you indicated that you did not go along with? A. That's right.

Q. What would this station do? And you indicated that it would operate as an independent. A. That's right.

Q. Well, now, what type of programming do you propose under those assumptions with which you do not agree?

2363

A. There are an increasing——

Mr. Dempsey: If the Examiner please, I don't believe the testimony is that they have any proposal. The proposal is based on network, and he doesn't have a proposal for a non-network operation.

Mr. Lester Cohen: That is not his evidence at all.

Mr. Dempsey: He just said yes it was.

The Presiding Officer: That is not the way I interpreted the witness's testimony. I think that you are taking it in a rather limited context. The witness has testified——

Mr. Dempsey: I think the witness just said yes when I made the statement.

Mr. Stanley Cohn: I think the witness has also stated he had given some consideration as to programming if he couldn't get any network programming.

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By Mr. Hancock:

Q. Now, Mr. Kersta, over the evening recess have you had an opportunity to review your record with respect to the date of your employment by Butterfield and the dates of the various

meetings with the Butterfield principals in connection with your employment? And I am thinking particularly of the date of your employment and the dates of your meetings in the field with them. A. Yes, sir.

Q. Will you give those dates for the record, please? A. October 30 we had a formal agreement.

Q. This is 1952? A. That's right. October 30 and 31 were the first two dayes of discussion on this plan.

The Presiding Officer: That was in Washington?

The Witness: In Washington.

By Mr. Hancock:

Q. And with whom did you discuss that then? A. Mr. Gowthorpe and Mr. Norris.

Q. All right. Proceed. A. Then as a result of that discussion I was to make up some material for further discussion and approval, and I went to Detroit the evening of the 7th and was there the 8th, 9th and 10th.

Q. Of what month and year? A. Of November.

Q. 1952? A. That's right.

Q. All right. Continue. A. On Saturday, the 8th, we made a tour of Flint, at which

time we inspected the transmitter sites and the Roxy Theatre, and toured the area across the market in the city and saw various buildings and went to the IMA Auditorium, as an example, and so on.

On Sunday we had continuous discussion, and Monday we continued our discussion, and we went to Ann Arbor to visit officials and other people of the University of Michigan.

Q. Now, with which Butterfield principles did you hold these discussions that you refer to? A. Mr. Gowthorpe, Mr. Norris, Mr. Seippel.

Q. All right, continue. When was your next meeting with the Butterfield principals? A. Also had discussions in Flint with Mr. Earl Berry, who is a local man there.

Q. And did these discussions with the Butterfield principals include discussions of the Flint area and the various organizations and institutions in there? A. That's right.

Q. All right, continue. When was your next meeting? A. With the board on December 9 we had an all morning meeting and a luncheon.

Q. At that time did you discuss generally the Butterfield plans? A. That's right.

Q. And when was your next meeting, in that area I am talking about?

2371

A. December 16, 17, 18, and 19.

Q. And that was the time that you made the trips to Flint, Lansing, and Ann Arbor, and during the time in which you and other representatives of Butterfield talked with local people, and about which you have testified? A. That's right. Of course, over this entire period there were phone calls and other contacts like that, that would be normal in business.

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2418

J. J. Herbert,

a witness appearing for and on behalf of W. S. Butterfield Theatres, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hancock:

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2419

Q. And what is your official connection with W. S. Butterfield Theatres, Inc.? A. I am a director of that corporation.

Q. And I believe the stipulation shows that you are a director representing the University of Michigan's stock in that corporation, are you not? A. That is correct.

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By Mr. Hancock:

Q. Mr. Herbert, will you state for the record your participation in connection with the Butterfield activities at the present time? A. My activities are those normal to a director of a corporation. I attended the meetings, regular and special that are called of that corporation. I am in communication with its officers from time to time as matters arise. I engage in correspondence with them and engage in telephone conversations with them and, depending upon the nature and the emergency of the situation, they are more or less frequent.

Q. Will you state for the record, Mr. Herbert, what your participation will be with respect to the Butterfield applicant in the event it is successful and receives the grant for a television station in Flint? A. Well, I would assume those responsibilities which the Federal Communications Act places upon directors of licenses. It will be incumbent upon me as a director to take an active interest in and to have an understanding of the operation of such a station.

I would assume and I believe that meetings of the directors will become more frequent because of the novelty of the enterprise to Butterfield, and I would seek particularly to reflect the

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interests which the University of Michigan has in this new medium of educational interest.

I may point out that actually as a director I serve somewhat in a dual capacity because I am now a representative of the constitutional group; when I serve as director of Butterfield, the interests of the University of

Michigan are therefore necessarily reflected in my attitude as a member of the Butterfield board.

In that connection I might add that the university has for some time taken an active interest in television as an educational and social and cultural medium and has employed it in programs which have been broadcast over the television station, WWJ.

The university also is acquiring a building to stimulate interest in the training in both the artistic as well as the technical aspects of television broadcasting and performance. This is a new and interesting activity to us, in which we are greatly interested and in which we have taken some definite steps already; so that the activities of Butterfield, should they become the grantee of a license, would be of very considerable importance to the university.

Q. Now, Mr. Herbert, I believe you have been informed, have you not, that the Butterfield proposal will provide what is known as a Grade A service over Ann Arbor, Michigan, have you not? A. So I am advised, yes, sir.

Q. Is that of any significance to you as a representative of the University of Michigan?

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A. It is indeed.

Q. And would you state for the record why? A. Any programs in which the university participates, in which the students and the faculty and persons associated with the university will take part, as they have during the past year—we have found it to be of great local interest both to the academic community, the students and the faculty, as well as the people of the City of Ann Arbor. They are interested in seeing what the university is doing on television and the quality of their performance. I have noted a keen interest. So it is of some consequence to the university to have a station that will give a greater good signal to Ann Arbor.

Q. Do you have any opinion as to what, if anything, a station such as Butterfield's proposal would, or how it could be of benefit to the university as it develops its training program which you indicate has recently been inaugurated with respect to television? A. Well, it would afford what you might term a laboratory medium or an actual medium for observation, for demonstration to students and those who are interested in the field of television. It would afford them a very good opportunity to see it in action and to learn from the operation of a commercial station as to how those things are done.

Q. When the time comes that it would be of assistance to the University of Michrigan, would you as a member of the Board of

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Directors, do everything you can to make the necessary facilities available? A. I don't believe I understand your question, Mr. Hancock.

Q. Well, in other words, you have described how you feel this station could be of assistance to the University of Michigan. A. Yes.

Q. And I say will you as a member of the board of Butterfield do everything you can to carry out the ideas you have expressed as to how this station can aid in connection with the university? A. Oh, obviously so, sure.

Q. And have you received any assurance from the other officers and directors of this company that such a program will be carired out? A. That we have.

Mr. Hancock: I have no further questions on direct.

Cross-examination

By Mr. Eagan:

Q. Mr. Herbert, as you may know, my name is Eagan and I am counsel for WJR, one of the three applicants in this proceeding.

How long, sir, have you been a regent of the University of Michigan? A. I am in my fourteenth year.

Q. And do you know when the University of Michigan acquired Class C stock in Butterfield; I believe it is Class C stock that

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the university has, is it not? A. Yes, sir. They acquired 37,000 shares of that stock in August, 1950, I think the 15th of August. That is my recollection.

Q. Could you tell me how and why they acquired the interest in Butterfield? A. How and why?

Q. Yes. A. We have used this as an investment, as we had funds to invest in securities of various kinds. It was offered to us on terms that we thought were favorable and to the best interests of the university, so we acquired a lot of this stock.

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By Mr. Hancock:

Q. Mr. Herbert, in line with Mr. Eagan's question with respect to the interest of the University of Michigan being purely financial, you also have some proprietary interest in the operation

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of the station, do you not, as a member of the Board of Directors, a policy-making board? A. Well, the interest —I assumed he was talking about a financial interest. Yes, naturally, the university has an interest in an organization that may be of value in the promotion of the general purposes of the university, as stated before, and if Butterfield or any other corporation in which we have a financial interest is or can be of benefit or can further the purposes of the university, of course we have an interest in it.

Q. Yes. A. We happen to own stock in the Parke-Davis Company, and they make chloromycetin which is used in the university hospital, and I may use that as an example, it is unique, and we happen to be stockholders in the Parke-Davis Company, and we are interested in that otherwise, that is, quite apart from the investment standpoint.

Q. Mr. Herbert, you and the other members participated in the original policy decision of Butterfield to enter television, did you not? A. Yes, sir.

Q. And Mr. Gowthorpe has been authorized at all times by the board to proceed with the prosecution of the application, isn't that right? A. That is right.

Q. As a practical matter, Mr. Herbert, do you have an

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opinion as to whether or not the university is or would be more interested in television because of the matters you have testified about more than as a practical matter it is in the theater operation, that is, the motion picture theater operation, because of the peculiar aspects of television in the relations of the university? A. Yes, I would have an opinion.

Q. Will you express that, please. A. Well, as I have explained before, the cinema, the commercial cinema from the viewpoint of the university has no great educational or significant cultural value as related to the activities of the university, and I don't mean to belittle the quality of pictures. But television is something else. It is a new medium for the dissemination of learning and for the demonstration of new things, new procedures. We believe it will play an increasingly important part in the educational life of the community and in the cultural life.

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Recross-examination

By Mr. Eagan:

Mr. Herbert, as regent of the University of Michigan, would it be accurate for me to say that the university's position would be to cooperate with any television station in Michigan with respect to good programming?

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A. Certainly, by all means.

Q. And it would cooperate as much with a television station in which it had no financial interest as it would in one in which it had? A. We certainly would cooperate, because we believe in television.

Recross-examination

By Mr. Dempsey:

Q. At the time the university acquired stock in the Butterfield Company, it was because Butterfield was in your opinion a sound financial corporation and not because it was a television applicant? A. At the time we acquired it, I don't think we associated the thought of television with Butterfield.

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Paul W. Seippel,

a witness appearing for and on behalf of W. S. Butterfield

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Theatres, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hancock:

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Q. Will you describe, please, the policy over the years, and today, of Butterfield with respect to participation or cooperation with local philanthropic, civic, and religious and similar organizations? A. Well, I can speak from a personal experience of over 25 years, and I think that is pretty nearly from the inception of the company, that we have always had a policy of one hundred per cent cooperation with the type of organi-

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zations you have just mentioned.

Q. And how is this policy carried out? A. We carry it out through our managers at a local level.

Q. And are any instructions issued to the managers? A. They are more than instructions. We tell them to do it but on top of that we urge them to do it, and, along that line, we are very happy to pay their luncheon-club dues and initiation fees and chamber-of-commerce dues.

Q. Would you say that your activities in Flint are typical of the active management of Butterfield through the years? A. Well, I would say my activities were average. There were lots of boys who did much more than I did, and, I suppose, some who did not do as much.

Q. Are there any outstanding examples of contributions you can think of? A. Yes. We had some managers—of course, in all classes, you have some men who seem to have a natural gift for that sort of thing. One who has been with us for many years I think of; he originated the Red Stocking Club in Lansing.

Q. What is the Red Stocking Club? A. It started out as a Christmas-time activity, and this manager that had the original theater got red net, from

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which he stamped out stockings and passed them to the patrons of the theater and they filled the stockings and returned them to the theater and they were given out at Christmas time to the poorer children of the community.

Q. When was this campaign instigated? A. Back in 1930, I believe.

Q. Is it still in existence today? A. Yes; it is still in existence today. However, after the first year or so, it was taken over by the State Journal in Lansing; they thought so much of it that they made it their own project in cooperation with the Butterfield managers.

Q. In other words, it has been a joint project since that time? A. Ever since. But a Butterfield manager has either been the president or vice president of the organization since its inception.

Q. Yes.

Are there any other outstanding examples you would like to mention for the record? A. Yes; we have another rather unique example. I quote this one: Con Foster, deceased now,—If you have ever been to Traverse City—he converted rather a wasteland out in the bay into a municipal zoo and was a great collector of Indian relics; he founded a museum which bears his name

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today; in fact, he was almost known as Mr. Traverse City.

Q. I believe you stated that this policy has been in effect, from your knowledge, for 25 years, and, from your information, even prior to that. A. That is right.

Q. Can you now give us some specific examples of cooperation by Butterfield with churches and religious groups? And I would first direct your attention to making theaters available for special services in Flint. A. Yes; this is the proper season of the year to be talking about that. In Flint, Michigan, the Capitol Theater for at least twenty years has been used by the Flint Association of Churches for Lenten services, usually through Holy Week. The Palace Theater has been used by the Lutheran churches, the Della Theater by the Methodist churches. They usually have these throughout Holy Week, oftentimes, more often, through the Lenten season. On

Good Fridays we hold the opening of our theaters until three o'clock, and they have a service, usually, all over.

Q. Yes. Now, can you give me some examples of theaters being made available on a regular basis rather than for special services? I direct your attention first to Flint. A. Yes; we have a policy, which is well known to our managers, should any church get into difficulties through

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failure of its heating plant, or maybe they are remodeling, or maybe they will even sell the church and are building a new church—In Flint, I think, St. John Viennay's parish used the Della Theater for over two years, until they built a new church.

Q. Was that on a regular Sunday basis? A. Every Sunday.

At the present time, the First Church of Christ, Scientist, there, is going to sell their building, and, last year, knowing about our cooperation, they approached us and we assured them that we would be very happy to have them have their services in one of our theaters while they were acquiring a new site.

Q. Can you name for the record, without details, any other specific communities in which your churches were made available—your theaters were made available on a regular basis for use by churches for regular services? A. Yes. Among them might be Greenville, at the Silver Theater; Ann Arbor, at the Michigan Theater; in Cadillac, at the Lyric; and I think probably the outstanding example of that was the one in East Lansing, where one of the churches used it every Sunday for over four years.

Q. Is the use of the Butterfield theaters provided all without charge? A. All without charge by us, in every sense.

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Q. Does that entail any effort on Butterfield's part or is it a matter of opening the doors for the churches? A.

Of course, you have to provide for the earlier attendants there, you have to provide early heat; then there is the question of light; and usually the stage has to be rearranged every Sunday for church and then rearranged back into a theater again.

Q. And does Butterfield take care of that service? A. All without charge by us.

Q. What has been the policy of Butterfield over the years of running trailers for churches, such as go-to-church trailers, to encourage attendance? A. We have a stock of those. Each theater usually has one or sometimes a different one, in order to give some variety, and they run them from time to time—not as a regular thing, because they lose their significance, but we introduce them at odd times during the year.

Q. Does Butterfield have a policy and practice of making shows available to religious organizations? A. Yes; we do.

Q. Can you give an example of those practices? A. Do you mean in——

Q. Of special shows for religious organizations. A. Well, yes. You can take in Flint, for instance, some denominations, as you know, cannot come down to the

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theater at the regular times, and we are very happy to give them special showings. We showed Quo Vadis and The Miracle Of Fatima for the sisters, and usually at a special time.

Q. Is this typical throughout the area? Do you do this in other communities, too? A. That is quite a common practice.

Q. Do you recall any specific examples? A. I may have some listed here.

Q. Look through your notes and refresh your memory. A. Thank you. Yes; I recall some here; I have some jotted down.

The Dominican Sisters, in Grand Rapids, and the Mother House, I believe, is in Adrian, Michigan—we frequently give shows for them, and the Sisters of St. Joseph, in Kalamazoo, and the Hall of The Divine Child, in Monroe.

Q. Now, in connection with these special showings, do you wait to be asked by these religious organizations or just how are they handled? A. Well, we know and realize, of course, that they are interested in certain types of pictures, and we invite them to these showings and offer either to take the show to them or have them down at a time when the theater is not in regular operation.

Q. How long has this practice been in vogue? A. For many years.

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Q. These special showings are all provided without charge? A. Without charge by us.

Q. Has Butterfield a policy with respect to cooperation or contribution toward children's organizations and juvenile organizations? A. Yes. We, of course, are very much interested in children, because nobody enjoys a show like a kid; so, we are especially anxious to take care of that group of our citizens.

Q. Can you give an example of what Butterfield does in this connection, specifically, first, in respect to Flint? A. In Flint we have the annual newsboy show, which is usually given at Christmas time for the poor children. We have the safety-patrol boys and girls show, which is given some time during the year as a reward for their services in directing traffic around the schools. We have the 4-H show, when the Genesee County 4-H Club has their annual award and show, at the Capitol Theater. Shows of that type.

Q. Now, do you have a practice, in addition to providing shows, of making actual gifts to the children's organizations during the Christmas season? A. Yes; during

Christmas-time, through our concession department, we usually take care of the children's wards or homes in each locality.

Q. Can you give some specific examples of what you

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include in the Flint area? A. In the Flint, it would be Hurley Hospital, St. Joseph's Hospital, Whaley Home, Juvenile Home, Child Welfare Home, McLaren General Hospital there.

Q. And what does this gift consist of? A. Usually of attractively wrapped packages of all of the popular makes of candy bars and that type of thing.

Q. Now, is this practice of gifts to children by way of candy limited to Flint or is it general? A. Oh, no; we do that throughout the State.

Q. Approximately how many institutions are included? A. I would say 65 or so, approximately.

Q. Now, throughout the year, other than at Christmas time or at these special shows that you have mentioned, for various organizations, does Butterfield have a policy with respect to inviting children's groups to other shows, other than these that are specially arranged? A. Most of the managers have a contact with the children's homes through their locality, and I know in Flint the managers there many times invited the kids out at the Juvenile Home or the Whaley Home down to see special shows that would appeal to them, like the Disney pictures.

Q. That is a matter of common practice throughout the year in the various communities? A. Yes.

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Q. Now, you mentioned the children's show, both special showings at particular times or for particular events, and also regular showings throughout the year, when there is a particular type of picture there that would be appealing to children. Is this a matter of common practice throughout the different communities in which Butterfield has theaters? A. Yes. We have a number of these shows all through our towns. They are usually sponsored through different organizations in the town; say, in Kalamazoo, it will be the Boy Scouts, and the Kiwanis Club in a town like South Haven; the Elks, up in Cadillac; the Salvation Army, in Ann Arbor; groups like that.

Q. In connection with these showings, does Butterfield provide the show and the theater free of charge? A. Absolutely, without any charge by us.

Q. Now, what is the policy of Butterfield with respect to special motion-picture programs for various institutions on a regular basis, rather than these special shows that you have referred to? A. We provide a program of regular motion pictures through several organizations; I have a list of some of them here.

Q. Could you read just a few of them? Four or five. A. Yes.

Q. This is on a regular basis?

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A. In the various institutions of that type; is that what you mean?

Q. Yes. A. Michigan State Reformatory, in Ionia.

Q. How often is that? A. Weekly basis.

And the Veterans' Hospital, in Grand Rapids; the Masonic Home, in Alma, Michigan; St. Vincent's Orphanage, in Saginaw, Michgan. There is a place where we would not only give them shows; we furnished and installed the equipment so they do not have to bring the children downtown; we take the shows to them.

Q. In other words, Butterfield contributed the equipment and the installation? A. That is the truth.

Q. Are all of these on a weekly basis? A. The first three are on a weekly basis. I think there is another one, the Hall of the Divine Child, in Monroe, Michigan—I think that is not quite that frequent; I would say maybe twice a month or so.

Q. Butterfield makes available to them a motion-picture program on the basis you have mentioned, all without charge to the institution? A. That is true; and the places where they have their own equipment we usually pay the cost of transportation of

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the film both to and from the exchange.

Q. We have dealt, so far, with religious and children's organizations. Has Butterfield had a policy over the years and at the present time with respect to making their theaters available as an auditorium or other thing as a meeting place for other organizations? A. Oh, yes.

Q. Give some examples. Let's take Flint. A. Of course, we have, on the whole, now, we have very good schools in most localities in Michigan. They have excellent aditoriums of their own. Prior to that time we had a great deal of school activities in our theaters; they would use them for graduation exercises and so forth. But in Flint we make our theater—the Capitol Theater, for example, is available to the Junior League of Flint for their annual children's play. The play is given on three succeeding Saturdays each fall.

Q. Can you think of any other examples? A. Yes. I think the auditoriums there in Flint—usually they take the Capitol; it has been used for community kick-off speeches for the various funds, and they have been used by the chamber of commerce, retail division, for a meeting place for their lectures on selling to their clerks—things of that nature.

Q. Can you give me an example of specific use by

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schools? A. In Flint?

Q. No; outside of Flint. A. Yes. In Big Rapids the Institute did a good job of burning down here a little while ago and we offered the auditorium of our theater in Big Rapids for classes or lectures. They accepted it and held some lectures there.

Q. And when was that? In recent years? A. Yes; only a couple of years ago. It is run by the Michigan State College.

And a long-term example would be where the Alpino burned down in 1939 and caught them at the wrong time, during the war, and I think they used the theater for eight or nine years before they could rebuild.

Q. Now, could you give some examples of use by clubs or other organizations, throughout the years, such as farmers' organizations, and Rotary, and things of that nature? A. Yes; a number of those. There is an annual convention of the Farmers' Cooperative, and they use the Lake Theater, over in Benton Harbor. Every summer we have the postmasters up at Traverse City in one of our theaters.

Q. And are all of these facilities provided by Butterfield without charge? A. Yes; without charge by us, and often at a cost because of heat and electricity. As you know, they are rather

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expensive items in these days.

Q. In addition, you have to have your men there additional hours? A. That is right; cleaners and things like that.

Q. Has Butterfield over the years and does it now have a policy with reference to the showing of trailers in connection with philanthropic and fund-raising organizations? A. Yes; we do, indeed.

Q. What is that policy? A. Well, it is pretty well known that we are always available to run all types of trailers, and we do get numerous requests. I have a partial list here. If you would care to have me read them,—there is the Red Cross, the March of Dimes, the Cancer Fund, the TB Association, the Community Fund, the Heart Fund, the trailer "Civic Support of Registering and Voting", The American Legion Poppy Drives, Veterans of Foreign Wars, Forget-Me-Not Drives.

Q. That is enough; that is typical of the example, and there are many, many more; are there not? A. Yes. And things come up very sudden; we have had a number of trailers on for Holland relief, due to these floods that have come up very fast.

Q. Could you estimate, for the record, on an average, that is, in hours, the screen time of each of these trailers, during the time that you run them?

A. Well, of course, you realize trailers vary in length, and you would have to hit an average. Some of them would tell quite complete stories. I would say at a pretty close average it would be around two hours of screen time per week for each trailer.

Q. That is during the time you are running? A. That is right.

Q. With respect to running of these trailers for these various organizations, do you run them just at any time or are they fitted in with a particular campaign? A. Well, they are usually run at the time the national campaign starts, or a little bit in advance.

Q. Yes. Now, has Btuterfield had a policy with respect to lending assistance to other media in the area that it serves? Can you give some examples of that? A. Yes.

Q. He shook his head: "Yes." A. In Saginaw the Community Players, a couple of years ago, put up the Balcony Theater, and were without any seats until we provided around 500 of them.

Q. And Butterfield donated the seats to that organization? A. That is right.

Q. Can you give any other examples? A. same thing happened at the Gull Lake Players,

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out in Battle Creek. We gave them about 500 seats, too.

Q. Do these organizations present legitimate plays? A. Yes, sir.

Q. Do they charge admissions? A. They certainly do.

Q. Do the plays run at the same time you run your theaters and things in the community? A. That is right.

Q. Could you name some other contributions you have made to other media in the area? A. Well, again through the use of trailers, we extensively advertise all the firemen's and policemen's dances, and so forth, on our screens, and in one case I can remember we advertised the Shrine Circus on our screen.

Q. Were these Shrine Circuses and the benefit affairs of organizations like the policemen and firemen run or did they take place at the same time you had motion pictures showing in your theaters? A. Very definitely, especially the Shrine Circuses, which are really powerful competition.

Q. Yet, despite that, you donated these services without charge, these services and material? A. We advertised them very thoroughly.

Q. Now, has Butterfield ever contributed by way of assistance—actual assistance—to other theater operators

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in the community in which they are operating? A. Yes. Our theaters usually have spare parts for sudden breakdowns, and these parts have been made available to competing theaters, other exhibitors, in the area. I can think of the Rialto Theater, in Flint, we kept going on a couple of occasions with frozen-up heads. In Flint, too, we are happy to give the I. M. A. Auditorium whatever use of our extensive stage equipment that we have and they happen to need, a particular spotlight, or anything like that; we are always happy to give them to them. We usually have some very good mechanics at our theaters, too, and if these small neighborhood theaters break down with sound difficulties we usually make arrangements for our boys to go out and get them going again.

Q. Do you charge your competitors for the work of your men when you send them down to help out? A. No charge.

Q. Specifically with respect to one of your competitors, Station WFDF, in Flint, can you state for the record some of the things you have done in conjunction with them with respect to Flint, specifically? A. I think we have got along with our worthy opponents over here. For many years they have been using a $25,000 Wurlitzer organ, without any charge, for one of their musical programs.

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And, then, we are very happy to give them passes for a program that they call "The Man On The Street", when they are without a sponsor, on occasion.

We have also run, as a steady feature, the WFDF trailers, which announce what excellent shows they have over the station.

Q. And they, in turn, run spots for you? A. That is right. We have done that on the theory they are not going to be listening to the radio or be at the show seven nights a week, so we sort of throw in our joint wares.

Q. Have you done the same thing in connection with Station WOOD in Grand Rapids? A. That is a common practice throughout the State. We have gone farther in

Grand Rapids. We were on the WOOD radio station for a long time, but now we are also on their TV program. They advertise our pictures and we advertise their TV programs. They are very cordial. Whenever we bring stars and people of that kind to town they are always very happy to interview them on the air.

Q. And you always make them available? A. Yes; and they always put them on.

Mr. Hancock: I just wanted to establish they are very friendly in Flint, Mr. Examiner.

The Presiding Officer: I am amazed. I wish it had carried over to this proceeding.

Mr. Eagan: That was before you brought your lawyer.

By Mr. Hancock:

Q. Now, directing your attention to another subject, and especially with respect to the activities of Butterfield during the war years, did Butterfield have a policy with respect to assisting local campaigns such as the Red Cross and March of Dimes and Cancer Fund in the actual collection of funds in their theaters, at their suggestion or instigation? A. Yes; we did. We spent many, many hours counting the heaps of nickels and dimes you would have on your desk at the end of the night and had to roll up and present to the bank the next day.

Q. You made these collections without charge? A. Without charge, and usually did all the work, too. For instance, as representative amounts, between $43,000 and $46,000 for the Red Cross drives; we collected over $25,000 for the March of Dimes.

Q. That is where? A. In Flint.

Q. That is in Flint; yes. A. For the March of Dimes, from 1944 through 1949 we collected $33,000; and for the Cancer Fund, '46 to '49, it was $15,000. Let me tell you:

All of that money was usually in nickels, dimes, and quarters, so you can appreciate the

mountainous fiscal job that was done by our men.

Q. Was it not the policy of these organization not to take actual collections in theaters? That was just during certain years when they desired such collections to be made? A. That is right. After '49 they gave that up.

Q. Now, what, if anything, did Butterfield do in connection with bond drives during the war? A. I think our theaters were extremely active on warbond work during the war.

Q. Well, what, specifically, did they do? A. In Flint or——

Q. Throughout the area. A. Well, Flint was typical, I think. We had a series of activities. We had the first one, which was called The War Bond Premier.

Q. How was that handled? What did you actually do? A. This was a presentation of a picture, usually the best there was at that particular time of the year, whenever it was handled; we would secure that picture and then take our leading theater out of operation at seven o'clock at night and put the premier on for the nine o'clock show. Every seat had a price tag on it in the amount of bonds; there could be $5,000 seats, $5 seats, $500 seats, and so forth. It was on a reserved-seat basis. Then, all over

town, the various issuing agencies would, whenever a bond was issued, issue the appropriate ticket, which would be, in turn, exchanged for a reserved-seat ticket.

Q. And how many of these bond premiers did you actually have during the year? Do you recall? A. Well, I think there were six or seven bond drives, and I know we had five; during five of the bond drives we had premiers, and the premiers were all over the State.

Q. In other words, in each community where you had a theater? A. That is right.

Q. Do you know approximately how much money was raised by the sale of bonds at these bond premiers put on by the Butterfield organization? A. Yes. They had a system, in those days, of keeping track of the amount of funds raised in each particular branch, and we were credited with raising over fifty million dollars through war-bond activities, that is, the premiers, and the free-movie days, on which we gave free tickets for the bond purchasers, and the bond auctions, in which we secured a lot of merchandise and auctioned it off in the theater, in the amount of bonds.

Q. Now, did Butterfield also participate, through its theaters, as an issuing agent of bonds? A. Every theater was an official issuing agent.

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Q. How was that actually worked? A. We had the bonds at the theater, which was an especially advantageous spot, because we could sell at night and on Saturdays and Sundays, when other institutions selling bonds were closed. As a result of the theaters' activities in the sale of bonds, we actually sold and handled the money through our theaters of nearly eight million dollars worth of bonds.

Q. Was this service available at all times the theaters were open? A. At all times.

Mr. Stanley Cohen: This is all very interesting, but is all this detail necessary in connection with this type of activity? It is something we have avoided, even in terms of the exhibits. I do not believe they have actually reached this length, in detail.

Mr. Hancock: I am sure, if you would examine the exhibits, with the written testimony on the record, these will be much shorter.

Mr. Lester Cohen: It is pertinent.

The Presiding Officer: We are getting toward the end of it?

Mr. Hancock: Oh, yes.

By Mr. Hancock:

Q. Now, during the war years, did Butterfield have

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any policy with respect to assisting in the entertainment of the men and women in the armed forces? A. Yes. And, of course, our big concentration was over at Fort Custer, which made Battle Creek and Kalamazoo particularly available to the soldiers over there.

The Presiding Officer: That is what you think.

The Witness: Well, there were enough of them there, and we issued free passes to the various USOs and even in other towns that did not have such a concentration. I think we were also playing a vaudeville in Battle Creek at the time, and at the Bijou we would take six acts a week out to Percy Jones Hospital.

By Mr. Hancock:

Q. And were all of these services that you have mentioned during the war years, were they done by Butterfield without charge? A. Without charge, gratis, and we were very happy to do so.

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H. E. Stuckey

called as a witness on behalf of Butterfield (sic), having been first duly sworn, was examined and testified as follows:

By Mr. Hancock:

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Q. Now with respect to the live talent shows which you have, and which you said you occasionaly had in your circuit, does Butterfield have a policy with respect to making this talent available when it is playing in the area to such institutions as Percy Jones General Hospital or other hospitals in the area in which it is playing, or institutions? A. We have a policy of long-standing of doing that.

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I think Mr. Seippel testified as to the number of acts that were sent to Percy Jones Hospital.

Within my experience, since I have been with Butterfield, I can say that I think every personality that we have ever had in Battle Creek under any conditions did appear at Percy Jones, and we try to do that whenever the opportunity arises in any of the towns where we have personalities.

Q. Has Butterfield had any experinece in the development of amateur talent by shows in its theaters? A. Yes, we have had some experience in that respect.

Q. Could you give some examples? A. Well, in Grand Rapids for a number of years we had a show called "Search for a Star" that we used in our theater; it was in conjunction with Station WOOD. The applicants appeared first at the Radio Station for an audition. Then the best of them were selected and they, in turn, appeared in the theater, where they were judged by the audience and the show from the theater was broadcast over WOOD.

There were several series of these, each of which ran for twenty-six weeks. The prize—we had a final prize of either an all-expense trip to New York, with an audition on NBC, or a one year's scholarship to an accredited school of music.

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Q. And who deferred the expenses for this? A. They were split between the stations and ourselves.

Q. And when were these amateur enterprises in Grand Rapids? Were they of recent years, or what? A. I think the most recent in Grand Rapids was 1950.

Q. In other words, they were of recent vintage then? A. Yes.

Q. Are there any other examples? A. We had a program in Kalamazoo, where I believe it was Radio Station WKMT, and also one in Flint that ran for a number of years with Station WTAC.

Mr. Hancock: I am sorry, that wasn't WDF that time.

(Laughter.)

The Witness (continuing): We have also participated in similar events, such as the selection of the Cherry Queen in Traverse City; the Apple Blossom Queen in Benton Harbor, and so forth.

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Q. Now turning now to film procurement for your theaters, Mr. Stuckey, I believe you indicated that you were the officer responsible for the licensing of films for the Butterfield Theatres; is that correct? A. I am.

Q. What are the sources of film that you use in your theaters? A. The local exchanges of the various distributors.

Q. And are they all in Detroit? A. They are all in Detroit.

Q. Would you name them for the record, please? I think there you can use their trade name. A. Columbia; Twentieth Century Fox; Metro Goldwyn Mayer; Paramount; RKO; United Artists; Universal; Warner Brothers; Monogram, and Republic.

Q. Now with respect to these sources, these exchanges or sources that you mentioned, do these sources license films for theaters only—that is, for Motion Picture Theaters only—or for both Television and Motion Picture Theaters? A. All of the distributors with whom I deal license for Motion Picture only, distribute film for that.

Q. Would you describe the practices and procedures

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employed by these exchanges in connection with the licensing of their film? A. Before the distributors attempted to arrange licenses for the showing of the film they first wait until a print is available in our area. Our first activity in that respect is to look at the picture.

Q. Now who in the organization actually screens the picture? A. Well, I will start at the top. Our President has his own screening room at home, and I think he spends most of his weekends and other times looking at pictures. He sees most of them.

I see all of the pictures. I also have four people responsible for the booking of the pictures to the theaters, and they also see all of the pictures; and when I say all of the pictures I mean not only features but short subjects as well.

Mr. Seippel is very often at our screenings; Mr. Norris and people from his department, which is our Advertising Department, are always present at our screenings.

In addition to that we encourage all of the people who work for our organization to come over and see the pictures. Sometimes we can get a little hint as to the public reaction from them.

Q. All right, continue now as to the practices.

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A. Well, we generally screen the picture in the first place to evaluate as far as we can its commercial value, primarily; but also to make certain that it is the type of picture that would fit in with the Butterfield policy of theater operation, and that it is in good taste and is proper; and in order to determine if we can what terms we would be willing to agree to the picture.

After that is done the representative——

Q. Before we proceed, you are speaking generally, which I want you to; but first, are these pictures licensed picture-by-picture, theater-by-theater, or in blocks, or how are they licensed by the distributor? A. Well that is their first approach. They negotiate for each picture individually——

Q. And theater by theater? A. And for each theater individually; picture by picture and theater by theater.

Q. All right, proceed. A. They also determine what run they will offer the picture in each individual theater, the playing time, and any clearance that might be included. That was set forth——

Q. Now just a minute. Just for the record describe those three terms very briefly. What is a run? A. A run is the sequence that the picture will play

in a competitive area, whether it is the first time or the second time or the third time, and so forth, denotes the run.

Q. And what is the playing time? A. By playing time we mean that is the length of the run the picture might have, whether it is two days or a week or whether or not it includes specific days of the week.

Q. And what is clearance? A. Clearance is the time lapse between runs in a competitive area.

Q. All right, and I believe you testified that the distributors and the distributors alone set the runs, the clearances and playing time, and determined which theaters fall within which runs and—in other words, determined which theaters they will offer this particular film to on a theater to theater basis? A. That is right.

Q. All right, proceed.

The Presiding Officer: Subject first to legal action.

Mr. Hancock: That is right.

By Mr. Hancock:

Q. Proceed, please. A. After the distributor has specified all of those qualifications and which theaters he is offering the pictures,

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we then enter into negotiations as to the terms.

We also negotiate in respect to the playing time, the length of the run and the days of the week.

When and if we can come to a mutual agreement on those factors, we then reduce that to a licensing agreement in respect to each theater, and each picture.

Q. Now are all licensing practices in their procedure done with negotiation or by bidding? A. Some are by bidding, and that again is at the option of the distributor. They advise us of the method.

Q. In other words the distributor advises as to whether or not he will offer the film by negotiation or by bidding? A. Yes, he does.

Q. All right. Proceed.

I guess you have completed it, though. A. That completes the negotiation then. However, on the bidding end, if he has offered his picture for bidding, we elect to submit or not submit a bid, and if we do we are later advised as to whether or not it has been awarded to us, and if it is again that is followed by the licensing agreement.

Q. Now I believe you mentioned earlier, Mr. Stuckey, that care was taken with respect to the selection of pictures after screening as to suitability, good taste and matters of

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that sort; do you have any censorship of film in Detroit? I mean, any State censorship? A. No State censorship in Michigan.

Q. Do you have any? A. Yes. The only one I know of is a police censorship board with respect to the City of Detroit. Their censorship, though, is only binding with respect to those theaters in Detroit, and we have none there.

Q. Do you follow the recommendation of the police board, though, in the selection of your pictures? A. That is one of the determining factors as to whether or not a picture is suitable for our theaters and how we will present it. I mean by that, that if the Detroit censor decide that a picture is not suitable for showing in Detroit, then we would elect not to play it in our theaters either, because our areas are certainly similar.

Also, if the Detroit Censor Board, which they sometimes do, eliminates certain scenes or certain dialogue from a picture, it is our policy to insist upon similar elimination in the prints going to our theaters. We might in addition make others ourselves.

Q. Do you ever go further than the Police Department Censor Board here, and refuse to show motion pictures that they have passed?

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A. Oh yes, there are many pictures that they have passed that we have refused to show. There are some, at least.

Q. Does Butterfield have any policy with respect to the playing of the sensational type picture, I believe they are generally called? A. Yes, we do. We never play those pictures that were made primarily to commercialize upon a sex expose and that sort of thing. We don't even give them consideration as far as our theaters are concerned.

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Q. Mr. Stuckey, has Butterfield ever contributed anything by way of providing talent—and I am thinking particularly of the motion picture stars—to kick-off drives with connection to community activities in the particular area? A. Yes, I think that Butterfield were the originators of that plan. I mean by that, I think it was the first instance of extensive use of motion picture personalities

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for the promotion of the Community Chest was in John Payne.

Q. Can you describe what was done in connection with Mr. Payne, and what was done, if you recall? A. We were advised that Mr. Payne would be available to us to use for local appearances, in 1941, at the time the community funds were starting their drives.

So with the cooperation of Mr. Payne and Mr. Bill Pine, who had him under contract at the time, we arranged to use him throughout our territory in connection with the Community Chest and activities in the various towns.

The first day he arrived we took him to Saginaw, Michigan, where he appeared at the United Fund luncheon. He made a radio broadcast from there on behalf of the United Fund, and he gave newspaper interviews for them.

He went for a kick-off drive. He went to Flint and gave an inspiring talk there to their workers and also made tape recordings to be used on the radio subsequent to that, to be used on the Community Fund.

The following day he went to Lansing and he was there again the guest of the Community Fund Organization, and again appeared at a meeting of theirs.

Later that day he arrived in Grand Rapids where he was sponsored by the Community Chest of Grand Rapids.

He made public appearances on the corner of Glen and Lenore

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Streets, where everybody could come out and see him and listen to him.

He broadcast an outdoor broadcast in behalf of the Community Chest from downtown. The message was carried on WOOD.

He spoke to the Community Chest luncheons at the Pantland Hotel that night, so that in the days he was in Michigan he devoted his full time to community fund activities.

Q. Now with respect to other talent that has been in the area, are their activities similar to those you have described with respect to Mr. Payne? A. Yes. We have used other stars for the same purpose we did Mr. Payne.

Q. Without describing what you did, for the record will you just name some of the talent? A. Well the principal one and the one who did a grand job was Betty Hutton.

Q. You would like to talk about that? A. Yes.

(Laughter.)

Q. Yes. Proceed. A. Bob Crawford was a devoted worker also in that respect.

We have had Francis the Mule; John Derrick; Piper

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Laurie; Susan Ball; Perc Westmore; Kenney Baker; Cindy Garner; Yvette Dugay; Lex Barker, those are all within recent years.

Q. And were these stars then made available under the auspices of Butterfield? A. Oh yes, they were made available, and not only to a community chest but a number of them were used in other ways, all in these institutions and other things.

Q. They also went around to the various institutions in the area whenever they had time? A. Oh Yes.

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By Mr. Stanley Cohen:

Q. Am I correct, sir, there are no exclusive first-run theaters in Flint that are not owned by Butterfield? A. Exclusive first-run that are not owned by Butterfield? Not at present. The Hitching Post, for example, was in a first-run policy for a while.

Q. Recently? A. Yes. They did confine it to an art type of picture.

Q. An art type? A. Yes. It was a first-run policy. But at the present time I know of no other theater maintaining a strictly first-run policy.

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John F. Patt recalled

The Presiding Officer: The record might show that Mr. Patt is being recalled at the request of the Examiner.

Mr. Patt, you were here this morning when Mr. Kersta was questioned concerning rate basis and the effect of rate basis on local advertising.

The Witness: Yes, I came in while he was testifying, and I assume I heard most of the testimony with respect to the rates.

The Presiding Officer: Now let me go over some of the testimony which I believe you gave earlier in this proceeding.

The WJR rate base will be based primarily on circulation, am I correct in that?

The Witness: That is correct.

The Presiding Officer: And would you be kind enough to define for me what you mean by circulation in that respect?

The Witness: Yes. We have studied the number of receiving sets that are presently in the area. We have made an educated guess as to the fact that the sets, the number of sets, will increase over a period of the next few months and few years. We have taken into consideration all of the potential

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circulation that the station will reach.

The Presiding Officer: Now let me interrupt you, Mr. Patt, and have you clarify something for me. You mentioned area. Now do you mean your proposed "service area" or do you mean the area in Flint and immediately contiguous to Flint?

The Witness: I testified we have proposed a Flint television station.

In addition to covering the metropolitan area of Flint as defined by various marketing services in this proceeding, we will have receptability outside of that area in all directions, and including, as we testified, over nearly all, if not all, of the city of Detroit. That additional receptability was taken into consideration as a plus factor in determining the rate.

The Presiding Officer: Well, I used a hypothetical question with Mr. Kersta this morning, and using the same approximate figures, let's say that if at some time it develops that there are a million sets in Detroit, 100,000 sets between Detroit and Flint, and 100,000 sets in Flint, and let us assume that your signal could be received by the sets in Detroit and the sets between Detroit and Flint and the sets in Flint, what of that 1,200,000 sets would you consider as the circulation base for your station in determining rates?

The Witness: In selling, we could call the attention of national advertisers to the receptability of the station wherever it could be heard, including all of the sets that——

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The Presiding Officer: I know that that is a WJR practice now.

The Witness: That is right, and I may say that is the practice of any good selling executive of any radio station or any television station that I have ever known anything about.

We would give major weight to the selling circulation in the Flint area. Our rate would always contemplate being competitive in Flint to the other Flint media, including the newspaper or newspapers, radio stations and the television stations. We feel we would have a plus to offer all advertisers outside of that immediate area, and we would naturally sell that plus.

The Presiding Officer: Now, that plus to which you refer would be of primary usefulness to national and regional advertisers, would it not?

The Witness: Primarily, yes, but I can conceive of a good many local advertisers operating in Flint alone and in regional advertisers having perhaps distribution outside of the immediate city limits of Flint or the county limits, who would be interested in that plus factor as well.

The Presiding Officer: So to that extent you disagree with Mr. Kersta, and from what I remember, with what some of the other witnesses have testified.

The Witness: I don't recall exactly what Mr. Kersta said on that subject.

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The Presiding Officer: Let me put it this way, then. If someone were to say that the primary usefulness of a Flint TV station to Flint local advertisers would be

Genesee County and the area immediately contiguous thereto, you would disagree?

The Witness: No, I would not disagree that it would be of primary interest.

The Presiding Officer: Let us say that more than primary interest, there would be almost complete interest.

The Witness: I would disagree so far as the interest that any advertiser might have in calling attention to his product or his service to anyone who conceivably might buy it or use it.

The Presiding Officer: Well, let's use as an example a small department store in Flint. Do you think that it would be able to draw much business advertising its products in Detroit over a Flint television station?

The Witness: I doubt if he would sell very much. I think they would be interested in selling all the business they could get, no matter where it came from.

The Presiding Officer: And I think the difference is a question of degree between your views and those of other witnesses.

The Witness: Yes.

The Presiding Officer: What I am primarily trying to get to is, assuming that because of this substantial plus which you propose to have, namely, service over all of the city of

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Detroit, and the fact that you plan to give that area, as was described, a new an distinctive service so that you would have a high degree of possibility of listenability of Detroit, might not that result in your being able to get substantially higher national rates than other TV stations located in Flint who didn't have that plus?

The Witness: Yes, I think it would.

The Presiding Officer: And is it not possible that by having those substantially higher national rates, that your local rates may also be upped comparatively?

The Witness: Our hope would be to have a single rate. If we found that we were able to get a much higher national rate and that that rate would not be acceptable to local advertisers, we would then consider very seriously having a local rate.

The Presiding Officer: Isn't it your hope of a single rate, in view of the facts and in view of our little discussion here, I wouldn't say obviously impracticable, but apparently impracticable if you plan to sell a very large tail wagging a reasonably small dog?

The Witness: We intend to be a Flint institution. We cannot conceive that this operation would be competitive in any large measure with the Detroit stations.

Our rates, our programs, are all designed to be competitive rates and competitive programs to the other Flint institutions,

the two that have been granted, the other radio stations, the newspaper, and so forth.

The Presiding Officer: Now, Mr. Patt, assuming just for the purpose of this discussion, and without any concession on your part, that it does develop that your station, because of the different type of programming that you propose, has a high degree of listenability and viewability in Detroit, you are able to get a substantially higher rate of national advertising than you are for local advertising, and you wind up with two rates, what would be the effect of those two different rates with respect to the sale of time on your station as against between local and national advertising, and again assuming a top percentage of time sold in accord with good broadcasting practices?

The Witness: I can't give you an exact guess on that, but we would always want a substantial part of our business to come from local Flint merchants.

The Presiding Officer: Assuming that you would have an area of discretion, whether it would be good broadcasting to have local or national business and national business would be very much more remunerative, what would be your reaction there?

The Witness: Again I say we would insist on maintaining a substantial part of our client list coming from—

The Presiding Officer: That is right, but I am going now into an area of discretion. Let's say that you would have what

might be recognized as a reasonable minimum of local advertising, and it becomes a question of the difference between a reasonable minimum and a maximum of local advertising as against a reasonable minimum of national advertising and a maximum of national advertising, if you see what I am driving at, that area between the two.

The Witness: Well, there are several hypotheses there, and we would want to have at least one more, and that is what two advertisers are we talking about.

The Presiding Officer: Let me talk about two advertisers. Let me talk about department store A in Flint, and let me talk about Esso, which is a national advertiser.

The Witness: Would you say Sal Hepatica?

The Presiding Officer: Very well, Sal Hepatica.

The Witness: We would take department store A.

The Presiding Officer: You would take department store A?

The Witness: Yes, sir.

The Presiding Officer: Despite the fact that the national advertising would be substantially more remunerative?

The Witness: Yes. Let me go a little further to say that we would endeavor to find ways of carrying department store A and some other fine or acceptable product, not Sal Hepatica, but some other nationally advertised product.

The Presiding Officer: Let's say Esso. If you had your choice between carrying one or the other, with Esso being able

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to pay, let's say two or three times the rate that you would receive from department store A?

The Witness: The answer is first come first served. Whoever gave us the order first.

The Presiding Officer: Now that I think changes the the situation slightly.

The Witness: Well, you have asked about two quality advertisers, one in the local field and one in the national field that are made available.

The Presiding Officer: That is right.

The Witness: It is customary to deal, when you are considering acceptability of accounts, on a first come first served basis.

The Presiding Officer: How do you deal with the field in renewing accounts? Let's say you are about to renew a certain time segment and store A "snuck" in there two minutes before Esso, and now you have your opportunity on renewal, knowing that Esso is trying to break the door and trying to get on the station. What do we do now?

The Witness: We would assuredly continue the schedule of department store A on the renewal.

Mr. Dempsey: May I ask whether that is based on a dual rate, the same rate for both or two different rates?

The Witness: This is based on the hypothesis that we might at some future date, which we have not decided to do as yet, have

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two rates, as I understood your question.

The Presiding Officer: That is right, that is the hypothesis which was used. Now let me ask you another question, sir.

There was a certain amount of discussion this morning as to whether another network affiliation other than the one which you now propose might be available from the site which you propose with the height and power which you propose.

If my memory serves me correctly, one of your witnesses testified that the particular network with whom you are proposing to affiliate would not necessarily have been the choice had they considered that other networks were available. I believe that I am correct in that testimony.

Mr. Lester Cohen: I believe there was a variety of testimony.

The Presiding Officer: I am trying to remember Mr. Kramer's testimony.

Mr. Lester Cohen: There was a variety, as I understand it. One witness said in effect that he was not told certainly that he could get them all, but he preferred this because of his interest in Detroit.

The Presiding Officer: Let us put it this way, then. Let us asume that I am correct and that one of your witnesses did say that you have chosen the particular network with whom you propose to affiliate now, not solely on the basis of comparative merit, but also on the basis of availability, and that you might

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have chosen or you would have chosen a different one had a different one been available.

Mr. Patt, I believe you are fully familiar with the fact that after a certain period of time, network affiliations run out. Now let me draw a hypothetical case, again to back up with respect to the testimony of the witnesses, I believe there was a reply to questions that had been propounded concerning availability of new and distinctive programming.

Now let us assume for the purpose of argument that sometime later, at a time when a new affiliation would be possible—what would WJR do with respect to giving up, let us say, the Du Mont affiliation and taking on a CBS or an NBC affiliation?

Mr. Rollo: May I interrupt, not to object, but couldn't that question be asked without the reference to what the record already contains? I don't see that that is necessary, and my recollection is to the contrary.

The Presiding Officer: All right, let's put it, then, that it is solely on my recollection, and let us put it on the basis of a completely hypothetical question.

However, I would appreciate it if during one of these interims somebody checks the record. I will try to find it also. I think I remember the act point which was raised.

The Witness: Maybe I can clarify it this way. Our program proposal was to provide the Du Mont service because it is not currently available over this entire area, on a full-time basis,

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and we felt that we should, if we could, offer something exclusive and something different.

I believe both Mr. Kramer and I testified to that, and that is the fact. I further believe that he testified that in the future we would always consider the possibility of improving ourselves. If we could find a net work that would offer us more business or better programs or better terms, we would certainly take up that offer. I agree with that testimony Perhaps we have made a wrong assumption here. I do not believe so.

I question seriously whether many advertisers, national advertisers, would be interested in paying twice to reach substantially the same area. A certain amount or a small amount of duplication, of course, is possible and would be considered by most national advertisers, in my belief.

It was for that reason that we chose an entirely separate network service, and in direct answer to your last question as to whether we would affiliate with CBS if CBS offered us a chance to affiliate with them at the end of their present contract, I believe we would.

The Presiding Officer: Now how about if CBS offered you a chance to affiliate at the end of your present contract with Du Mont, but also informed you that it planned to continue its Detroit affiliation?

The Witness: In that event we would continue our Du Mont affiliation. It was on the assumption that we would continue a

CBS affiliation in Detroit that we decided to build our program service on the Du Mont Network programming.

The Presiding Officer: Let me ask you this, sir. Supposing it turns out that CBS at the time that it offers you that affiliation does not then have an affiliation in Flint, and let us say that the CBS program are received on a marginal basis in Flint, not as well as they would be received from your station.

Let us again assume, without meaning any offense to any of the networks involved, that you considered that the CBS programs would have more listenability in the Flint metropolitan area. Then what would be your answer?

The Witnes: I am not sure I got all of those hypotheses.

The Presiding Officer: Well, my point is this, sir. If you were aware of the fact that your programming was not available in Detroit, would that be the determining factor, or would the determining factor be that a certain type of program is better for Flint and is not well received there?

The Witness: I think I get it. If we found that the program was not well received in Flint, if that is your hypothesis, we would then certainly give consideration to making our station available on that basis. Our assumption, however, sir, has been otherwise.

The Presiding Officer: Your asumption has been that Detroit would be able to serve Flint?

The Witness: Yes, with Grade A service from the area where they plan to locate, as we understand it. In fact, it is my understanding that it would offer a service somewhat to the north of Flint over Saginaw.

Mr. Dempsey: Is that your station you are talking about, Mr. Patt?

The Witness: No, I am talking about the WJBK-TV and WWJ-TV. The Examiner asked me if that was my understanding that they would deliver a high quality receivable signal over Flint, and I said, yes.

Mr. Dempsey: If the Examiner please, I would like to have the record note that from the original WJR site there was not a Grade A signal over Saginaw and Bay City, and I don't think there is any indication that any Detroit station intends to go further north of Detroit than WJR had proposed in this proceeding.

The Presiding Officer: Let me interrupt on this. We were having some additional information being drafted by the engineers. I would appreciate it if you gentlemen would have them take into consideration on an additional exhibit the proposed changes in location, height and power of the Detroit TV station.

Mr. Dempsey: We had such an exhibit.

Mr. Rollo: If you will recall, I was given permission to submit for the record before it is closed exactly that information.

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The Presiding Officer: On recollection, I may be wrong about what I just said. I am sure that a Grade B service covers Saginaw.

Mr. Patt, I think you have clarified, or at least you have helped me in some of the matters which I had in mind. However, I am sure that now there might be some questions by counsel, in view of the fact that I have appeared to open up the field. Are you going to be here tomorrow? If not, at the convenience of all parties, I will be very glad to continue until such time as we finish with cross-examination.

Mr. Dempsey: I would only have one or two questions, and if it is to Mr. Patt's convenience to have them asked now, I will be glad to do it.

The Witness: I haven't decided when I am going yet. I have to leave by noon tomorrow.

Mr. Dempsey: May I suggest we might run for a few more minutes. If it appears to be prolonged, we can then break up.

Mr. Lester Cohen: We have witnesses scheduled for the first thing in the morning that have been waiting here, too.

The Presiding Officer: Let's go.

Mr. Dempsey: Mr. Patt, there is one additional fact that has been put into the record since you testified, and that is that Flint does not have a professional baseball team.

Now going back to the question the Examiner asked you about the Detroit Tigers being made available to your station, did you

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agree with Mr. Kersta's view that there would be doubt in your mind as to whether you would advertise that program in Detroit if you were given the opportunity to carry it on a new station?

The Witness: We would promote listening to our station everywhere we could within our means.

I would agree with Mr. Kersta that the degree of our promotion would start with Flint, and then would expand as far as our funds or our ability would take us, but we would promote all of the listening that we could to whatever feature we might have, whether it was the Detroit Tigers or——

Mr. Dempsey: I would like to ask you to refer to that specific feature. Do you believe it would be of sufficient interest in Detroit to call to the attention of the people there that they could see the games by tuning in your station?

The Witness: I think it would, both by paid advertising and by as much newspaper publicity as could be secured on the sports pages and elsewhere.

Mr. Dempsey: And with respect to the Du Mont programs, which would only be available to the people of Detroit over your station, would you think it appropriate to advertise and call those programs to the attention of the Detroit people?

The Witness: Yes, I am sure we would send the Detroit newspapers publicity releases.

Mr. Dempsey: And it would be your hope that you could compete for the network audience in Detroit with your Du Mont

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programs?

The Witness: Yes, sir.

Mr. Dempsey: I have no other questions.

Mr. Stanley Cohen: I have no questions at all.

Mr. Hancock: I have no questions, either.

Mr. Rollo: Just one question. You would also distribute your publicity releases and promotion in the city of Flint, would you not?

The Witness: We certainly would. I think I stated that we would start there and move out to the outer perimeter of our service area.

The Presiding Officer: It is my understanding, then, that the proposed plan insofar as it can be determined now is that you will advertise your programs to the fullest extent practicable in the Detroit listening area.

The Witness: I can't say in advance whether we would spend money in Detroit on every program or even on any program. We would certainly send publicity releases to the papers and use every other propaganda or promotion device that we could within our means to call attention to the programs on our station, both local and network.

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Montague F. Gowthorpe,

called as a witness on behalf of W. S. Butterfield Theaters, Inc., having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hancock:

Q. Will you state your name, please? A. Montague F. Gowthorpe.

Q. What is your official connection with W. S. Butterfield Theaters, Inc.? A. I am President, Treasurer and Director.

* * * * * * * * * *

2566

Q. Will you state for the record what your ideas, or your considerations, or your beliefs are with respect to this policy? Just sum it up in your own mind and tell me for the record what you believe these policies are. A. First of all we try to provide the best form of motion picture entertainment primarily to our theaters and the others. Secondly, we try to provide entertainment; see that the theaters are comfortable and have nice surroundings and good seats; third, the integration of the theaters into the life and activities of the community in civic and philanthropic activities.

Q. Will you be motivated by the same general policies or objectives in the operation of the television station in the event you are successful? A. We certainly will. We wouldn't know how to operate any differently. That has been the policy of the company right from its inception.

Q. You have heard, of course, the testimony of the preceding witnesses with respect to the participation of Butterfield through its theaters and local managers and home office by making contributions to the various communities directly through your theaters. In addition to the use of the theaters with the contributions they make in the

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operation of the theaters over the years, has Butterfield made it a practice to make actual cash contributions to local activities, such as the Red Cross, March of Dimes, and activities of that nature in the various communities in which they operate? A. Yes. Very substantially.

Q. For the record can you just give us one example, Mr. Gowtharpe? A. Well, for the last ten years—over the last ten years we have made cash contributions to charitable organization of over $235,000.

Q. Over the years, Mr. Gowthorpe, in connection with the Butterfield activities with civic groups, charitable groups and organizations which have been described here, have they received any letters or awards, that is, letters of commendation or appreciation, or awards expressing the gratitude of the various organizations and communities? A. Many of them. I think it is safe to say it would run into thousands.

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2585

Cross-examination

By Mr. Eagan:

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Q. Mr. Gowthorpe, when you filed your application in June of 1952 for Flint, Michigan, you signed the application, I believe, and it had all the detailed program plans, what we call a typical week schedule. Can you tell me who prepared that typical week schedule? A. That was prepared after consultation with Mr. Fusco.

Q. Mr. who? A. Fusco. F-u-s-c-o. He was the program director for WKTV, I believe, at Utica-Rome.

Q. Does the same apply to your October 16 amendment, which is the amendment where you changed from Channel 16 to Channel 12? A. Yes.

Q. With respect to your program plans? A. Yes.

Q. Mr. Fusco? A. Mr. Fusco.

Q. But in connection with the November 13, 1952, amendment, those program plans were drawn up after consultation with Mr. Kersta?

2590

A. That is correct.

Q. Did Mr. Fusco play any part in the November 13 program plans? A. No. Other than, I believe, Mr. Kersta did talk to Mr. Fusco about his previous plans.

Q. What directions did you give to Mr. Kersta in preparing the November 13, 1952, program schedule, and in connection with what changes, if any, should be made from the previous one that you filed? A. Well, we started off this way: I told Mr. Kersta generally of our policies; the concepts of our company and how we integrate ourselves in a local community's activities, and so forth; and told him about the area of Flint and the immediate vicinities, and came up with the suggestions as to types of programs we thought would fit into the station. We discussed them among ourselves, wih Mr. Kersta and other members of our organization—Mr. Seippel, Mr. Norris—and with that knowledge we have prepared that program or that outline.

Q. But it is true to say Mr. Kersta was the expert you leaned on? A. Oh, yes.

* * * * * * * * * *

2635

Statements Concerning the Filing of Findings

The Presiding Officer: The only reason I am suggesting Friday is, as a matter of fact, it gives you 21 days rather

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than the 20, and I do not want to put it over until the following Monday because I want to give all of you gentlemen that weekend in which to work on the answers or comment or whatever you may wish to file with respect to each other's proposed findings. And I will expect those to be in at the close of business on Monday, April 6.

I will expect that all parties, with the exception of the Commission Broadcast Bureau, will file proposed findings and conclusions, and, of course, the Commission Broadcast Bureau, if it desires, may do so either to the whole record, or specific portions thereof.

On the other hand, I will expect all parties, including the Commission Broadcast Bureau, to file what they may designate as comments, answers, replies, or whatever other title they may wish to give to each other's proposed findings and conclusions, and I trust that that document will be in accord with discussions which we have had at pretrial conferences and off the record.

Again, to make it clear, I would like to have pointed out for the convenience of myself, of the Commission and all the respective parties any particular glaring errors which may appear in the proposed findings and the conclusions, and directed, gentlemen, particularly at the findings, so that it will not be necessary at some future proceeding to attempt to clear up minor matters which can be taken care of by precluding the

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mistakes in going over each other's proposed findings.

Mr. Rollo: I wonder if we could have on the record a statement as to what the position of the Broadcast Bureau is concerning the filing of any findings.

Mr. Stanley Cohen: The Broadcast Bureau does not intend to file proposed findings at this time. However, the Broadcast Bureau does intend to prepare a reply, or attempt to prepare a reply, and we most certainly will file such reply.

The reply, as I currently visualize, will be a statement of the position of the Bureau with respect to its views as to the applicant that should have the grant, and a statement of the factors which it believes has been significant throughout the hearing, and all the statements will make direct references to the proposed findings of fact and will not be based primarily upon re-evaluation of the entire record in view of the time element involved.

Mr. Rollo: Thank you.

Mr. Stanley Cohen: I also might state these are the thoughts running through my mind personally, and how it will actually work out, we can only tell by doing. However, we do not intend to prepare a detailed exception to all the proposed findings of fact. I do not believe that either the Examiner wanted anything of that sort or that the time element will permit such detailed reply. We wish it understood that by not preparing detailed exceptions we are not waiving any subsequent right.

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The Presiding Officer: Now I want to bring to the attention of all counsel that proposed findings will not be considered by me unless they refer specifically to exhibits or to pages in the record. Now I want to make that as emphatic as possible. And I would also suggest that they refer to the proper exhibit and to the proper pages on the record, without casting any reflection on present counsel or perhaps other counsel who have appeared before the Commission.

Mr. Rollo: We may need another week to check the record references.

Mr. Stanley Cohen: I would also like to announce, when I stated the Broadcast Bureau's position, I stated it as of the present moment, and I hope that no counsel personally will hold it against me if subsequent events are such as to cause a change.

Mr. Rollo: We shall have the benefit of the Broadcast Bureau's views on the case before an initial decision is rendered?

Mr. Stanley Cohen: As I say, that is our present position. We hope to be able to furnish you that type of reply. However, subsequent things may occur which may preclude the possibility.

* * * * * * * * * *

CHAMBERS OF JUDGE BAZELON

10-7-59
14685
①

United States Court of Appeals
for the District of Columbia Circuit
FILED [illegible] 1956
Joseph W. Stewart

JOINT APPENDIX

(Volume II)

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527, 12,666 and 12,752

W. S. BUTTERFIELD THEATRES, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC., *Intervenor*

Nos. 12,528, 12,667 and 12,753

TREBIT CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,
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Appeals from Decisions and Orders of the Federal Communications Commission

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appeals from Decisions and Orders of the Federal Communications Commission

JOINT APPENDIX

(Volume II)

WJR Studio Plans Submitted at Hearing
(Record 2754-58)

[2754]

W J R Exhibit

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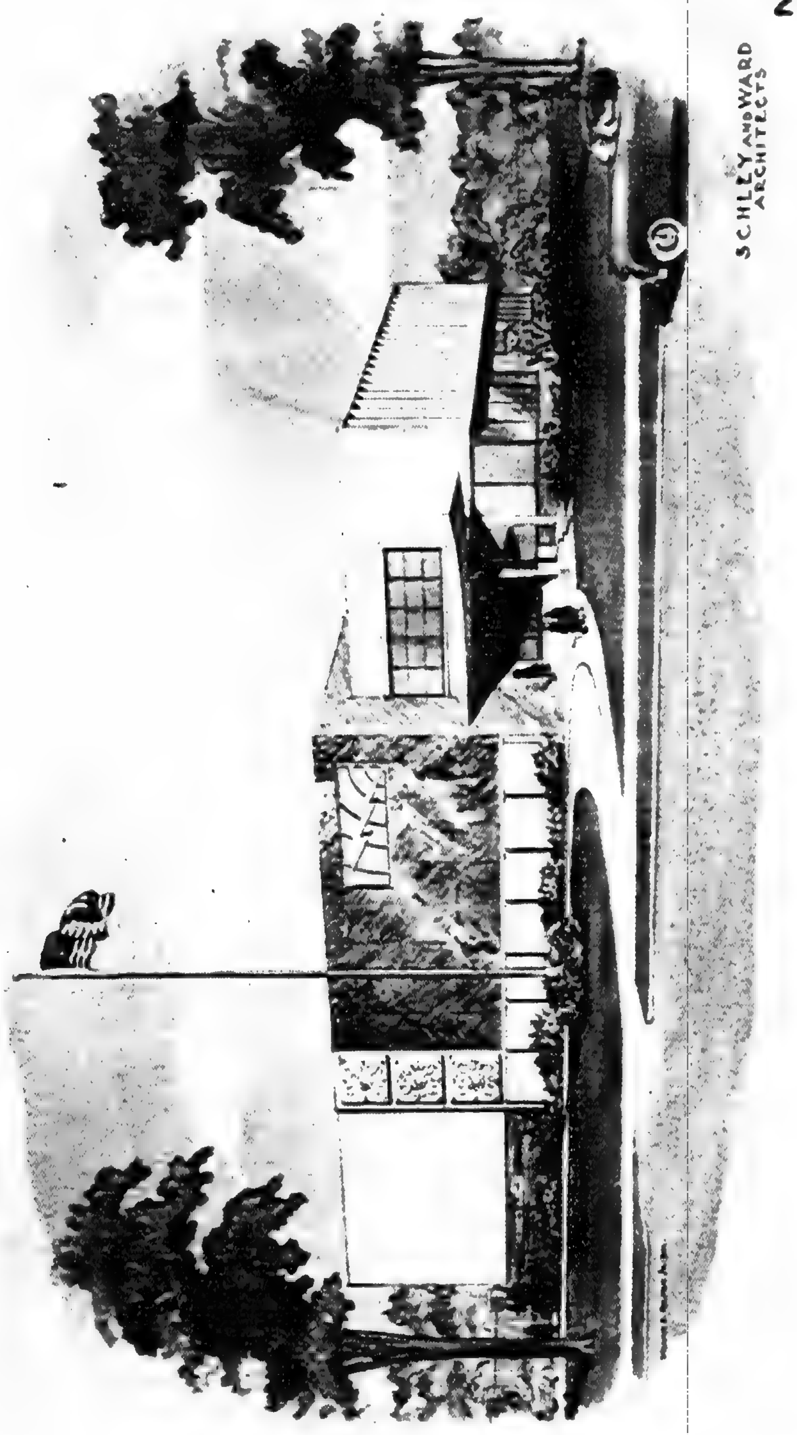
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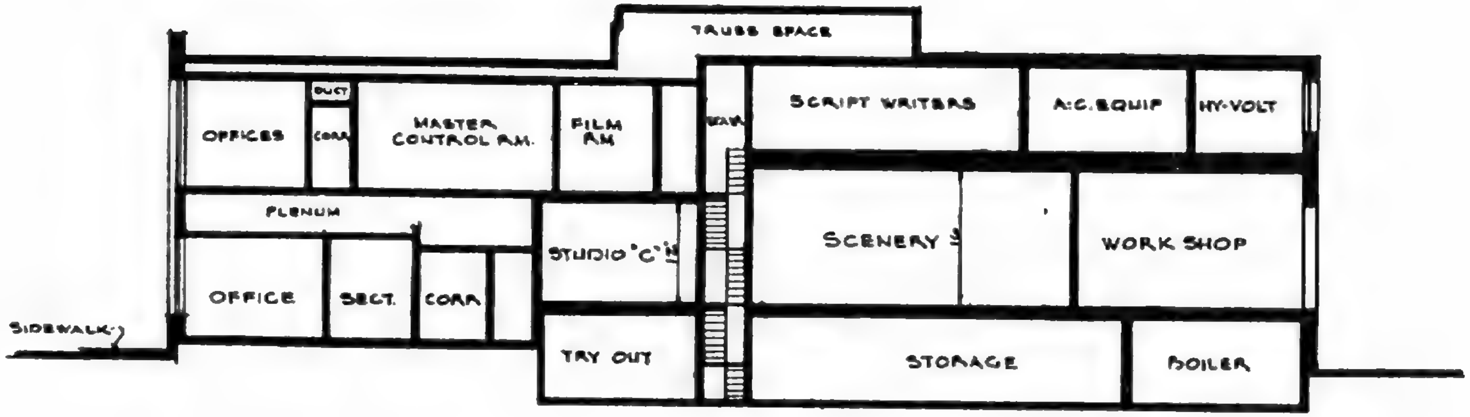
ARCHITECTS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MASTER CONTROL RM.
FILM RM
SCRIPT WRITERS
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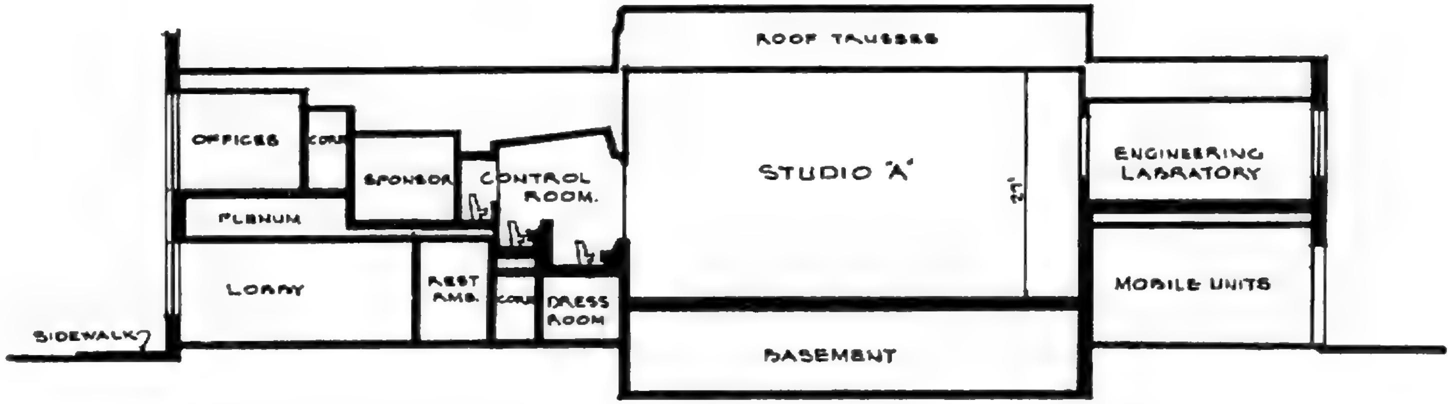
HY-VOLT
PLENUM
STUDIO "C"
SCENERY
WORK SHOP
OFFICE
SECT.
CORR
SIDEWALK
TRY OUT
STORAGE
BOILER

SECTION THRU OFFICES, MASTER CONTROL ROOM & STUDIO "C"

2755

SECTION THRU OFFICES, MASTER CONTROL ROOM & STUDIO "C"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OFFICES
CORR
SPONSOR
CONTROL ROOM.
PLENUM
LOBBY
REST RMS.
CORR
DRESS ROOM
SIDEWALK
STUDIO "A"
BASEMENT
ENGINEERING LABRATORY
MOBILE UNITS
10
6
2
8
4
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10
20

SECTION THRU ENTRANCE LOBBY, STUDIO "A" & CONTROL RM.

SCHLEY AND WARD
ARCHITECTS
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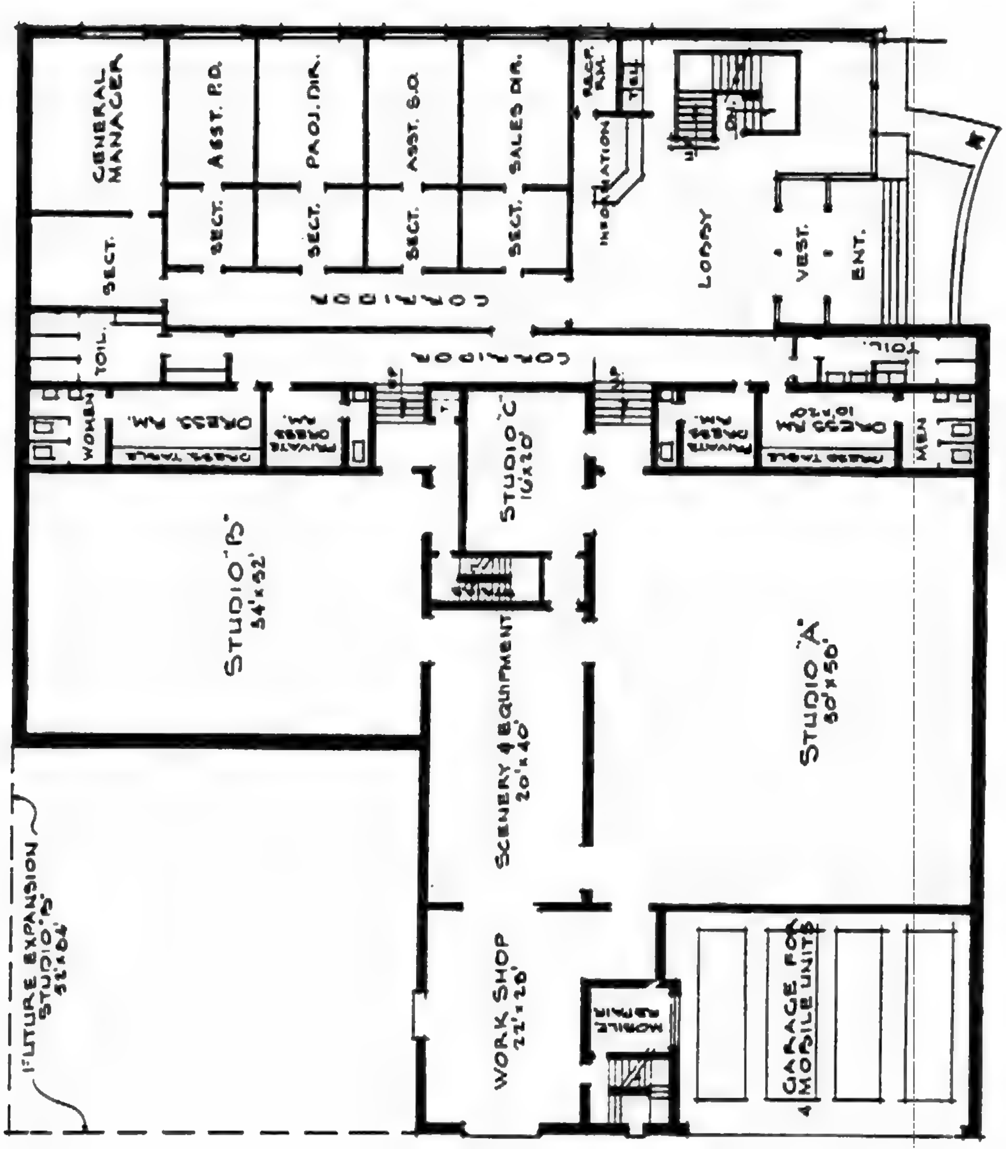
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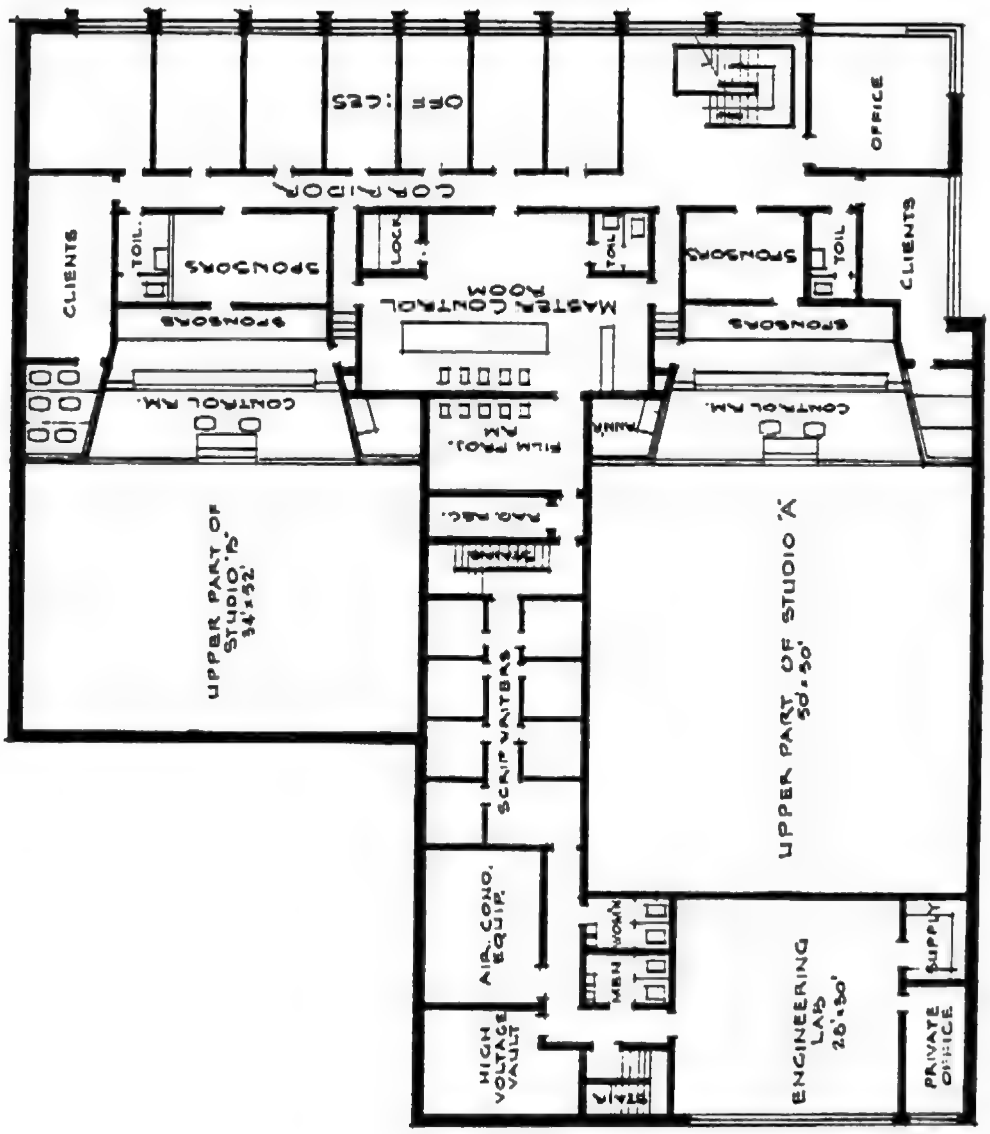
ASST. P.D.
PROJ. DIR.
ASST. S.O.
SALES DIR.
RECP. RM.
TEL.
SECT.
SECT.
SECT.
SECT.
SECT.
INFORMATION
LOBBY
VEST.
ENT.
CORRIDOR
CORRIDOR
TOIL.
TOIL.
WOMEN
DRESS RM.
DRESS TABLE
PRIVATE DRESS RM.
PRIVATE DRESS RM.
DRESS RM.
DRESS TABLE
MEN
STUDIO 'C' 16'x20'
STUDIO 'B' 34'x52'
STUDIO 'A' 50'x50'
SCENERY & EQUIPMENT 20'x40'
WORK SHOP 22'x20'
MOBILE REPAIR
GARAGE FOR 4 MOBILE UNITS
FUTURE EXPANSION STUDIO 'D' 32'x64'


OFFICES
CORRIDOR
OFFICE
CLIENTS
TOIL.
SPONSORS
SPONSORS
LOCK
MASTER CONTROL ROOM
TOIL
SPONSORS
TOIL
CLIENTS
SPONSORS
CONTROL RM.
CONTROL RM.
FILM PROJ. RM
ANN.
RAD. REC.
UPPER PART OF STUDIO 'B' 34'x52'
SCRIPTWRITERS
UPPER PART OF STUDIO 'A' 50'x50'
AIR COND. EQUIP.
WOMEN
MEN
SUPPLY
ENGINEERING LAB 20'x30'
PRIVATE OFFICE
HIGH VOLTAGE VAULT
STAIR

UPPER FLOOR PLAN

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Exhibit No. WJR 43

LIST OF CONTACTS IN FLINT WITH WHOM PERSONAL DISCUSSIONS HAVE BEEN MADE REGARDING SPECIFIC PROGRAMS

Name & Position	Programs Discussed
E. J. Penney, Executive Secretary Chamber of Commerce 423½ Detroit Street Telephone: 27101	Flint Spotlight Your City in Focus Industrial Review
Clarence E. Vanduzer, Director Flint Institute of Arts 215 W. First Street Telephone: 24032	This is Flint
Walter Scott, President Board of Trustees, Flint Institute of Arts Public Information Officer, Flint Office of Civil Defense 506 Mott Foundation Building Telephone: 96673	This is Flint Industrial Review Your Government (Local)
David S. Magee, Attorney Chairman of Board of Directors of the Flint Community Players 517 Mott Foundation Building Telephone: 48686	This is Flint
Waldo McNaught, Director of Public Relations Buick Motor Division Telephone: 28111	Industrial Review (Plant Safety Theories)
Frank Manley, Director of the Mott Foundation Assistant Superintendent of the Board of Education Mott Foundation Building Telephone: 88411	Mott Foundation Adult Education Junior Town Meeting
Rev. Earl V. Sheridan, Pastor of St. Michaels Roman Catholic Church Director of the Catholic Social Charities 609 E. Fifth Avenue Telephone: 26153	Hour of Faith Thought for the Day One Moment Please Bible Lesson Flint Spotlight This is Flint Prayer for Peace

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Name & Position	Programs Discussed
Miss Theresa A. Farrell, Director Council of Social Agencies 200 E. Kearsley Telephone: 45190	Flint Spotlight This is Flint
Dr. Ralph D. Kearns, Executive Secretary Flint Council of Churches 707 Sill Building Telephone: 59011	Bible Lesson Hour of Faith One Moment Please Thought for the Day Prayer for Peace
Charles C. Goodwin, Manager Genessee County Chapter American Red Cross 606 E. Kearsley Telephone: 43611	Flint Spotlight This is Flint Industrial Review
Raymond Gerkowski, Director of School & Community Music Oak Grove Campus Telephone: 30941	Symphony at Work Music Has a Story This is Flint
Mrs. Beth Kaplan, Executive Secretary, Flint Jewish Community Council 911 Sill Building Telephone: 90646	Flint Spotlight This is Flint
Ezra Perry, Executive Secretary Farmers Club Citizens Bank Telephone: 26171	Weekly Farm Review Farm News Michigan State College Farm Development Program R.F.D.-T.V.
Arthur J. Edmunds, Acting Executive Secretary Flint Urban League 200 E. Kearsley Telephone: 92915	Hour of Faith Flint Spotlight This is Flint Your City in Focus
S. H. Latorette, Associate Agricultural Agent 114 Court House Telephone: 43681	Weekly Farm Review Farm News Michigan State College Farm Development Program R.F.D.-T.V.

Name & Position	Programs Discussed
Ray Vasold, 4-H Club Agent 114 Court House Telephone: 43681	Weekly Farm Review Farm News Michigan State College Farm Development Program R.F.D.-T.V. This is Flint Flint Spotlight Your City in Focus
Guy Cowing, President General Motors Institute Telephone: 48611	Junior Town Meeting Flint Spotlight This is Flint
Charley Mobley, President International Institute c/o General Motors Institute Telephone: 48611	Flint Spotlight Your City in Focus This is Flint
Carl Bonbright, President Flint Community Crest Association P. O. Box 119 Telephone: 23248	Flint Spotlight Your City in Focus This is Flint
Frank J. Corbett, Community Relations Secretary Flint Urban League 200 E. Kearsley Telephone: 92915	This is Flint Flint Spotlight Your City in Focus
Rabbi Morton Applebaum Temple Beth El Beecher at Ballenger Telephone: 31465	Hour of Faith Chapel Voices Prayer for Peace Thought for the Day One Moment Please Flint Spotlight Junior Town Meeting Your City in Focus This is Flint
Michael J. Burke, Secretary Flint Federation of Labor 528 Garland Telephone: 98623	This is Flint Flint Spotlight Your City in Focus Industrial Review

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Name & Position	Programs Discussed
Rabbi Philip Kieval Congregation Beth Israel Hamilton at Oren Avenue Telephone: 35386 (Office) 97758 (Residence)	Hour of Faith Chapel Voices Prayer for Peace Thought for the Day One Moment Please Flint Spotlight Junior Town Meeting Your City in Focus This is Flint
Mr. Bruce Siders, Superintendent Michigan School for the Deaf M. S. D. Campus Telephone: 91951	This is Flint Flint Spotlight Your City in Focus Industrial Review Junior Town Meeting
Russel G. Albrecht, Executive Director Goodwill Industries 2410 N. Saginaw Street Telephone: 90121	Flint Spotlight This is Flint Hobby Shop Industrial Review
Alexander J. Waugh, Director of Personnel and Public Relations Goodwill Industries 2410 N. Saginaw Street Telephone: 90121	Flint Spotlight This is Flint Hobby Shop Industrial Review
The Honorable Donald W. Riegle Mayor of Flint City Hall Telephone: 34165 (Office) 27707 (Residence)	Your Government (Local) This is Flint

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Exhibit No. WJR 57

LIST OF PROPOSED TV PROGRAMS TO BE ORIGINATED LIVE AT FLINT

Sunday

Time	Program	Type
9:45 AM	Bible Lesson	Religious
10:00 AM	Hour of Faith	Religious
11:00 AM	Chapel Voices	Religious
11:30 AM	Religion in the News	Religious
11:45 AM	Mother's Album	Entertainment
12:00 Noon	What's Ahead on WJR-TV	Entertainment
12:15 PM	World News	News
4:30 PM	This You Should Know	Educational
4:45 PM	News	News
11:00 PM	News	News
11:15 PM	Sports News	Talks
12:00 Mid.	Weather	News
12:03 AM	Prayer for Peace	Religious

Monday Through Friday

Time	Program	Type
8:55 AM	Thought for the Day	Religious
9:00 AM	Morning News	News
9:15 AM	Women Today	News
9:30 AM	Goodwill Kitchen	Entertainment
10:00 AM	Koffee Klatsch	Entertainment
12:00 Noon	Mid-day News	News
12:15 PM	Farm News	Agriculture

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Time	Program	Type
12:30 PM	Mott Foundation for Adult Education	Educational
1:30 PM	Your Government—Local (Monday)	Talks
1:30 PM	Your Government—State (Tuesday)	Talks
4:00 PM	Look N' Shop (Monday, Wednesday & Friday)	Entertainment
5:45 PM	Dinner Date with Music	Entertainment
5:55 PM	One Moment Please	Religious
6:00 PM	News	News
6:30 PM	Sports	Talks
6:45 PM	Know Your America (Monday, Wednesday & Friday)	Talks
6:45 PM	Michigan Afield (Tuesday & Thursday)	Talks

Monday Evening

Time	Program	Type
11:00 PM	News	News
11:15 PM	Sports News	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

Tuesday Evening

Time	Program	Type
7:30 PM	Flint Spotlight	Discussion
11:00 PM	News	News
11:15 PM	Sports News	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

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Wednesday Evening

Time	Program	Type
8:00 PM	Junior Town Meeting	Educational
10:00 PM	Wings Over Michigan	Entertainment
11:00 PM	News	News
11:15 PM	Sports News	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

Thursday Evening

Time	Program	Type
8:00 PM	Cross Roads Michigan	Educational
11:00 PM	News	News
11:15 PM	Sports News	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

Friday Evening

Time	Program	Type
11:00 PM	News	News
11:15 PM	Sports News	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

Saturday

Time	Program	Type
9:40 AM	Thought for the Day	Religious
9:45 AM	Morning News	News
10:30 AM	Kids' Sports Clinic	Entertainment

3240

Time	Program	Type
12:00 Noon	Mid-day News	News
12:15 PM	R.F.D.-T.V.	Agriculture
12:30 PM	Your City in Focus	Discussion
1:30 PM	The Ringmaster	Entertainment
5:00 PM	This is Flint	Entertainment
5:30 PM	The Hobby Shop	Entertainment
5:55 PM	One Moment Please	Religious
6:00 PM	News	News
6:15 PM	TV Camera Club	Entertainment
6:30 PM	Sports	Talks
6:45 PM	Dinner Date with Music	Entertainment
7:00 PM	Industrial Review	Discussion
8:00 PM	May Way for Youth	Educational
8:30 PM	Barn Dance	Entertainment
11:00 PM	News	News
11:15 PM	Sports	Talks
1:00 AM	Weather	News
1:03 AM	Prayer for Peace	Religious

3241

Exhibit No. 58

LIST OF PROPOSED TV PROGRAMS TO BE ORIGINATED LIVE AT DETROIT**

Time	Program	Type
	Sunday	
9:45 AM	Bible Lesson (When Appropriate)	Religious
10:00 AM	Hour of Faith (When Appropriate)	Religious
11:00 AM	Chapel Voices (When Appropriate)	Religious
12:30 PM	In Our Opinion	Discussion
	Monday Through Friday	
9:15 AM	Women Today (Portions of above program when appropriate)	News
1:30 PM	Your Government—Local (Monday) (When Appropriate)	Talks
	Wednesday Evening	
8:00 PM	Junior Town Meeting (When Appropriate)	Educational
10:00 PM	Wings Over Michigan (When Appropriate)	Entertainment

** Portions of all news programs will originate from Detroit when appropriate.

3242

Time	Program	Type
	Thursday Evening	
8:00 PM	Cross Roads—Michigan (When Appropriate)	Educational
	Saturday	
7:00 PM	Industrial Review (When Appropriate)	Discussion

3266

Received Jan. 5, 1953

Depositions Taken on Behalf of WJR, The Goodwill Station, Inc. in Flint, Michigan on December 17 and 18, 1952

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3269

Frank Manley

A witness called on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

* * * * * * * * * *

3270

Q. Mr. Manley, have you had any discussion with Mr. Dale MacIntyre, of WJR, relative to the question of your cooperating with WJR in the Public Service Programs proposed in its television program? A. Yes, that's correct.

Q. Have you discussed with Mr. MacIntyre a program that would be called "The Mott Foundation for Adult Education?" A. Yes, sir.

Q. Could you briefly describe in what manner, if any, you will cooperate with the station in connection with that program? A. We are very anxious to share with all the people of this area the activities of our Adult Education Program. There are some three hundred and fifty (350) odd activities in the Mott Foundation Adult Education Program. We would like to have more people know what we are doing and how they can become a part of it. We are not only anxious to cooperate, but we are anxious to see that sort of service given to people in our area.

Q. Mr. Manley, have you also discussed with Mr. MacIntyre a program entitled "Junior Town Meeting?" A. Yes, I have.

3271

Q. Could you tell us in what way, if any, you will cooperate with the station in connection with that program? A. We have outlined some sort of program where youngsters would develop a plan of citizenship and work it out through our adult education or our regular school programs, taking youngsters out of the dramatic classes and other groups to develop a plan where these people would familiarize themselves with the activities of citizenship and, I imagine, the various branches of the Government. I haven't gone too far in detail in that. We're very much interested in this program.

Q. I understand that program would consist of different panels for students, meeting once a week, which panels would discuss various current topics. In that connection, would you cooperate with the station in your capacity as Superintendent? Also in selecting, as representatives, panels to take part in this part of the program? A. I may not do it personally, but it would be done through the high school principals and deans and I would suggest to them that type of thing be done and the schools are very much interested in that sort of education.

Q. Mr. Manley, are you familiar with a program currently broadcast on Radio Station WJR, "In Our Opinion?" A. Yes.

Q. Have you ever been on that program and if so, state when. A. We had a program in October with WJR, "In Our Opinion" to tell all about our community school, which we're might proud of, and they had the Mobile Unit from WJR here and we took a half-hour program and described the difference between what you think of as a school

3272

house and a community center and what we now have is a community school. We take the big gymnasium, library, auditorium, and all the different things and this "In Our

Opinion" program took us all the way through and gave us a chance to explain our new school project to the listeners of WJR.

Q. Mr. Manley, if WJR is awarded the television channel in issue in this proceeding and carries the "In Our Opinion" program, would you cooperate with WJR in connection with that program? A. Yes, I'd be very happy to.

* * * * * * * * * *

3273

Cross Examination

By Mr. Ockerhausen:

Q. Mr. Manley, can you tell us the approximate time and date that you were approached by WJR, The Goodwill Station, to arrange for the programs you've just referred to? A. I couldn't say definitely the exact time.

Q. Within a month or so? A. I think about a month ago—six weeks or a month ago.

* * * * * * * * * *

3277

Bruce R. Siders

A witness called on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

Q. Mr. Siders, will you please state your name and home address? A. Bruce R. Siders, Superintendent of the Michigan School for Deaf. I live on the campus of the school, in the Superintendent's residence.

Q. And where is this school located, Mr. Siders? A. It's located on West Court Street, within the City of Flint.

Q. Would you kindly briefly state to us the nature of this school? A. The school is a State Public School, under the jurisdiction of the State Board of Education, and we educate all boys and girls of school age who have sufficient hearing loss, which makes it impossible for them to get along in a regular classroom.

* * * * * * * * * *

3278

Q. Mr. Siders, have you had any conversation with Mr. Dale MacIntyre of WJR relative to what cooperation, if any, you could give to WJR in connection with its Public Service Programs? A. Yes.

Q. Have you, in those conversations, discussed a program entitled "This is Flint" which would depict the activities of various Flint Civic Organizations? A. Yes.

Q. Would you cooperate with WJR in connection with that program? A. Yes, I would be glad to.

Q. Could you tell us what way you would cooperate? A. There are several ways in which it might be done. First place we could sponsor a program that is beneficial to our youngsters.

Q. Is that also true with respect to the program entitled "Flint Spotlight"? A. Yes.

Q. And your cooperation with that program would follow the same general lines just discussed? A. Yes.

Q. Have you also discussed with Mr. Dale MacIntyre the program entitled "Your City in Focus"? A. Yes.

Q. The same holds true with respect to a program entitled "Industrial Review"? A. Yes.

Q. In connection with that program, did you discuss with Mr. MacIntyre the possibility of one of the programs employing the physically handicapped?

3279

A. I don't recall. The implication I had was we would be able to participate in some kind of program which would involve the school. No reference was made to the particular school or program.

Q. If a program was to be devoted in that series to the employment of the physically handicapped, would you be in a position and willing to cooperate? A. I'd be very happy to.

Q. Did you also discuss with Mr. MacIntyre a proposed program entitled "Junior Town Meeting" which would be a weekly program which would present a panel of four students each week from schools of Flint, which would discuss subjects of current interests? A. I don't recall.

Q. If such a program was to be broadcast by WJR, would you be willing to cooperate? A. I'd be very happy to.

Q. Would it be possible to make a panel of four students from your school to take part? A. Yes.

Q. Mr. Siders, if there is any other way in which you could cooperate with the station in connection with its Public Service Programs, would you do so? A. I would do so every instance I could that wouldn't jeopardize my school or some similar position, yes.

Q. Since you've come to Flint, have you become associated with any civic activities in Flint and would you name those organizations? A. Council of Social Agencies.

Q. Explain what that is, please? A. Near as I can figure it out, it is an organization of all the groups

in the City of Flint that are interested in the welfare of the people.

Q. Were there any other civic organizations with which you are associated? A. With a church.

Q. I have no further questions.

Cross Examination

By Mr. Ockerhausen:

Q. Mr. Siders, you've described about five programs that apparently you've had conversation with Mr. MacIntyre about. I'm an attorney for Trebit Corporation, WFDF, and I'd like to ask if you have any knowledge as to when these programs will be on as to hour and day? A. It was definitely stated in my previous discussion that some would be on as often as once a week.

Q. Do you have any knowledge as to what day or what time during day or night? A. Yes, at the time I interviewed Mr. MacIntyre, the time was specified for the program.

Q. How often do you think your group would put on such a program? A. I imagine about once a year for a whole program.

Q. When did Mr. MacIntyre approach you about the idea of giving time or cooperating with Station WJR? A. I can't give an exact date. About two or three weeks ago.

* * * * * * * * * *

3283

David S. Magee

A witness called on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

Q. Mr. Magee, will you kindly state your name and home address? A. David S. McGee, 1820 Chelsea Circle, Flint, Michigan.

Q. Will you please state your occupation? A. I'm an attorney.

Q. How long have you lived in Flint, Michigan? A. Off and on, since 1927.

Q. Did you grow up here? A. Yes.

Q. Mr. Magee, have you had any conversation with Mr. Dale MacIntyre relative to your cooperating with WJR respecting its proposed television programs? A. Yes, I have.

Q. Would you explain to us what connection, if any, you have with an organization known as the Flint Community Players? A. Chairman of the Board of Directors.

Q. Briefly describe the nature of your group. A. The Flint Community Players is a non-profit organization composed of any one interested in furthering dramatics in this country or area surrounding Flint. We put on five what we call "major productions" consisting primarily of previously successful Broadway plays, each one running approximately six nights. We also, of course, do some educational work in furthering dramatics in cooperation with the Mott Foundation in presenting Children's Theatre Courses, and have also

3284

presented Flint's children's theatres and plays acted by adults.

Q. Returning to your conversation with Mr. MacIntyre, did your conversation include a discussion as to what cooperation, if any, you could give in connection with the program "This is Flint" which is proposed for Flint on Saturdays, between 5:00 and 5:30? A. Yes.

Q. What nature of cooperation, if any, will you give? A. I was asked by Mr. MacIntyre that if the time were made available to the Flint Community Players, on these Saturday evenings, several times during the year, would I cooperate by utilizing the time and demonstrating to the people of the area, over television, what the Community Players does. I told him that so far as I was personally concerned, we would be very happy to cooperate in any way of putting on television programs of that nature as long as they aren't too often and didn't interfere with our hobby activities—if you wish to refer to it as that. Since that time, I've taken it to the Board of Directors and they have authorized me to say that for them also.

Q. Are you active in any other Flint civic affairs? A. Only in helping in the Service Clubs such as the Red Feather Campaign and various other programs and drives of that nature.

Q. Would you cooperate in a general way in respect to any Public Service Program that WJR-TV may broadcast, to the best of your ability? A. You're speaking of me personally?

Q. Yes? A. I'd be very happy to.

Q. That's all I have on direct examination.

3285

Cross Examination

By Mr. Ockershausen:

Q. Mr. Magee, I am an Attorney for WFDF, The Trebit Corporation, one of the parties to this proceeding. With regard to your last statement as to the fact that you would cooperate with WJR on other Public Service Programs, do you have any knowledge as to what other programs are proposed? A. No, I don't.

Q. When was it that Mr. MacIntyre contacted you? Could you give us an approximate date? A. To the best of my recollections, I would say it was approximately a month and a half to two months ago.

* * * * * * * * * *

3288

Carl Bonbright

A witness called on behalf of WJR, The Goodwill Station, Inc., having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eagan:

Q. Mr. Bonbright, would you state your name and home address, please? A. Carl W. Bonbright, 2700 Parkside Drive, Flint, Michigan.

Q. Would you tell us what connection, if any, you have with the Flint Community Chest? A. I'm President for the current term.

Q. How long have you lived in Flint, Mr. Bonbright? A. Since 1897.

Q. Have you been active in Civic Affairs during that time? A. Yes.

Q. Could you name some of the other civic affairs you've been active in over the recent years? A. I was once President of the Chamber of Commerce; Chairman of the Planning Commission for about fifteen years; I was on the Advisory Board of the University of Michigan Social Science Research Project.

Q. In other words, you have been very active in civic affairs? A. Yes, I think so.

Q. Tell us what your occupation is, please? A. President of the General Foundry and Manufacturing Company.

Q. Mr. Bonbright, have you had any conversation with Mr. MacIntyre of WJR relative to the question of cooperating with them in their Public Service Programs? A. Yes.

3289

Q. Did you discuss with him a program entitled "This is Flint" which is proposed to be telecast on Saturdays, from 5:00 to 5:30? A. Yes, I had a letter covering the details.

Q. Is it correct that in your capacity as president of the Flint Community Chest, you will cooperate with WJR in connection with that program? A. Yes, if I'm still president at that time. I'll be happy to.

Q. Do you have any reason to believe the Community Chest won't carry forth with that after you're out of office? A. They would be happy to cooperate.

Q. Did you also have discussions with Mr. MacIntyre with respect to the proposed TV program "Your City in Focus" which is scheduled for 12:30 until 1:00 o'clock on Saturdays? A. Yes.

Q. As far as cooperating, your answer would be the same as previously? A. Yes.

Q. Is the same true with the program entitled "Flint Spotlight" proposed to be telecast from 7:30 to 8:00 P.M. on Tuesdays? A. Yes.

Q. Mr. Bonbright, would you cooperate in any other way in connection with the Public Service Program, that is, would you be able to or have time? A. Yes, I won't guarantee personal appearances.

Q. But you would devote time to it and do whatever would be necessary to bring to the TV audience particular civic activities or things of public interest, not necessarily appearing yourself, but arranging so others would appear? A. Yes.

3290

Q. I have no further questions.

By Mr. Ockershausen:

Q. I'm the attorney for Station WFDF, also one of the applicants applying for this TV channel. What do you understand to be the format as we characterized in the outline of "This is Flint"? Was that ever explained to you—the type of program it would be? A. I'd have to refer to the letter for detail. It would be that phase of program as I understand it, which would help promote civic interest on the part of other citizens and tell them what is going on and be educational and fill in that part of required programs on a worth-while basis.

Q. Is that the same idea with respect to the program "Your City in Focus"? A. That's the way I understood the three different phases of cultural, educational, and civic interest programs.

Q. How often do you think your organization would be putting on programs within these times? A. Well, I don't know how often the organizations would put them on themselves, but they could supply perhaps more material than you might want.

Q. Your organization could supply this material? A. I think so. As far as the Community Chest is concerned, which would really include the Red Feather, they are doing promotional work twelve months a year and if you'd follow the newspapers, you would note stories continually regarding various activities all over the county. That ought to be good material.

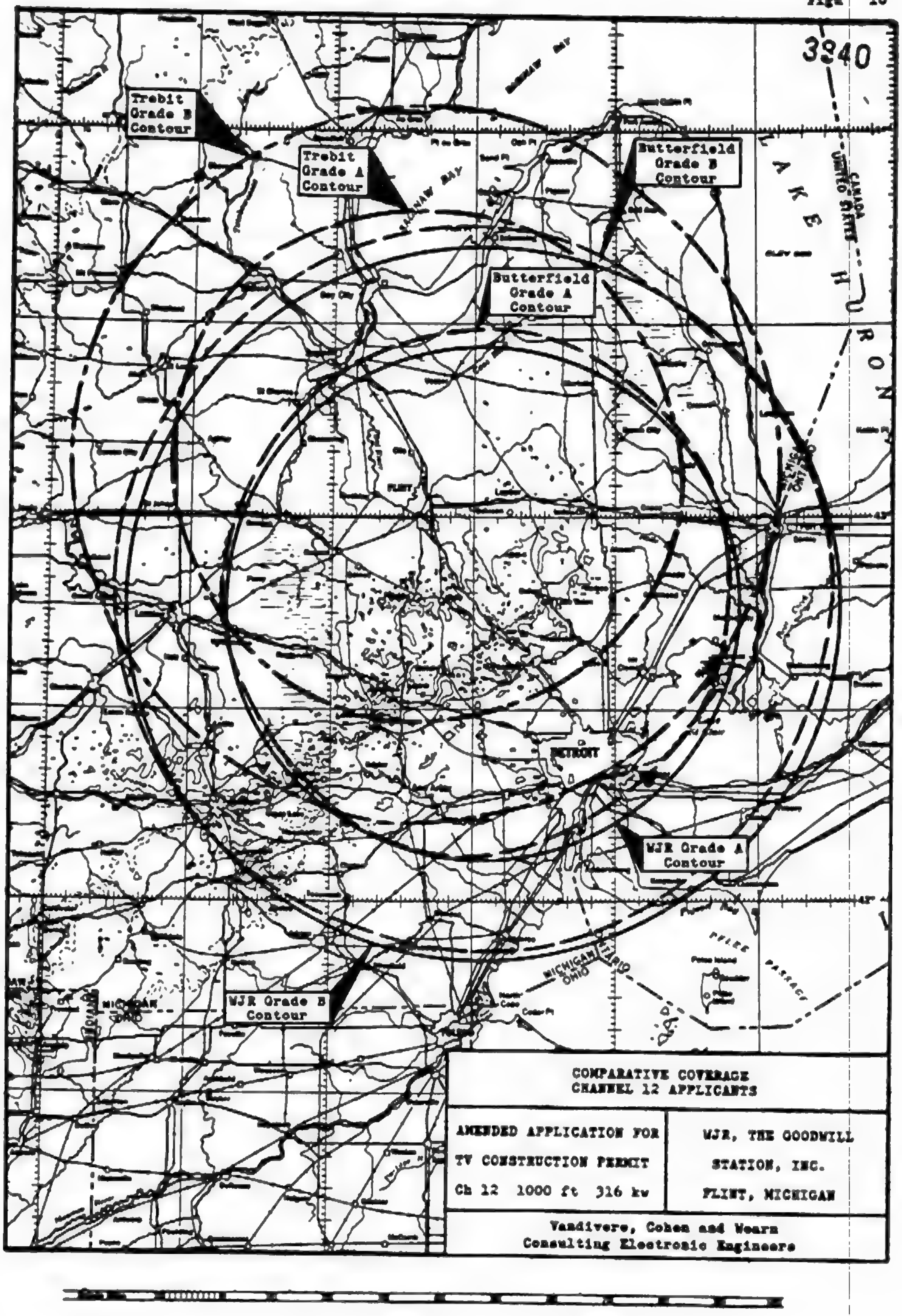
Q. Mr. Bonbright, have you had any discussion with Mr. Dale MacIntyre as to specific programs? A. I don't think I gave him time to tell me.

Q. By the way, when did Mr. MacIntyre first contact you regarding this offering of time on their station? A. I never make a good witness on dates. I would say it would be two or three weeks prior to the correspondence we had. September or October, probably October.

Q. Did Mr. MacIntyre contact you before that time to offer you any air time on WJR-AM? A. No.

* * * * * * * * * *

Figu 10


Trebit Grade B Contour
Trebit Grade A Contour
Butterfield Grade B Contour
Butterfield Grade A Contour
WJR Grade A Contour
WJR Grade B Contour
SAGINAW BAY
LAKE HURON
CANADA UNITED STATES
FLINT
DETROIT
MICHIGAN OHIO
PELEE PASSAGE

COMPARATIVE COVERAGE
CHANNEL 12 APPLICANTS

AMENDED APPLICATION FOR
TV CONSTRUCTION PERMIT
Ch 12 1000 ft 316 kw

WJR, THE GOODWILL
STATION, INC.
FLINT, MICHIGAN

Vandivere, Cohen and Wearn
Consulting Electronic Engineers

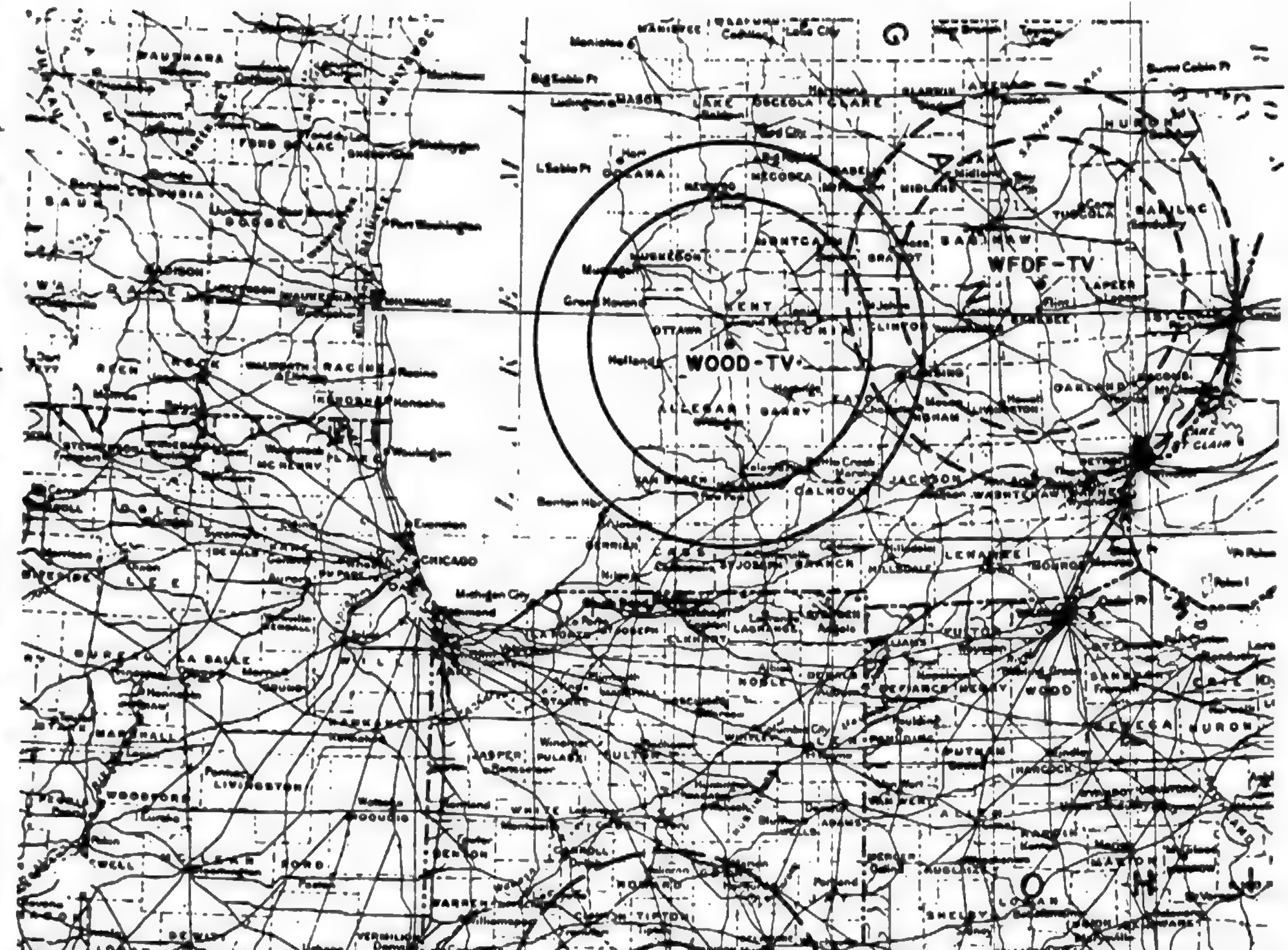

WOOD-TV
WFDF-TV
WFBM-TV
WEAO-TV
CHICAGO
MILWAUKEE
KENT
OTTAWA
ALLEGAN
BARRY
CALHOUN
JACKSON
SAGINAW
HURON
LENAWEE
HANCOCK
WOOD
PUTNAM
I N D I A N A
O H I O
I L L I N O I S
K E N T U C K Y
Miles

FIGURE 3
MAP SHOWING EXISTING AND PROPOSED OPERATIONS
WITH RESPECT TO GEOGRAPHICAL LOCATIONS
Prepared by
Craven, Lohnes & Culver Washington 4, D. C.
November 1952

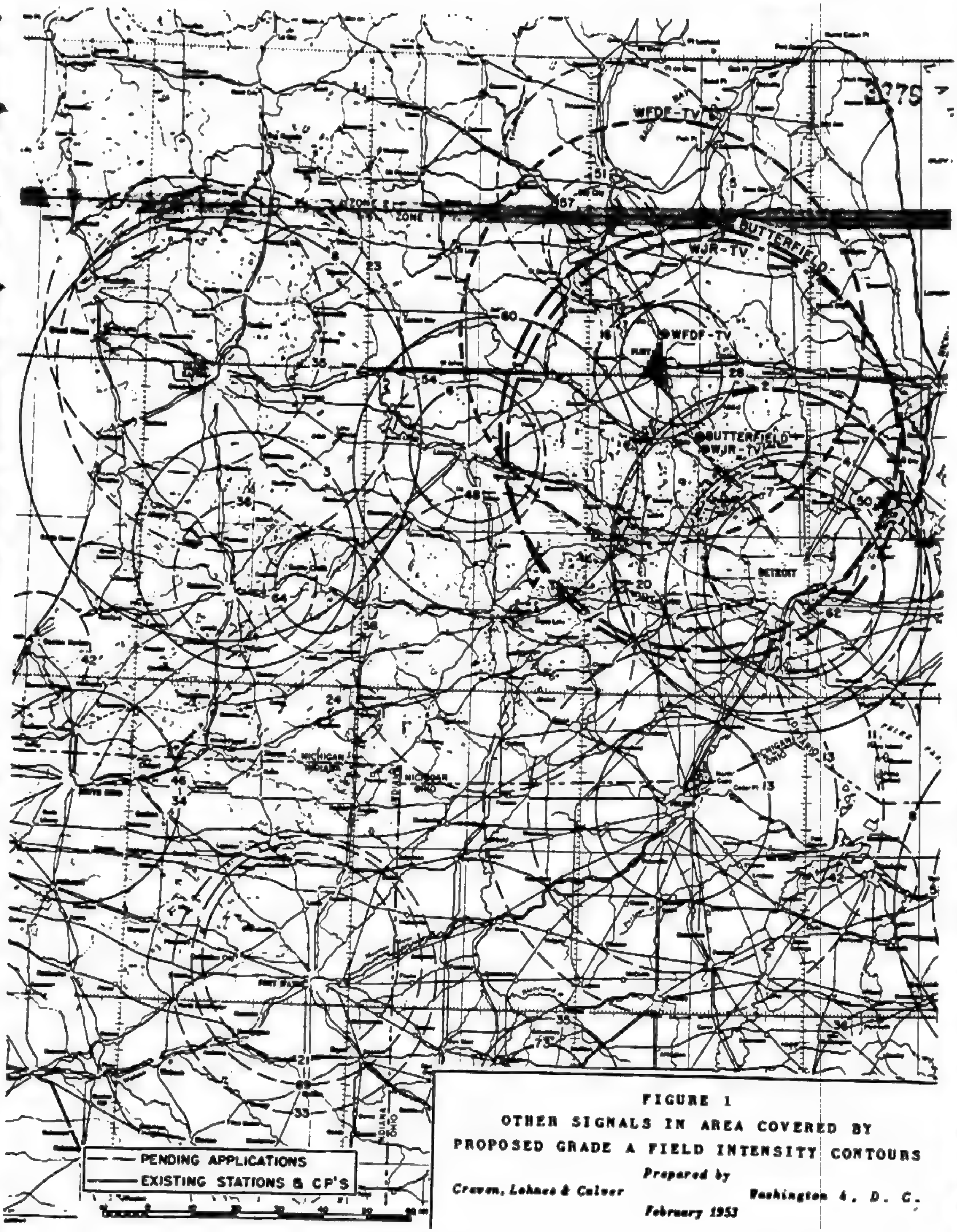

WFDF-TV
WJR-TV
BUTTERFIELD
WFDF-TV
BUTTERFIELD
WJR-TV
FLINT
DETROIT
ZONE II
ZONE I
MICHIGAN
INDIANA
MICHIGAN
OHIO
INDIANA
OHIO
PENDING APPLICATIONS
EXISTING STATIONS & CP'S

FIGURE 1
OTHER SIGNALS IN AREA COVERED BY
PROPOSED GRADE A FIELD INTENSITY CONTOURS

Prepared by
Craven, Lohnes & Culver *Washington 4, D. C.*
February 1953

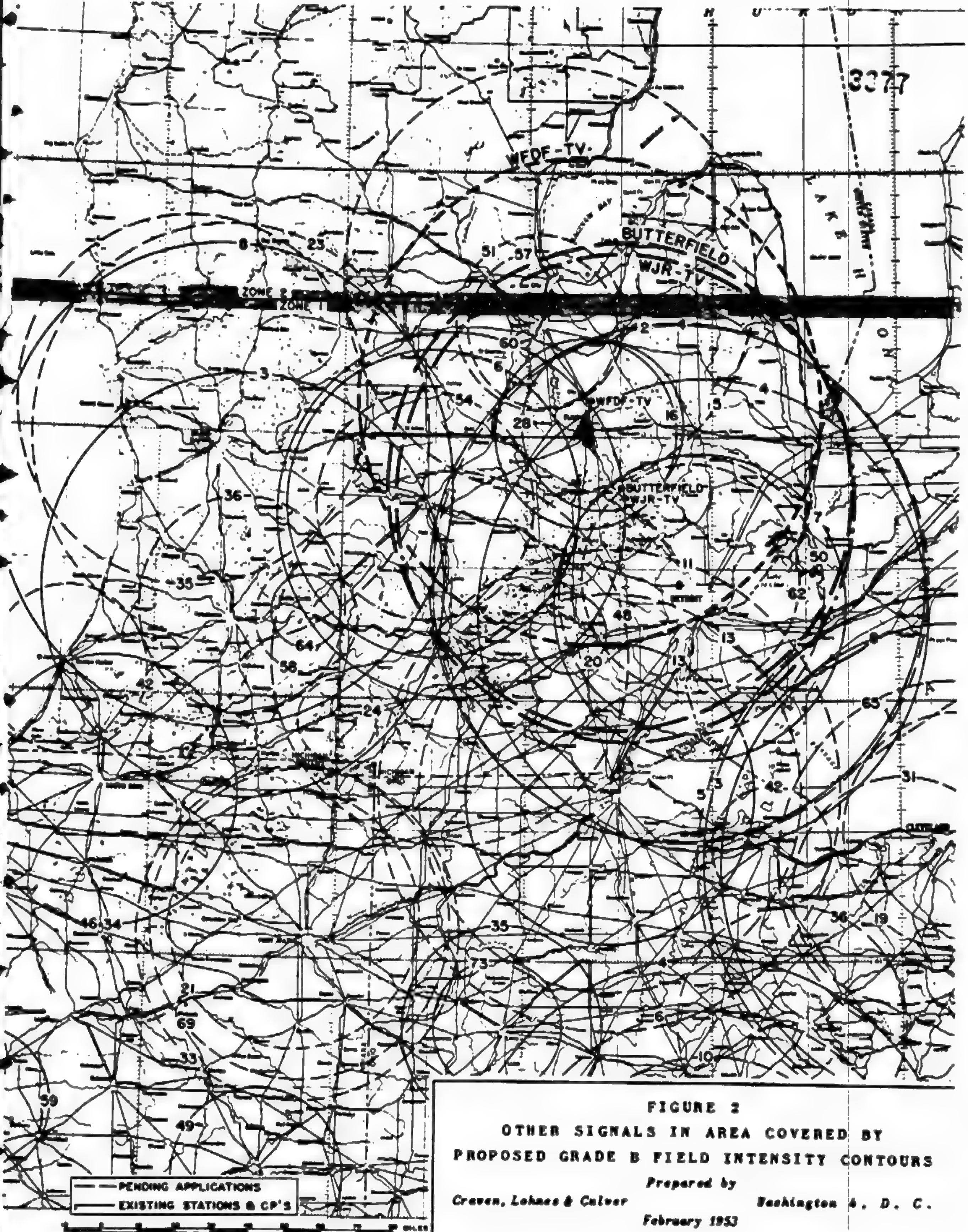

3377
WFDF-TV
BUTTERFIELD
WJR-TV
ZONE 2
ZONE 1
WFDF-TV
BUTTERFIELD
WJR-TV
DETROIT
CLEVELAND
LAKE HURON
PENDING APPLICATIONS
EXISTING STATIONS & CP'S
MILES

FIGURE 2
OTHER SIGNALS IN AREA COVERED BY
PROPOSED GRADE B FIELD INTENSITY CONTOURS
Prepared by
Craven, Lohnes & Culver *Washington 4, D. C.*
February 1953

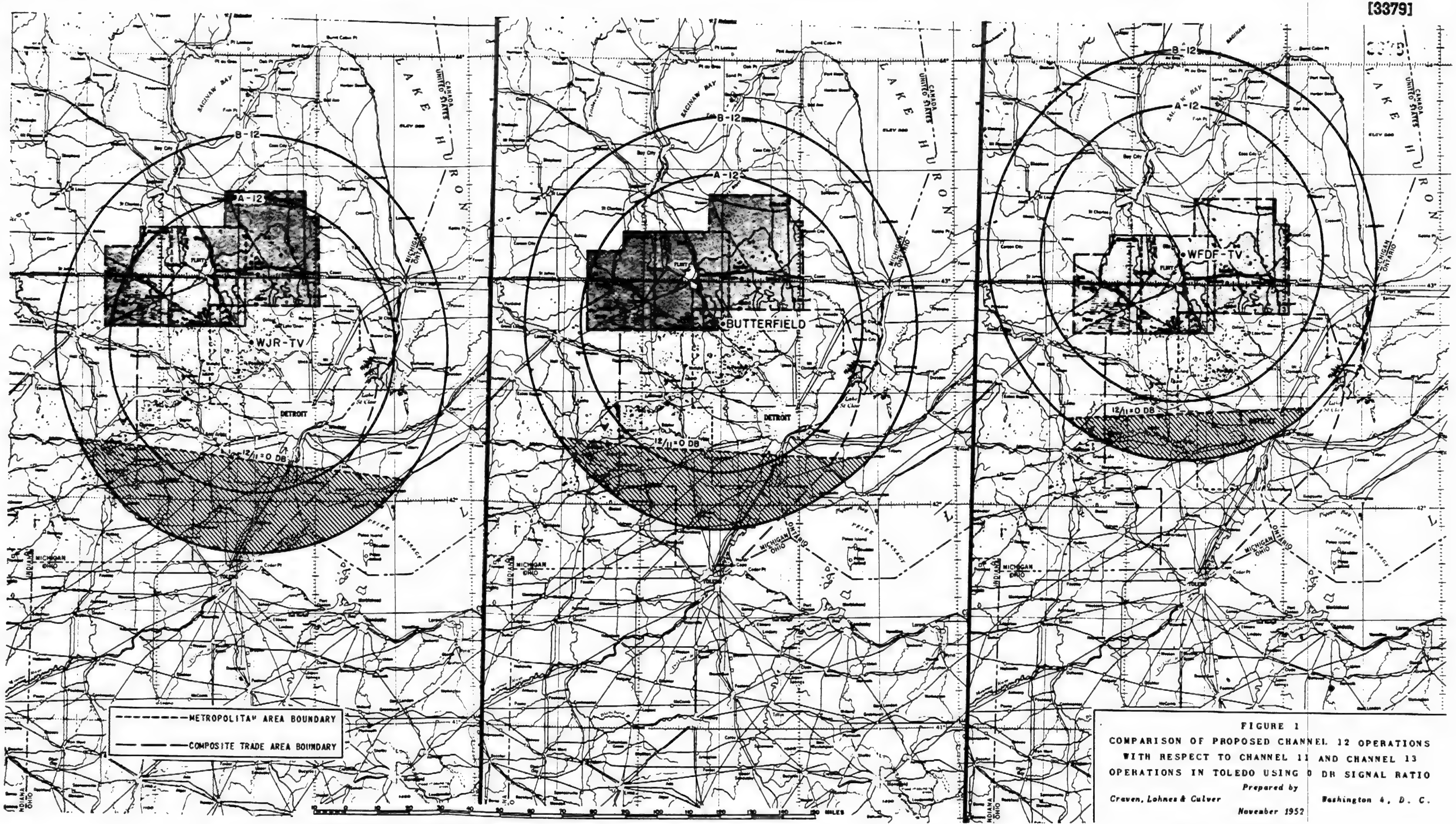

B-12
A-12
WJR-TV
BUTTERFIELD
WFDF-TV
FLINT
DETROIT
12/11=0 DB
SAGINAW BAY
LAKE HURON
CANADA
UNITED STATES
MICHIGAN
ONTARIO
MICHIGAN
OHIO
INDIANA
OHIO
TOLEDO
PELEE PASSAGE
METROPOLITAN AREA BOUNDARY
COMPOSITE TRADE AREA BOUNDARY
MILES

FIGURE 1

COMPARISON OF PROPOSED CHANNEL 12 OPERATIONS
WITH RESPECT TO CHANNEL 11 AND CHANNEL 13
OPERATIONS IN TOLEDO USING 0 DB SIGNAL RATIO

Prepared by

Craven, Lohnes & Culver *Washington 4, D. C.*

November 1952

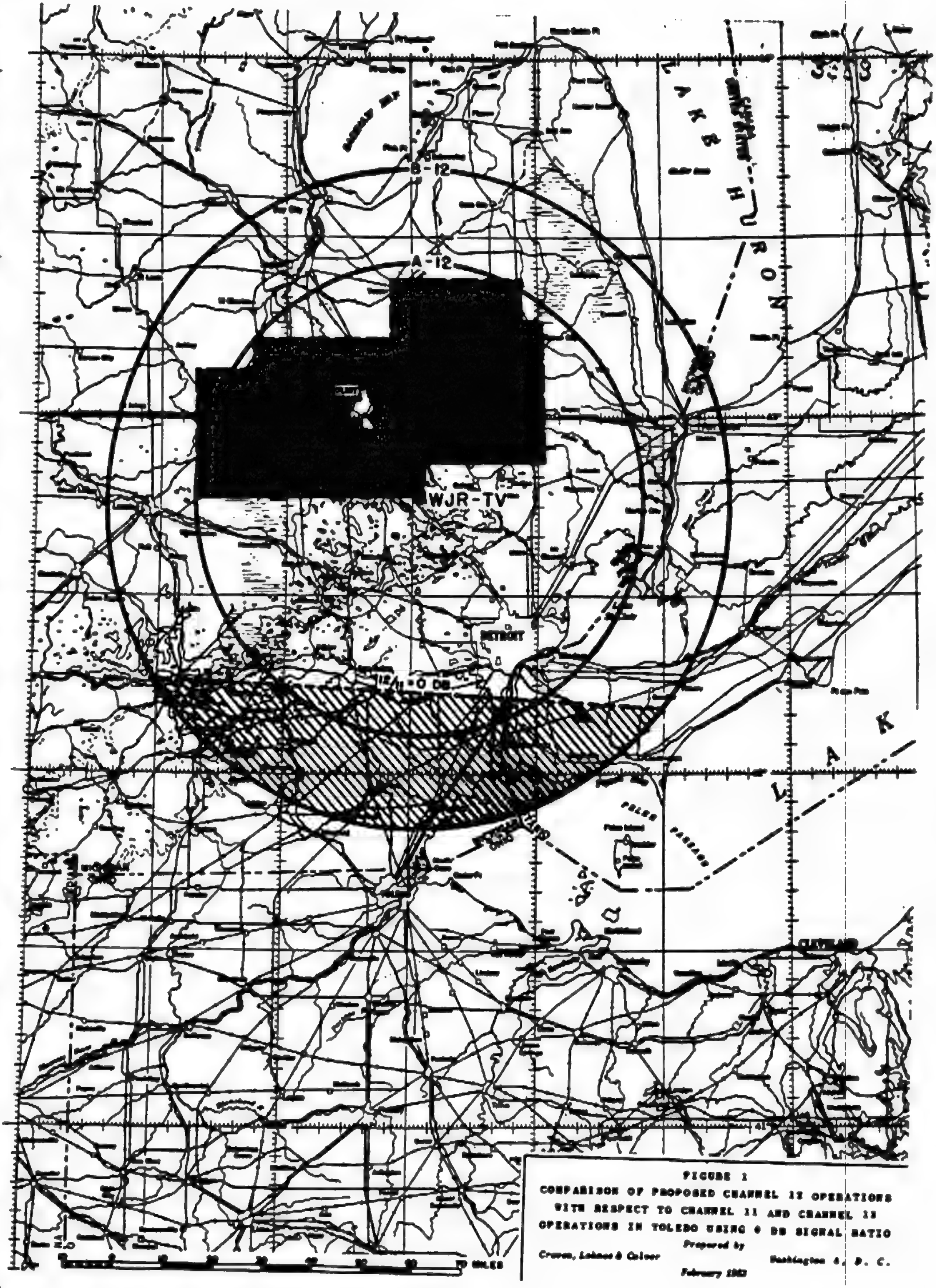

B-12
A-12
WJR-TV
DETROIT
12/11 = 0 DB
L A K E
H U R O N
L A K E
CLEVELAND
PELEE PASSAGE
0
10
20
30
40
50
60
70 MILES

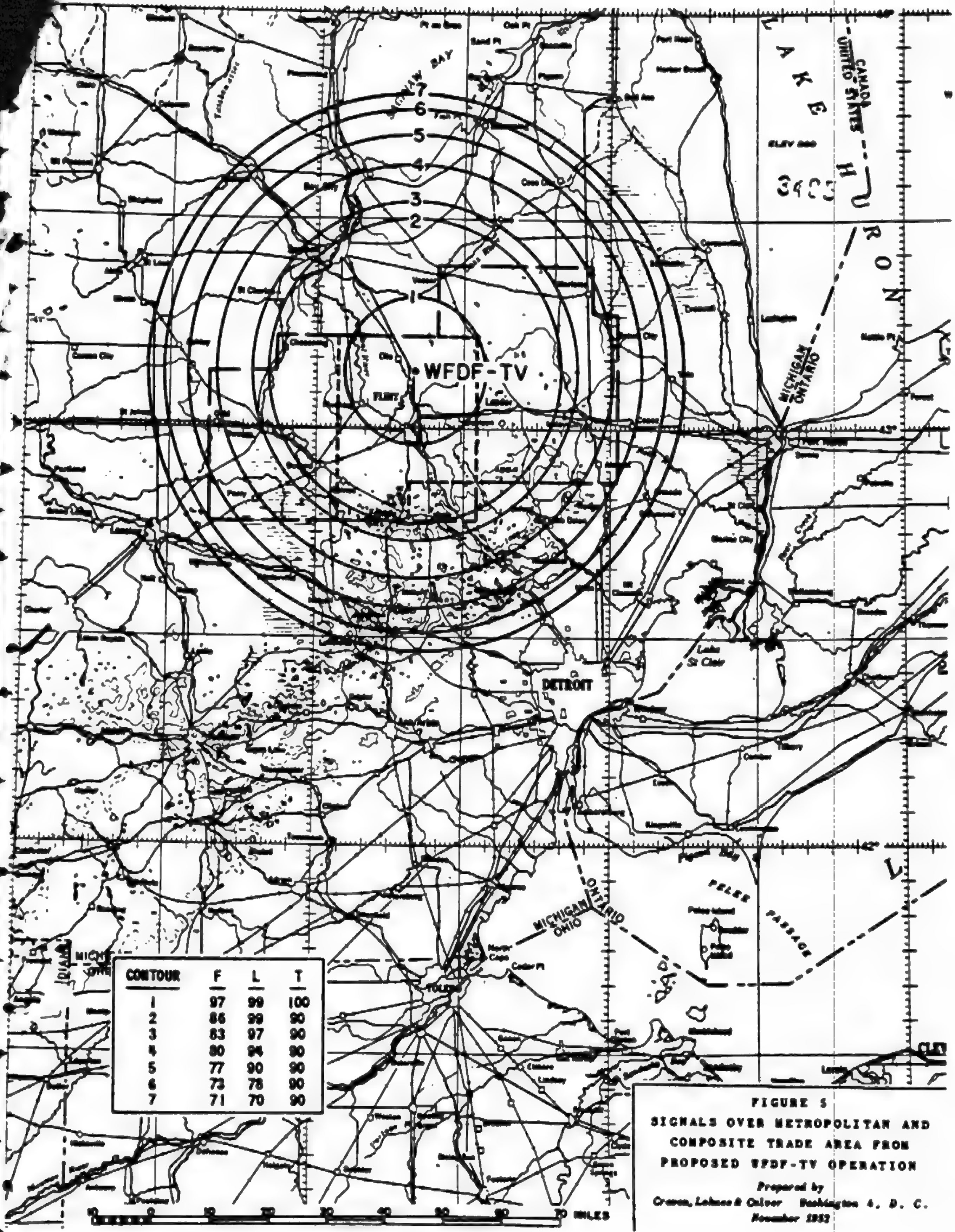
FIGURE 1

COMPARISON OF PROPOSED CHANNEL 12 OPERATIONS WITH RESPECT TO CHANNEL 11 AND CHANNEL 13 OPERATIONS IN TOLEDO USING 0 DB SIGNAL RATIO

Prepared by

Craven, Lohnes & Culver Washington 4, D. C.

February 1953


WFDF-TV
1
2
3
4
5
6
7
SAGINAW BAY
Bay City
Flint
DETROIT
Toledo
Lake St Clair
L A K E H U R O N
CANADA
UNITED STATES
MICHIGAN
ONTARIO
MICHIGAN
OHIO
PELEE PASSAGE
3403
43°
42°
10 0 10 20 30 40 50 60 70 MILES

CONTOUR	F	L	T
1	97	99	100
2	86	99	90
3	83	97	90
4	80	94	90
5	77	90	90
6	73	78	90
7	71	70	90

FIGURE 5
SIGNALS OVER METROPOLITAN AND COMPOSITE TRADE AREA FROM PROPOSED WFDF-TV OPERATION

Prepared by
Craven, Lohnes & Culver Washington 4, D. C.
November 1952

FIGURE 6

COMPARISON OF FLINT METROPOLITAN AND COMPOSITE TRADE AREAS

ISO-SERVICE

WITH RESPECT TO CERTAIN ISO-SERVICE CONTOURS FROM PROPOSED OPERATIONS

F(50, 50)[1]	64(L, T)		WJR	Butterfield	WFDF
		(FLINT METROPOLITAN AREA)			
97 dbu	99%	99%	1%[2]	11%[2]	53%[3]
86	99	99	37	65	42
83	98	90	..	65	5
82.5	97	90	27	14	..
77[4]	90	90	30	10	..
73	78	90	5	..	..
			(100%)	(100%)	(100%)
		(FLINT COMPOSITE TRADE AREA)			
97 dbu	99%	99%	5.5%	12.5%	16.6%
86	99	90	24.0	33.2	43.7
83	98	90	..	..	12.9
82.5	97	90	15.5	17.5	..
80	94	90	..	..	17.9
77[4]	90	90	25.5	24.0	7.5
73	78	90	..	..	1.4
71	70	90	18.5	11.8	..
67	50	90	..	1.0	..
62	27	90	11.0	..	..
			(100%)	(100%)	(100%)

[1] From FCC curves for 25DBK-1000 FT.

[2] Does not include any of city of Flint.

[3] Includes all of city of Flint.

[4] Required over city.

Prepared by Craven, Lohnes & Culver, Washington 4, D. C., November 1952

FIGURE 7

COMPARISON OF RECEIVING LOCATIONS IN FLINT METROPOLITAN AND COMPOSITE TRADE AREAS WITH RESPECT TO PROPOSED OPERATIONS

(FLINT METROPOLITAN AREA)

F(50, 50)[1]	64(L, T)		WJR	Butterfield	WFDF
86 dbu	99%	90%	37.0%	72.3%	88.5%
83	98	90	..	..	10.5
82.5	97	90	26.7	15.4	..
77[2]	90	90	28.4	10.5	..
73	78	90	4.2	..	..
			96.3%	98.2%	99.0%

(FLINT COMPOSITE TRADE AREA)

F(50, 50)[1]	64(L, T)		WJR	Butterfield	WFDF
86 dbu	99%	90%	25.2%	37.6%	51.9%
83	98	90	..	..	15.2
82.5	97	90	16.1	19.6	..
80	94	90	..	..	20.6
77[2]	90	90	25.2	25.6	8.3
73	78	90	..	..	1.4
71	70	90	15.7	10.8	..
67	50	90	..	0.7	..
62	27	90	5.5	..	..
			87.7%	94.3%	97.4%

[1] From FCC curves for 25 DBK-1000 FT.

[2] Required over city.

Prepared by Craven, Lohnes & Culver, Washington 4, D. C., November 1952

3408

FIGURE 7A, EXHIBIT 5-A

37.0	72.3	88.5
..	..	10.5
26.7	15.4	..
28.4	10.5	..
4.2	..	..
96.3%	98.2%	99.0%
25.2	37.6	51.9
..	..	15.2
16.1	19.6	..
..	..	20.6
25.2	25.6	8.3
..	..	1.4
15.7	10.8	..
..	0.8	..
7.6	..	..
89.8%	94.4%	97.4%

3411

Trebit Exhibit 5S

Dashed line is location of equal signal strength from the two proposed Channel 12 operations. The Metropolitan Composite Trade Areas are divided about this line as follows:

	Met. Area		Trade Area	
	Sq. Mi.	%	Sq. Mi.	%
WFDF	495	75	1650	69
WJR	160	25	750	31

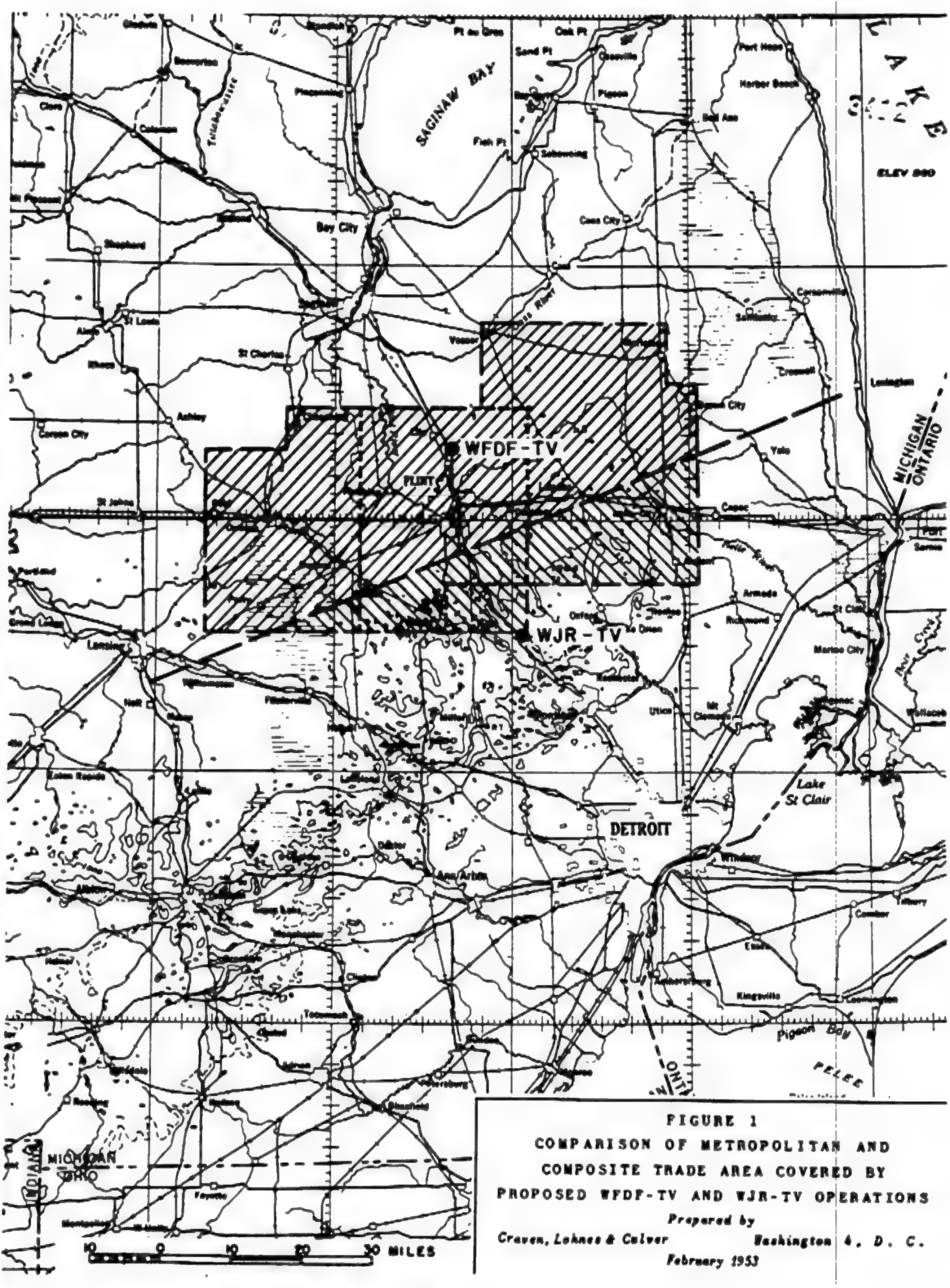

SAGINAW BAY
L A K E
Bay City
WFDF-TV
FLINT
WJR-TV
MICHIGAN
ONTARIO
Lansing
Lake St Clair
DETROIT
Ann Arbor
Windsor
Pigeon Bay
PELEE
MICHIGAN
OHIO
INDIANA
10 0 10 20 30 MILES

FIGURE 1
COMPARISON OF METROPOLITAN AND
COMPOSITE TRADE AREA COVERED BY
PROPOSED WFDF-TV AND WJR-TV OPERATIONS

Prepared by
Craven, Lohnes & Culver *Washington 4, D. C.*
February 1953

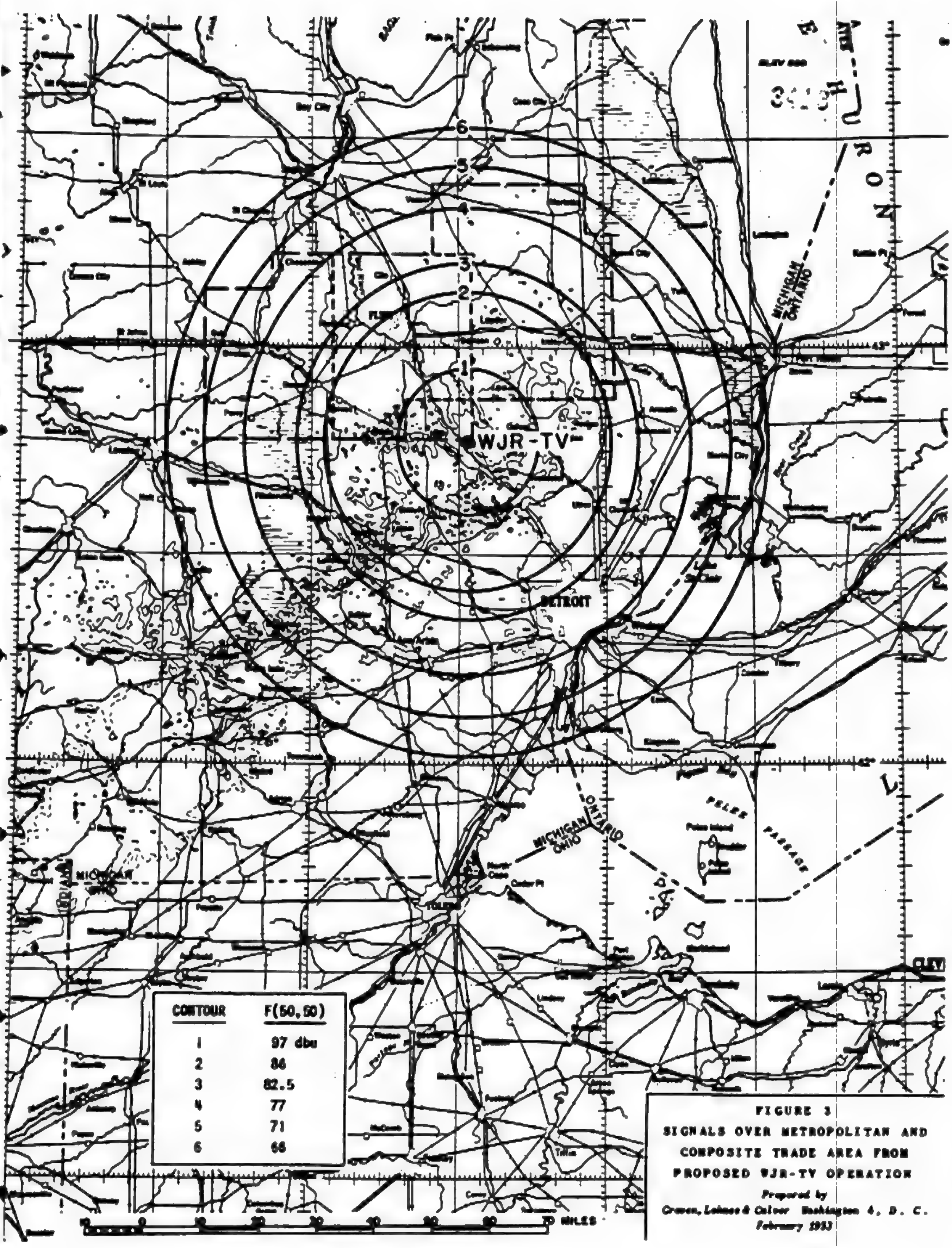

WJR-TV
DETROIT
1
2
3
4
5
6
H U R O N
MICHIGAN
ONTARIO
MICHIGAN
OHIO
PELEE PASSAGE
Bay City
Flint
Toledo
CONTOUR F(50,50)
1 97 dbu
2 86
3 82.5
4 77
5 71
6 66
70 MILES

FIGURE 3
SIGNALS OVER METROPOLITAN AND COMPOSITE TRADE AREA FROM PROPOSED WJR-TV OPERATION

Prepared by
Craven, Lohnes & Culver Washington 4, D. C.
February 1953

3414

FIGURE 6

(REVISED FOR WJR-TV AT NEW SITE)

COMPARISON OF FLINT METROPOLITAN AND COMPOSITE TRADE AREAS ISO-SERVICE WITH RESPECT TO CERTAIN ISO-SERVICE CONTOURS FROM PROPOSED OPERATIONS

F(50, 50)[1]	64(L, T)		WJR
	(FLINT METROPOLITAN AREA)		
97 dbu	99%	99%	6.5%[2]
86	99	90	54.6
83	98	90	—
82.5	97	90	21.0
77[4]	90	90	17.9
73	78	90	—
			(100%)
	(FLINT COMPOSITE TRADE AREA)		
97 dbu	99%	99%	9.8%
86	99	90	28.5
83	98	90	—
82.5	97	90	15.3
80	94	90	—
77[4]	90	90	27.0
73	78	90	—
71	70	90	16.7
66	47	90	2.7
			(100%)

[1] From FCC curves for 25 DBK-1000 FT.

[2] Does not include any of city of Flint.

[3] Includes all of city of Flint.

[4] Required over city.

Prepared by Craven, Lohnes & Culver, Washington 4, D. C., February 1953

3415

FIGURE 7

(REVISED FOR WJR-TV AT NEW SITE)

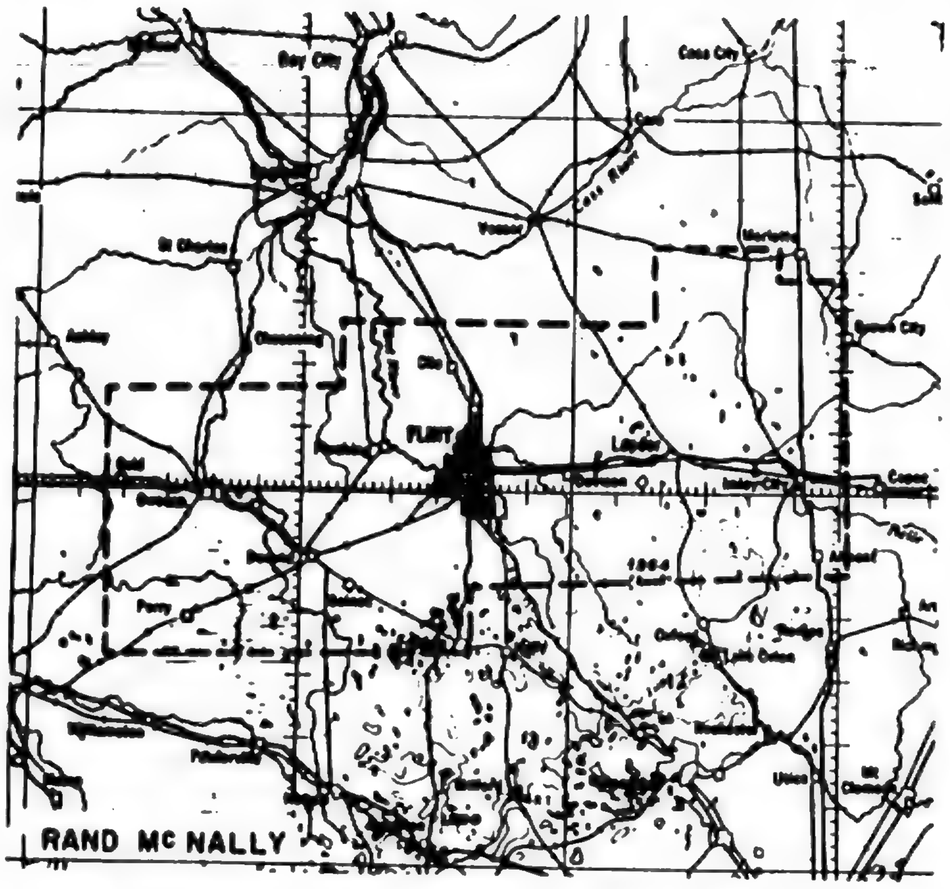
COMPARISON OF RECEIVING LOCATIONS IN FLINT METROPOLITAN AND COMPOSITE TRADE AREAS WITH RESPECT TO PROPOSED OPERATIONS

F(50, 50)[1]	64(L, T)		WJR
	(FLINT METROPOLITAN AREA)		
86 dbu	99%	90%	57.9%
83	98	90	—
82.5	97	90	22.0
77[2]	90	90	17.9
73	78	90	—
			97.8%
	(FLINT COMPOSITE TRADE AREA)		
86 dbu	99%	90%	31.3%
83	98	90	—
82.5	97	90	16.6
80	94	90	—
77[2]	90	90	28.0
73	78	90	—
71	70	90	14.8
66	47	90	1.8
			92.5%

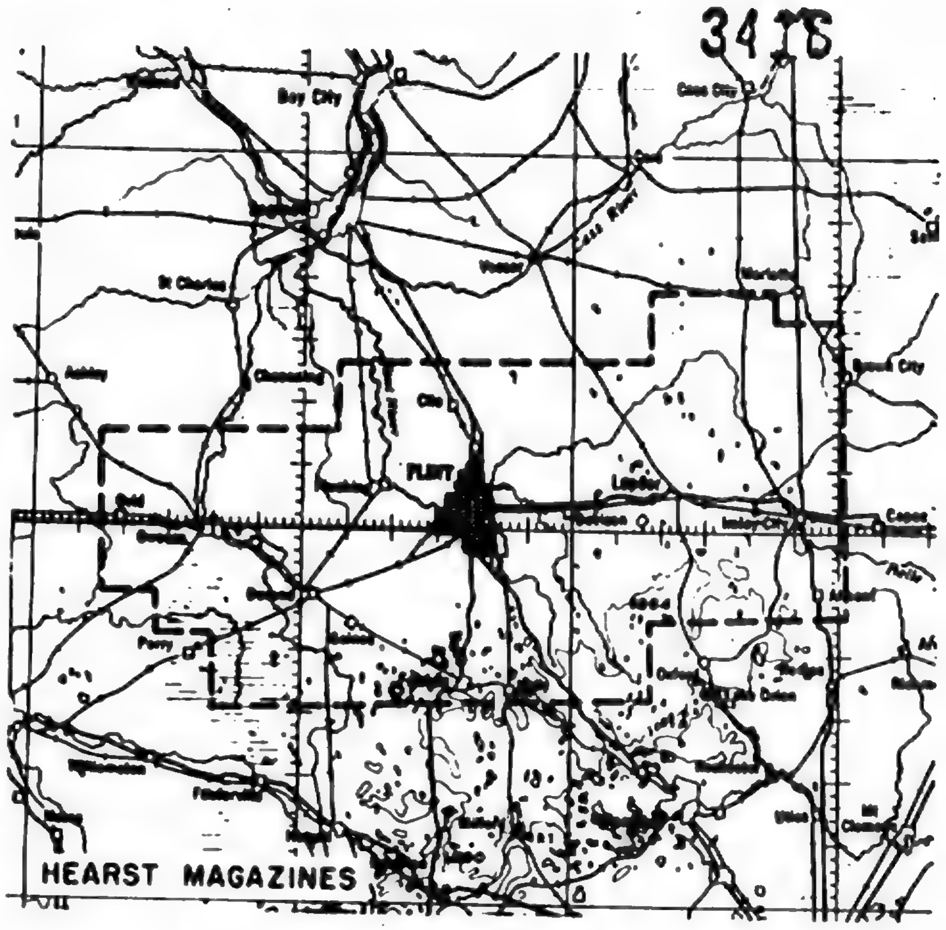
[1] From FCC curves for 25 DBK-1000 FT.

[2] Required over city.

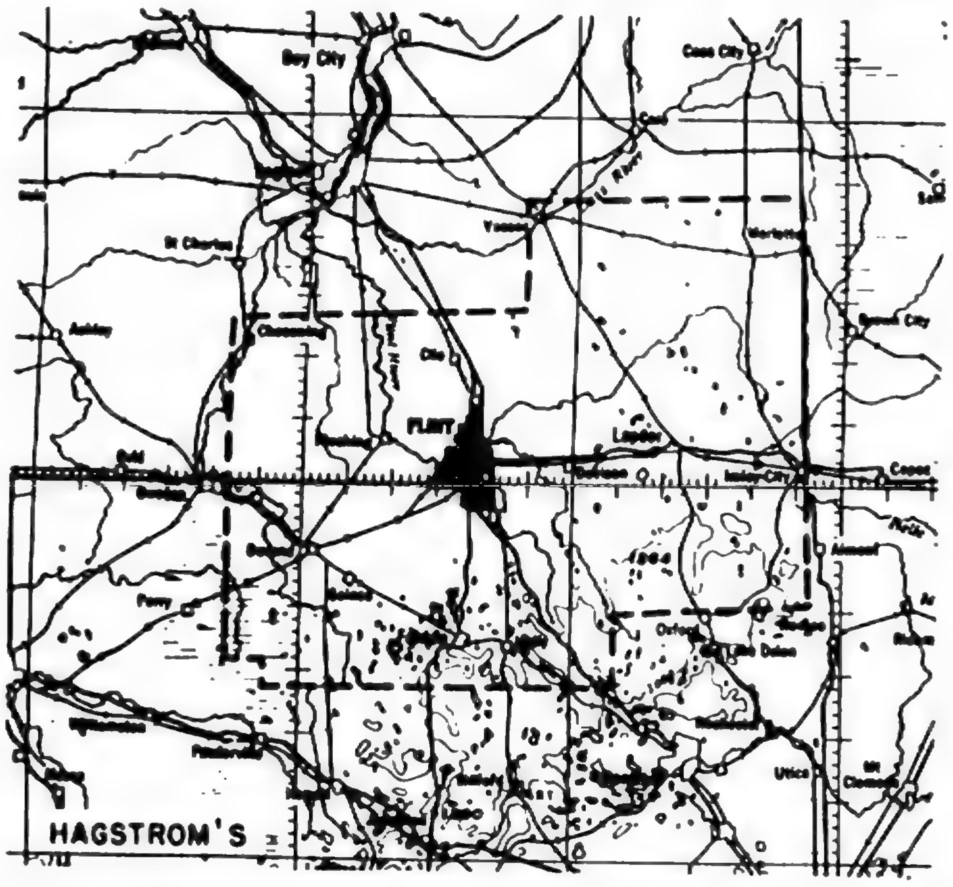
Prepared by Craven, Lohnes & Culver, Washington 4, D. C., February 1953



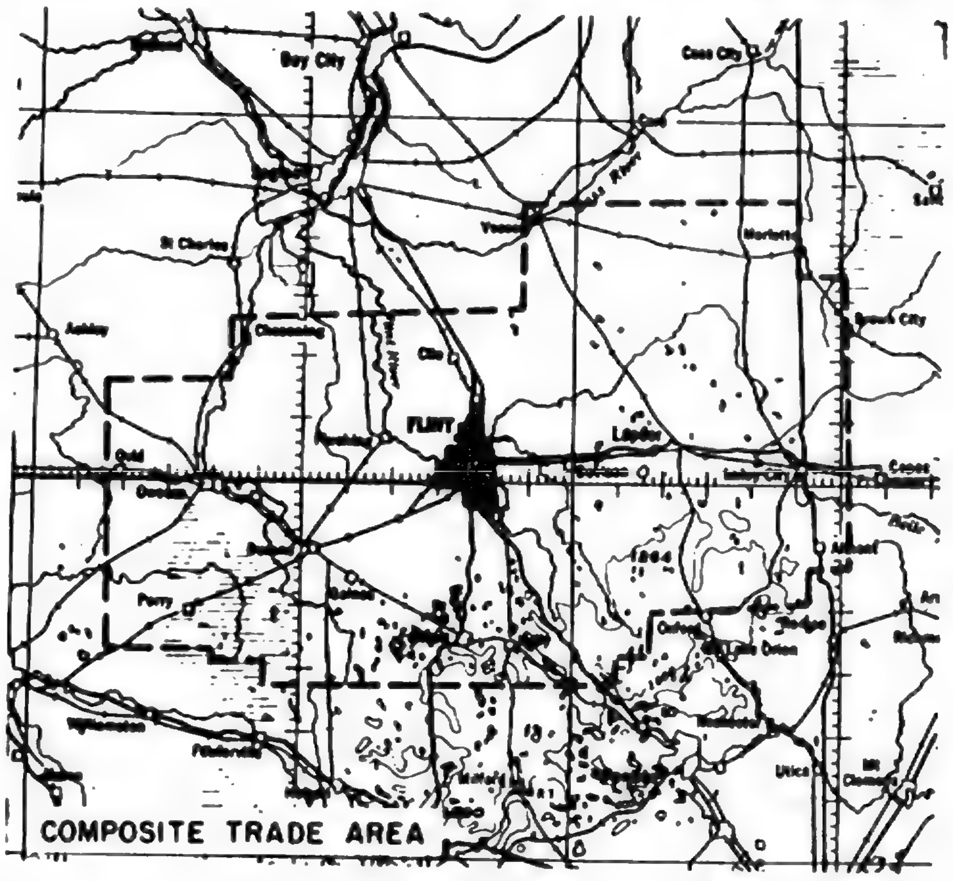
RAND McNALLY



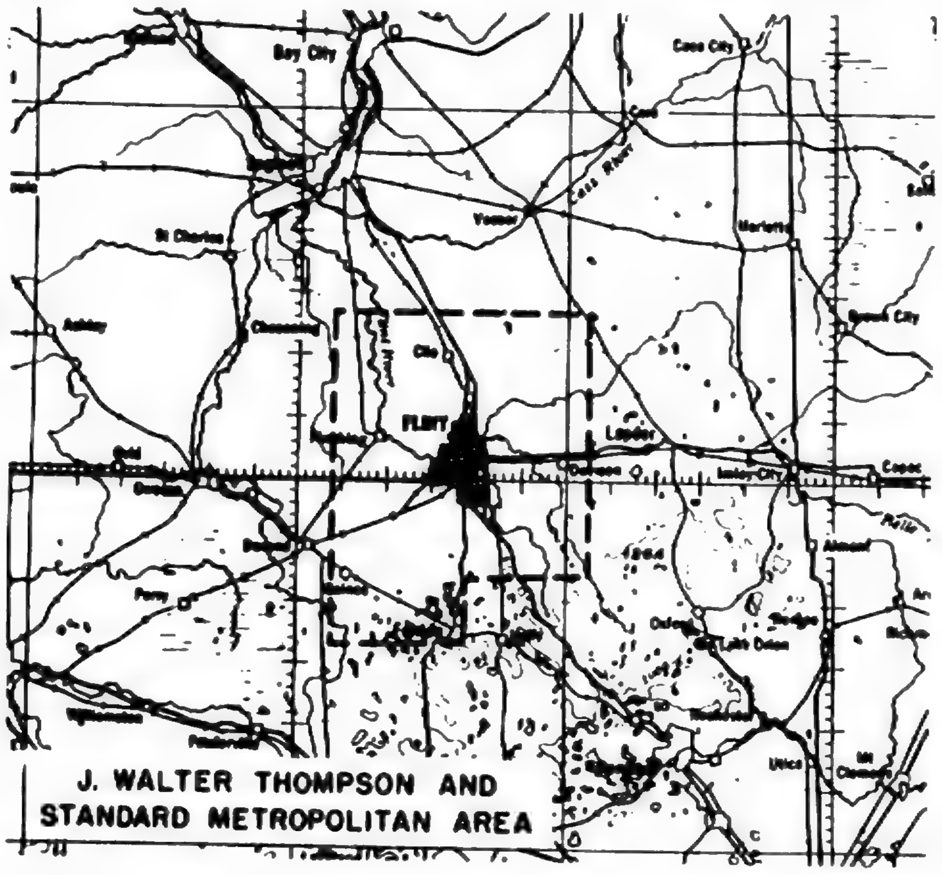
HEARST MAGAZINES



HAGSTROM'S



COMPOSITE TRADE AREA



J. WALTER THOMPSON AND
STANDARD METROPOLITAN AREA

WFDF EXHIBIT NO. 6

INDIVIDUAL AND COMPOSITE

[redacted]

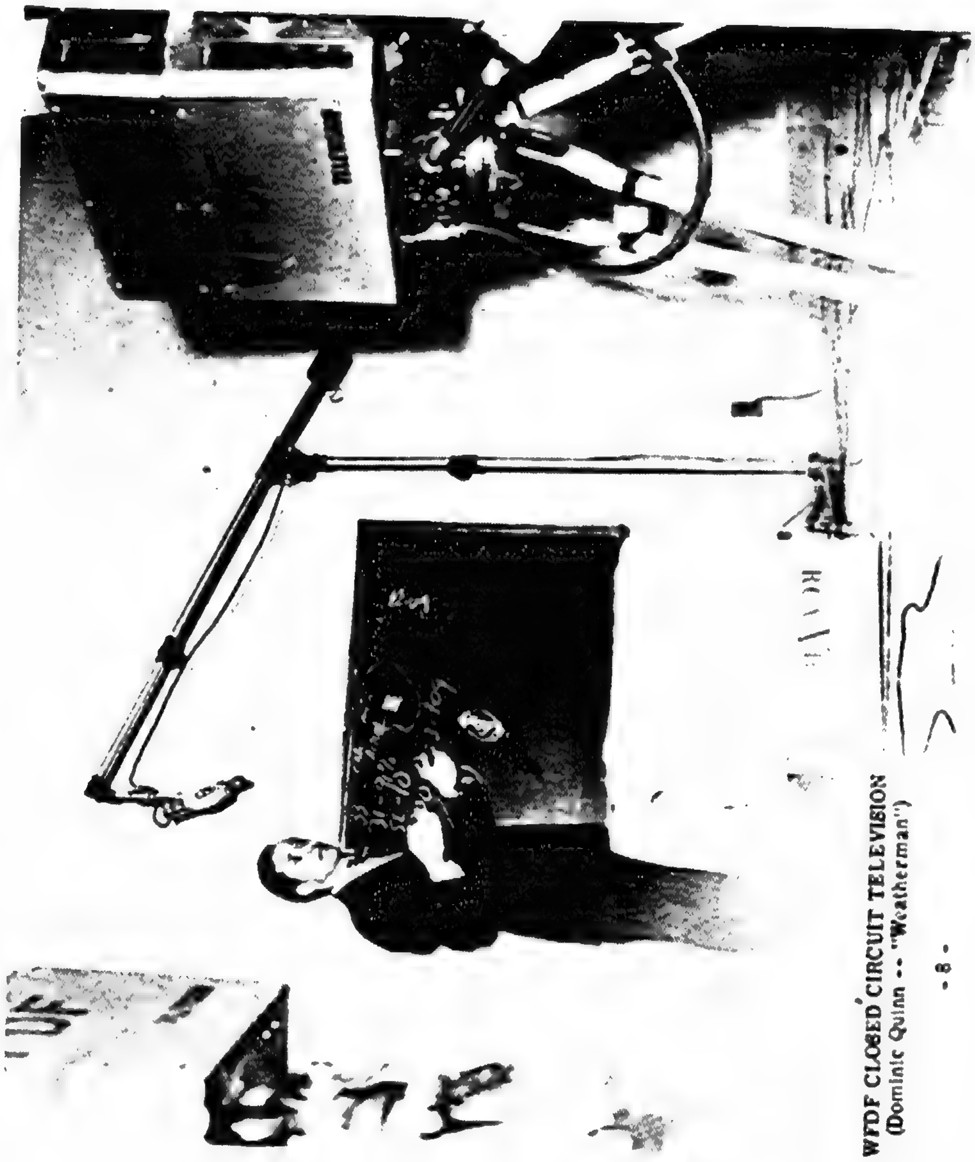
[redacted] 10268 et al

~~Prepared by~~

[redacted] WPDF ~~Kohnes & Culver, Washington~~ 4, D. C.

The Individual Station ~~November 1952~~

[redacted] 12-2-52



WFDF CLOSED CIRCUIT TELEVISION
(Dominic Quinn -- "Weatherman")

3491

Trebit Exhibit 7-H

HIGHLIGHTS IN PLANNING LOCAL PUBLIC SERVICE PROGRAM OPERATION

Genesee County Agricultural Extension Service

For the past three years, the Genesee County Agricultural Agent, Mr. R. C. Lott, and his staff, have appeared on WFDF-AM, daily, Monday through Saturday. Since WFDF will serve an even larger rural audience with television than with AM, plans have been made to utilize Mr. Lott's organization as well as the agricultural agents of other counties covered for television. However, since the agricultural needs of these other counties are similar to that of Genessee County, it is believed that our work with Mr. Lott's agency will serve as a pattern for the other agents.

Numerous meetings and conferences were held with Mr. Lott and his staff members during the Spring and Summer of 1952 in order to perfect plans by which the Genesee County Agricultural Service could utilize WFDF-TV. Discussions were also held regarding county agents in other areas which WFDF-TV proposes to serve to determine how they could best utilize television time.

In August, 1952, a special conference was held between Mr. Elmer A. Knopf, Program Director of WFDF, and Mr. Lott and his staff, in order to discuss specific and complete details as to how this television service could best be used, and secondly, how much time Mr. Lott's staff would have available to devote to work on these telecasts. Specific discussions were had on the ways and means by which material could be found for use in the programs. As a result of previous discussions with Michigan State College on the part of the County Agent's staff, as well as the staff of WFDF, and the Company's experience through its affiliated Station WOOD-TV, in Grand Rapids, Michigan, it was agreed by everyone that considerable use could be made of material provided by Michigan State College in the form of still photographs, 16mm motion picture film, as well as personal appearances of members of the College faculty. WOOD-TV has actually been doing this and finding it quite successful.

We also found that considerable material could be provided from the members of the 4-H Club. Arrangements have been made whereby 16mm motion picture film footage of such special events as Farm Machinery Field Day, Beef Tours, Grass Silage

3492

Tours, 4-H Fairs, and county and state fairs can be televised, using live narration to take care of sound.

The Women's Extension Service of the Genesee County Agricultural Office, which currently has a regular program on WFDF-AM, felt that the work their rural and urban home demonstration agents are now doing could be substantially improved through the use of television.

Mr. Lott and his staff considered the amount of time they would have available to work on farm television programs and felt they would be capable of handling three of the five noon-day farm programs proposed by WFDF on its television program schedule.

As a result of this conference, invitations to participate in WFDF's television planning were extended to the county agents and staff members of the counties in WFDF-TV's proposed coverage area. A meeting called for 7:00 PM, Wednesday, September 24, 1952, in WFDF's studios in Flint, was attended by seventeen agricultural people. Also present were the Genesee County Agent and two representatives from the Michigan State College of Agriculture. On this occasion, a live television demonstration program was produced and telecast by means of a closed circuit for the benefit of the visiting county agents. The program was done almost entirely by the Genesee County Agent's office insofar as talent was concerned. The production and technical work was handled by the WFDF staff. The meeting lasted for about three and a quarter hours and featured the actual telecast of the WFDF-TV proposed program enitled, "Farmer's Question Box", complete with props, scenery, lighting, etc. Participating in this program was Mr. R. C. Lott, Mr. Ray Vassold, 4-H Agent for Genesee County, Mrs. Clara P. Hay, Home Demonstration Agent for Genesee County, and Mrs. Lilas C. Frost, also of Mr. Lott's office.

During the program, Mr. Lott read letters written in by listeners; answered their questions; conducted some demonstrations; exhibited kinescope film supplied by the Michigan State College of Agriculture which demonstrated how to judge turkeys for size and condition as far as marketing of them was concerned. Mr. Vassold discussed the forthcoming 4-H cattle-judging show in Detroit and exhibited pictures taken at last year's show. Mr. Lott discussed and exhibited a new type of wheat being tested in this area, showing the actual wheat. The Home Demonstration Agent, with Mrs. Frost, gave a canning demonstration showing how to maintain and care for pressure cookers. Following this portion of the program, Alan Norman, of the WFDF staff, gave a demonstration on television techniques, showing how cameras are operated, etc. The guests were taken on a tour of the studios and Control Room and given an opportunity to see the equipment in action.

A meeting was then conducted at which time Messrs. Lott, B. D. Kuhn, of Michigan State College, Elmer A.

Knopf, Program Director of WFDF, and Lester W. Lindow, General Manager of WFDF, discussed with the county agents, television plans for WFDF-TV as far as farm programs were concerned; extended an offer to have these agents participate in the proposed television schedule and discussed ways and means by which this work could be divided amongst the various counties.

Following this meeting, there have been numerous conferences held between Mr. Lott and his staff members and Mr. Elmer A. Knopf, Mr. Lester W. Lindow, as well as other members of the WFDF staff, regarding planning activities for television.

* * * * * * * * * *

4004

Butterfield Exhibit No. 3

FIGURE 7

W. S. BUTTERFIELD THEATRES, INC.
FLINT, MICHIGAN

POPULATION AND AREAS OF "WHITE AREAS"

	Grade A		Grade B	
	Population	Sq. Mi. Area	Population	Sq. Mi. Area
Butterfield	62,928	1,380	3,793	62
WJR	59,407	1,300	2,750	55
Trebit	79,440	1,990	7,177	148

February 27, 1953

Consulting Engineers, George P. Adair Engineering Company
Washington, D. C.

* * * * * * * * * *

4101

Memorandum Opinion and Order

By the Commission: Commissioner Hennock not participating.

1. The Commission has before it two petitions for review and reversal of the Hearing Examiner's ruling in the

above-entitled proceeding in which he held that one of the applicants, WJR, would be permitted to amend its application for a television station construction permit to specify a new antenna site even though the engineering testimony on the original site had been received into the record. The petitions were filed on January 19, 1953 by Trebit Corporation and W. S. Butterfield Theatres, Inc. who, along with WJR, are competing applicants for television Channel 12 at Flint, Michigan. Butterfield, as a part of its petition, also requests that an order be issued denying or dismissing the WJR application for a construction permit. A reply to the petitions was filed by WJR on January 22, 1953, which was answered by Trebit on January 26, 1953.

2. WJR's petition for leave to amend was filed on January 9, 1953, at a time when engineering testimony in the hearing had been completed. According to WJR, permission to specify a new transmitter site for its proposed television station was made because of inability to obtain a recommendation from the Chicago Regional Airspace Subcommittee that the site originally proposed would not constitute a hazard to air navigation because of the height of the proposed tower and its proximity to Pontiac Municipal Airport. After hearing oral argument on the petition for leave to amend, The Examiner granted said petition by Memorandum Opinion and Order of January 14, 1953.

3. Under the provisions of our rules,[1] good cause must be shown before

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a petition to amend, filed after an application is designated for hearing, will be granted. In endeavoring to satisfy the requirement of "good cause", WJR, in its petition for leave to amend and at the oral argument before the Examiner, cited various facts leading up to the filing of the petition, argued that these demonstrated that WJR had been diligent in attempting to obtain a ruling from Air Space on its original site and that there was good cause for a grant of the amendment, and urged that the transmitter change would not affect the theory of the other parties' cases. It also contended the lack of approval of a transmitter site by the Air Coordinating Committee constitutes good cause for allowing a site amendment at this time.

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[1] Section 1.365(a) provides in pertinent part as follows (after stating that applications may be amended as a matter of right prior to designation for hearing):

"Requests to amend an application after it has been designated for hearing will be considered only upon written petitions properly served upon the parties of record, and will be granted only for good cause shown."

4. The Examiner, after hearing oral argument as noted above, granted the petition for leave to amend. After finding that the efforts to eliminate objections to the original site appear to have been diligently pursued by WJR, and that "the record does not show an unreasonable basis for reliance by WJR upon the expectation for approval," he concluded that good cause for the amendment had been shown. The Examiner also concluded that the proposed change of site was not of such magnitude as to be considered substantial, that WJR had offered to bear the expense of certain of the engineering material related to the new site, and that if the amendment were denied, Trebit and Butterfield would probably have to undergo considerable expense on the air hazard issue on which WJR would be entitled to offer proof under the designated issues of the case.

5. In their petition for review, Trebit and Butterfield argue that the Examiner erred in all his conclusions. They contend, first, that good cause for the amendment was not shown because WJR did not exercise due diligence and had no legitimate ground for believing that it could obtain a recommendation for approval of its original proposal from the Chicago Subcommittee. Secondly, it is contended

that the WJR proposal does make a substantial change which would require a completely new engineering record. For their third reason, petitioners assert that because of the substantial change involved and the need for a new engineering record, they will be burdened by additional expense which would constitute prejudice to them, an abuse of the Commission's processes, and would not be conducive to the orderly dispatch of the Commission's business. And, finally, Trebit and Butterfield maintain that at this stage of the proceeding and contrary to the Examiner's conclusion, WJR is estopped from proving that its original site does not constitute a hazard to air navigation because, after delaying a decision by the Chicago Subcommittee, WJR chose to specify a new site rather than to appeal the adverse ruling to the Washington Airspace Committee. Petitioners also point to the fact that the Commission does not have Airspace approval of the new site proposed by WJR and that if this site is later disapproved, the Commission may be faced again with the problem presented here.

6. WJR, replying to the petitions for review, cites data designed to show that it exercised due diligence and has shown good cause, argues that the proposed new site does not constitute a substantial change, and contends it is not estopped from presenting evidence on the issue of whether its original site would constitute a hazard to air navigation. Trebit answers the WJR reply by saying that the burden of the reply seems to be that WJR

could readily prove that its original site would not constitute a hazard and, therefore, Trebit further contends that under these circumstances WJR is not justified in seeking to amend after engineering testimony has been received.

7. Having carefully reviewed the various documents and pleadings referred to above and having carefully considered all the relevant facts and circumstances, we have concluded that the Examiner was correct in finding that good cause exists for the allowance of the amendment even though we are not in entire agreement with his reasons for so finding. The bases for our decision are set forth in the following paragraphs.

8. Initially, we wish to note that in disposing of this matter we are compelled to keep in mind two circumstances, not peculiar to this case, with respect to television applicants securing the recommendations of Airspace for clearance of their proposed sites. First, an administrative process is involved in the recommendation of Airspace clearance by the appropriate Airspace Committees and subcommittees which requires consideration by Airspace of the various factors and interests in making its determinations. Necessarily, this determination involves a time element which will vary depending upon the facts of each particular case. Secondly, an overall public interest consideration requires the Commission to expand television service as quickly as possible. Thus, it has been necessary where applications are mutually exclusive, as in this case, to designate such applications for hearing and to go forward with hearings without having first received recommendations concerning proposed antenna sites from Airspace.

9. Having in mind the process by which advice is obtained from Airspace concerning antenna site questions, we are unable to conclude that, in the absence of a definite recommendation by Airspace, the opposition by one or more complainants to the proposed antenna site in a particular case is enough, per se, to require that an applicant, because he has knowledge of such opposition, forego the questioned antenna site without an opportunity to obtain a resolution of the initial objection. Of course, our conclusion is con-

ditioned; it must be demonstrated that the applicant had reasonable grounds for believing that a resolution of the objections could be obtained, and he must exercise due diligence in his efforts to obtain a resolution of the objections and a recommendation from Airspace. We believe that where these conditions are met, and in view of the aforementioned policy consideration requiring us to proceed with hearings without prior Airspace recommendations, the subsequent disapproval by Airspace, under the circumstances such as those in the instant case, constitutes good cause for permitting an amendment.

4104

10. With these factors in mind, we turn first to the question of whether WJR had reasonable grounds for believing that the objections to its antenna site could be removed, thus leading to eventual approval of the site. These are the pertinent facts: The Aeronautics Commission of Michigan stated that it did not object to construction of the tower at the site proposed by WJR. The Air Transport Association of America interposed an objection because of the proposed height of the tower but indicated no objection if the height of the tower was reduced. The City of Pontiac interposed objections, but, according to WJR, its position was arrived at without having all the facts in hand. The objection of the Air Safety Division of the Civil Aeronautics Administration appears to have been based upon the conclusion that the site and tower would be on the very edge of a civil airway and on the alleged fact that the tower would be a hazard to the large planes using the Municipal Airport and to the contemplated increased use of the airport following certain planned improvements and enlargements of the airport. As to the first CAA objection, there appears to have been disagreement on the facts, for in the statement of facts set forth in the memorandum presenting the WJR site plan to the subcommittee for

consideration at its September 24, 1952 meeting, it was indicated that the site would be located just outside the limits of the civil airway. As to the second, WJR contends that it had information which showed that the volume of air traffic using the airport had been exaggerated and that there was considerable doubt that the airport would be enlarged and improved. Under these circumstances, we are of the opinion that WJR had reasonable grounds for believing objections to its site could be eliminated. Indeed, the conditioned objection of the Air Transport Association was removed by lowering the height of the proposed tower, and the City of Pontiac altered its position by simply referring the problem to the Airspace Subcommittee.

11. Our conclusion is also supported by the action of the Airspace Subcommittee which had the most intimate knowledge of the situation. Although the subcommittee appears to have been prepared to arrive at a decision concerning the WJR proposal at its meeting of September 24, when WJR requested that the decision be deferred, the subcommittee, which was in the best position to ascertain whether the request was a reasonable one, i.e., whether WJR could reasonably expect to succeed in overcoming or eliminating the objections, granted the request. This action of the subcommittee with full knowledge of the facts lends strong support to our own conclusions on this question.

12. As we noted above, the second condition precedent to a finding of good cause in a case as this is that it must be shown that the applicant exercised due diligence in its efforts to eliminate the objections and obtain a ruling from the Airspace authorities. WJR, following the September 24 Airspace meeting, took various steps in an effort to eliminate or satisfy the objections which, we believe, demonstrate that it acted with due diligence in its effort to obtain

approval of its original site. The conditional objection of the Air Transport Association was met, as noted before, by lowering

4105

the overall height of the tower, this change being covered by an earlier amendment to the application. Sixty-seven pilots operating planes out of the Pontiac Municipal Airport signed a petition to the effect that erection of the tower originally proposed by WJR would be beneficial rather than hazardous to air traffic. Representatives of WJR had numerous meetings with various members of the Pontiac city government in an endeavor to show them that their objections were not well founded. Delays were encountered, but finally the city changed its position, in view of its lack of expert knowledge, and referred the entire matter to the Airspace Subcommittee. These facts demonstrate, we believe, that WJR exercised due diligence in pursuing its aim of attaining approval for its original site.

13. In reaching the conclusion that "good cause" exists for the allowance of the WJR amendment, we have recognized that the allowance of the amendment will impose some additional burden and expense upon Trebit and Butterfield. Although we have noted that WJR will absorb a portion of the cost attendant to the introduction of new engineering evidence by the preparation of rebuttal exhibits, we do not rely on this alone as a basis for rejecting petitioners' contentions that this additional burden necessitates the denial of the amendment. The possible harm which might devolve upon petitioners here because of this additional burden must be weighed and balanced against the undesirable effect which a denial of the amendment might have upon our TV hearing procedures. As we noted earlier herein, we have been faced with the

necessity, dictated by a public interest consideration requiring the Commission to expand television service as quickly as possible of proceeding with hearings before Airspace recommendations of antenna sites have been received. In following this procedure, it is evident that because of the time element involved in the Airspace determination of antenna site questions, a few instances, such as the one before us, might occur resulting in some hardship or burden on a few individual applicants. That our procedure has not resulted in general hardship upon television applicants is evident, for the instant case is the first of the many TV hearings being held in which unfavorable Airspace action has come at a time after engineering testimony has been completed. We think that, in view of this fact, the public interest has been and will continue to be served by following this procedure. Were we to deny the WJR petition to amend on the grounds of additional burden and expense to petitioners, such action would have undesirable results. The procedure we have established might be rendered ineffective, for it is unlikely that in future hearing cases any applicant not in possession of a favorable Airspace recommendation would be inclined to assume the risk of proceeding to hearing until such approval has been received. Thus, the hearing process would be delayed and the goal of expanding television service would be longer in attainment. Secondly, we would be penalizing an applicant because it followed and cooperated in the procedure we have established. Accordingly, after balancing the advantages and disadvantages which would flow from a grant of WJR's petition to amend, we find and conclude that the public interest

requires us to reject petitioners' argument and to allow the amendment in spite of the additional burden to petitioners.

14. In view of the foregoing, we need not determine to what extent the amendment is a substantial amendment. Nor do we find it necessary to discuss petitioners' contention that were the amendment denied, WJR would be estopped from showing that its original site would not in fact constitute a hazard to air navigation and that WJR's application should be dismissed.

15. On the 29th day of January, 1953, the Commission DENIED the above-described petitions of Trebit and Butterfield. In order not to delay the further hearing of the proceeding, the Commission notified the parties of its denial of the Trebit and Butterfield petitions, stating further that its detailed reasons would be enumerated in its Memorandum Opinion and Order to be issued at a later date. We now this 4th day of March, 1953, ADOPT the above Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE
T. J. Slowie
Secretary

JRB

Released: March 9, 1953

Signed By Above Mailed By Mar. 9, 1953 Mail & Files
(Seal)

* * * * * * * * * *

4202

Federal Communications Commission April 6, 1953

Comments Re Proposed Findings of Fact and Conclusions of WJR and Butterfield

Trebit Corporation files herewith its comments concerning the findings of fact and conclusions of law submitted by WJR and Butterfield in the above entitled proceedings.

These comments are confined to the major points upon which it is urged that decision be made. Time has not permitted detailed discussion of lesser matters.

Section 3.636

1. Section 3.636(a) has no relevancy in this proceeding.[1]

2. Both Butterfield and WJR argue that Section 3.636(b) requires denial of the Trebit application on the record in this proceeding. Both erroneously claim that the only evidence bearing upon this issue proffered by Trebit was WFDF Exhibit 2. Trebit Exhibit 2 demonstrates that there is no duplication of service from any of the stations except for the marginal overlap referred to in the footnote to paragraph 1 thereof. Except in that overlap area no person will receive service from more than one of the television stations now owned, or proposed in the Trebit application and in the pending WEOA application, by the Bitner interests. The record testimony, as detailed in Trebit's proposed findings, shows that the four Bitner AM stations in the same markets as proposed for television are operated and programmed completely independently of each other and that each is closely integrated as a local community operation in the city for which it is licensed. The testimony also demonstrates without contradiction that the two existing and two proposed Bitner television stations would be operated in the same way. The Commission, by its authorization to the Bitners to

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[1] This section prohibits common ownership of television stations which "serve substantially the same area". The only overlap involved so far as Trebit is concerned is a marginal overlap with operation authorized for WOOD-TV under an outstanding construction permit. None of the areas which receive Grade A service from WOOD-TV and WFDF-TV would receive such service from both stations. Less than 5% of the areas which would receive Grade B service from these stations would receive it from both by reason of overlap and the negligible overlap area involved falls in the Lansing trade area.

acquire their existing stations, has evidenced that the ownership and operation of such stations is completely consistent with Commission policy, Rules and Regulations. No departure from that policy is suggested or required by the Trebit application. . On the contrary, only a repudiation of Commission Rules and Regulations could be urged as a basis for denying the Trebit application under the pretended application of Section 3.363(b). There is no question but what WFDF-AM fosters competition among AM stations and that its proposed television station would foster competition among television stations and that it would provide a television broadcasting service distinct and separate from any existing service to the Flint area. It is equally clear that the operation of the proposed Trebit television station would not result in any concentration of television broadcasting facilities in a manner inconsistent with public interest, convenience or necessity. The Commission's actions in granting applications for television stations to NBC, ABC, Empire Coil, the Wrathall-Carman-Smith group, George Storer and CBS leave no room for doubt that the licensing to the Bitners of a television station in Flint, in addition to the two now licensed—one in Indianapolis and one in Grand Rapids—would be

completely consistent with Section 3.636(b).[2] (See also Keystone B/C Co. et al 4 RR 575).

Diversity of Ownership of Media

3. The question of the effect upon competition of common ownership of AM and television facilities in the same area and of moving picture theaters and television stations in the same area is discussed at length in the findings of the

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[2] Assertions of undue concentration of control being involved in the Trebit application are also made in connection with an argument on the so-called "diversity" point and will be treated under that heading.

parties herein. Butterfield is far and away the dominant interset in moving picture theater ownership in both the Flint and Grand Rapids areas. WJR is the licensee of the most powerful AM station in the state of Michigan and renders service in all of the area which would be covered by its proposed television station. Trebit is the licensee of WFDF which operates with 1 kw and a directional antenna and renders service to some of the area which will be served by its proposed television station. Grandwood Broadcasting Company, owned by the same interests as own Trebit, operate a 5 kw AM station (with directional antenna at night) which covers a portion of the area which will be covered by WOOD-TV in Grand Rapids. WFDF and WOOD AM stations together cover much less of Michigan than does WJR AM. Butterfield's theater ownership is dominant in a far greater area than that covered by either the existing WOOD and WFDF AM stations or the television station proposed in Trebit's pending application and under WOOD's outstanding construction permit. It is conceded that these facts would not be a basis for denying any of the applications involved in this proceeding but it is contended that they have a bearing on the comparative evaluation of the applications. To whatever extent this may be true, it is obvious that the Trebit application would introduce far less extensive a combined control of two media of mass communication than would the granting of either the Butterfield or the WJR application.

4205

4. The somewhat curious contention is made by Butterfield and echoed by WJR that since Grand Rapids is the second market in Michigan and Flint the third market, it would be improper to grant the Trebit application because such action would give the Bitners television stations in the second and third markets in the state. Butterfield appears to have forgotten that it has pending a television

station for Grand Rapids as well as for Flint. Both Butterfield and WJR, with a blindness difficult to explain, ignore the fact that they each claim as a basis for preferring their applications to Trebit, that they cover Detroit as well as Flint and that Trebit does not. The reasoning by which it can be held sound policy to permit coverage of the first and third markets by one applicant as a public benefit and to condemn coverage of the second and third by another as a public detriment escapes us. This is particularly true in the light of the fact that the population of the city of Detroit is 1,850,000; the population of Flint, 163,000; the combined population of the two cities being in excess of 2,000,000. The population of Grand Rapids is 177,000, making the combined population of Flint and Grand Rapids some 340,000—approximately one-seventh as much as the combined Detroit and Flint populations. If to the Bitner interests there is added the population of Indianapolis—427,000, and Evansville—129,000, the total populations in all four cities is well under a million—less than half of the Detroit-Flint populations. The population of Cleveland alone, where the same interests as control WJR have a 50 kw AM station and a pending application for television station, is over 900,000—almost as much as Indianapolis, Evansville, Flint and Grand Rapids put together. It is quite obvious that if size is dangerous, the public has least to fear from Trebit.[3]

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Site and Coverage

5. Butterfield and WJR contend, in essence, that since from their respective sites they can put a minimum signal over the city of Flint, it is of no consequence whatsoever that Trebit puts a far superior signal across the city (as

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[3] The population figures used in this paragraph are from the 1950 Census, rounded off to the nearest thousand.

well as to the metropolitan, trade and other areas tied to Flint by social and economic bonds). This is a novel approach to comparative consideration of applications. If adopted, it would preclude the possibility of decision between competing applicants all of whom meet minimum qualifications. It is urged, despite Commission decision to the contrary, (Westinghouse Radio Stations, Inc., et al, 8 RR 381) and with the blandest indifference to consistency. The Trebit showing with respect to the comparative service in the city of Flint and its metropolitan and trade areas was confined rigorously within the framework of the Commission's Sixth Report and Order and its Rules and Regulations promulgated thereunder. The iso-service contours of the three proposed stations were superimposed on these areas in strict accordance with the procedure prescribed in the Commission's Rules and by use of its curves. The number of receiving locations which would receive what the Commission's Sixth Report and Order and its Rules require as the field intensity for Grade A service in these areas was computed by a straightforward, simple and unassailable procedure which was not contested or contradicted or in any manner impeached by any witness in this proceeding. This procedure is precisely the procedure prescribed in the Ad Hoc Report upon which the Commission's allocation is based. It demonstrates a staggering superiority from the standpoint of service to Flint and its metropolitan and trade areas of the Trebit proposal over the Butterfield and WJR proposals.

6. Both Butterfield and WJR argue the alleged superiority of their proposals on the basis of population within their proposed Grade A and Grade B contours. Any attempt to draw a conclusion relating to service from the number of people residing within the predicted Grade A or Grade B contour of a proposed station must fail because there is no relationship

between the number of people who may reside within either of such contours and the number of such people who will receive service from the station proposed. The whole theory of the Commission's allocation and the use of such predicted contours is antithetical to any such procedure. Such contours provide only a first step in a procedure for determining the number of receiving locations that will receive a prescribed signal intensity for a prescribed percentage of time. To correlate receiving locations and population, it is necessary to relate population density with the percentage of receiving locations in the areas of varying population density. A procedure for so doing set out in Volume II of the Ad Hoc Report was not adopted by the Commission, probably because of the very substantial error factor which inevitably is involved, particularly if only a few contours are used and those contours fall at substantial distances from the transmitter. Nothing is more certain on the record in this proceeding than that population distribution in the predicted Grade A and Grade B areas of WJR and Butterfield is as far as it can be from uniform density. A substantially higher degree of uniformity in population density is obviously to be found in the city of Flint in its metropolitan and in its trade area than in the predicted Grade A and Grade B areas of the proposed Butterfield and WJR stations. Furthermore, the very high percentage of receiving locations that will get Grade A or better service 90% or more of the time within these areas insures maximum service to them from the Trebit proposal. In short, the area of speculation concerning the probability of the service obviously intended by the Commission's allocation to Flint and its related area is reduced to a vanishing minimum so far as the Trebit application is concerned and involves substantial doubt so far as the WJR and Butterfied applications are concerned.

7. WJR and Butterfield each urged that height above mean sea level is a factor to be considered on a comparative basis in evaluating their site as against the Trebit site. No engineering basis for this contention is given. In view of the fact that height above average terrain and not height above sea level is the determining factor, it is not strange that no support for this contention is advanced. Except as a measure of the desperation of WJR and Butterfield, it must be ignored in this proceeding.

8. WJR makes an unavailing appeal to precedent by citing the applications granted Gulf Television Co., File No. BPCT-1108 and Versluis Radio & Television, Inc., File No. BPCT-1208 in an attempt to bolster its plea that its site should be accepted. None of the facts with respect to either of these cases (both involving non-comparative consideration) are given by WJR. A casual glance at any map of the United States is enough to demonstrate one critical and decisive difference between any station designed to serve the Houston area or the Muskegon area and one designed to serve the Flint area. The difference is that Houston is on the Gulf Coast and Muskegon is on the Coast of Lake Michigan. Section 3.683(e) provides that the Gulf of Mexico and Lake Michigan be excluded from the computation of square miles of coverage in either Grade A or Grade B areas. The necessity for moving away from the Gulf in the case of Houston and away from Lake Michigan in the case of Muskegon to reduce wasted signal across water obviously requires consideration in the case of a station proposing to serve either the Houston area or the Muskegon area. No such element exists in the case of Flint.

Network Affiliation

9. Neither WJR nor Butterfield deny that any network affiliation available to either of them would be equally available to Trebit. The record shows that Detroit is within the Grade A contours of both WJR and Butterfield and that none of it is within the Grade A contour of Trebit. The record also shows WJR (Exhibit 70) that none of the existing Detroit stations at present or operating as proposed will provide a Grade A service in the city of Flint, or to any appreciable portion of its metropolitan or trade area under Section 3.658(b). No Detroit station could therefore obtain a network affiliation agreement which would

preclude affiliation with the proposed Trebit station. On the other hand, any of them could under that Section preclude under an affiliation agreement an affiliation by its network with either WJR or Butterfield operating as proposed. This section of the Commission's Regulations is more than merely technical. It expresses a basic Commission policy against excessive duplication of programming in the same area and against network service being kept out of communities where it can be rendered without such excessive duplication. The Trebit proposal promotes this policy. The proposal for affiliation made by Butterfield flouts it. WJR, recognizing the policy and the practical exigencies of commercial operation, proposes an admittedly inferior network service for Flint as being the only one it can get in view of the superior importance of the Detroit market to network advertisers. Reality requires the recognition that no network will prefer a Flint affiliation to a Detroit affiliation and that a Flint affiliation for any network depends on its being consistent with a Detroit affiliation and not at odds with it, either on policy or commercial grounds. Trebit's proposal meets both the policy and the practical test.

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Federal Communications Commission April 13, 1953

Statement of Chief, Broadcast Bureau on Proposed Findings of Fact and Conclusions of Law Submitted by the Applicants

At the conclusion of the hearing in the above-entitled proceeding the Examiner inquired from Bureau Counsel the position of the Broadcast Bureau with respect to filing Proposed Findings of Fact. At that time Bureau Counsel stated that he did not intend to file Proposed Findings of Fact, and as a result of that and previous discussions on the record he indicated that he would attempt to file a Reply to the Proposed Findings of Fact and Conclusions filed by the parties.

Proposed Findings of Fact and Conclusions of Law were not filed by the Broadcast Bureau on the merits of the controversy between the applicants because of the shortage of personnel, and the period of time required in order to adequately prepare such findings. The Proposed Findings of the parties were filed on March 30, 1953, and a period of 7 days was provided for the filing of replies, which was subsequently extended for one week. A diligent effort was made by the Broadcast Bureau, in the time provided, to prepare a reply commenting on the Proposed Findings of Fact and Conclusions filed by the parties with respect to the merits of the proceeding.

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However, it was discovered that a period of two weeks was totally inadequate and that, in effect, this experimental procedure of filing comments on the merits of the case in the form of a reply to the Proposed Findings of Fact and

Conclusions by the applicants required more time than the initial preparation of Proposed Findings of Fact and Conclusions. Therefore, rather than delay the submission of the case to the Examiner for decision the Broadcast Bureau has been and will be unable to file such a reply or comments.

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FEDERAL COMMUNICATIONS COMMISSION

APRIL 30, 1953

Initial Decision

4245

APPEARANCES

Reed T. Rollo, Neville Miller and R. Russell Eagan, on behalf of WJR, The Goodwill Station, Inc.; William J. Dempsey and Harry J. Ockershausen, on behalf of Trebit Corporation; Lester Cohen and Parker D. Hancock, on behalf of W. S. Butterfield Theatres, Inc.; and Frederick W. Ford and Stanley B. Cohen, on behalf of the Broadcast Bureau of the Federal Communications Commission.

Preliminary Statement

1. In this proceeding WJR, The Goodwill Station, Inc., Trebit Corporation and W. S. Butterfield Theatres, Inc. (hereinafter sometimes referred to as WJR, Trebit and Butterfield, respectively) are applying for a construction permit for a new commercial television station to operate on Channel 12 at Flint, Michigan. The applications are mutually exclusive and those of WJR and Trebit were designated for hearing on July 11, 1952 in a consolidated proceeding. Butterfield's application was consolidated on November 5, 1952. The issues are: to determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations; to determine the type and character of the program services proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A

and Grade B field intensity contours; to determine whether the construction and operation of the proposed stations would be in compliance with the Commission's Rules and Regulations governing television broadcast stations; to determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation; and to determine on a comparative basis which, if any, of the above-entitled applications should be granted.

2. Hearings were conducted at the termination of which all three applicants filed Proposed Findings and Replies thereto. The Commission's Broadcast Bureau has filed a document indicating that the press of other duties precluded its filing either Proposed Findings or a Reply to Proposed Findings.

3. On August 11, 1952, Trebit filed a Motion to Strike all issues except Issue No. 5. The Commission by Order of October 15, 1952 (FCC 52-1325) denied said Motion. On January 9, 1953, WJR filed a Petition to Amend requesting authority to specify a new transmitter site. The petition was opposed by Trebit and Butterfield. On January 14, 1953 the petition was granted by the Examiner (FCC 53-M-26). Petitions for Review of this action were filed by Trebit and Butterfield and were denied by the Commission on January 29, 1953. A Memorandum Opinion and Order concerning this action was released on March 9, 1953 (FCC 53-99).

4. The participants in this proceeding agreed upon and prepared a stipulation relating, among other things, to the legal and financial qualifications, corporate matters and orgnizations, and other interests with respect to each applicant. This stipulation was accepted by the Examiner. In essence the agreement on the stipulation by all three appli-

cants and by the Commission's Broadcast Bureau provides a sound basis in fact and law upon which to predicate findings that all three applicants are legally and financially qualified to construct and operate the proposed station. Accordingly, findings on these three issues in this initial decision will be limited to the fullest extent practicable.

5. At the outset it may be mentioned that the various officers, directors, stockholders and employees of the applicants or their parent or affiliated organizations have all been normally active in the local civic and service organizations of the communities in which they reside, as well as associated with various national or local trade or professional associations in their respective fields of endeavor. Unless such activities are specifically connected with Flint organizations or Flint needs, or unless they are of exeptional importance or merit, they will not be elaborated upon in these findings.

6. The alleged violations of Commission regulations and sound broadcasting practices by the former controlling stockholder of WJR have not been held by the Commission to disqualify the present stockholders and nothing appears in this record to require deviation from such decision. Moreover, this record does not show that such alleged practices can be attributed to present management or ownership.

7. The alleged activities engaged in by Butterfield and made the subject of private anti-trust suits have not been established in this record. It is also significant to note that no federal or state anti-trust action has apparently ever been instituted against this applicant. In the light of the lack of any proof in this record concerning actions which might have constituted violations of anti-trust law, and the lack of judicial determination as to the effect of the actions alleged in the private suits, no finding can here be made substantially militating against Butterfield in this connec-

tion, particularly when we take into consideration the factors discussed in our Report on Uniform Policy of Violations of Law, 1 R.R. 495.

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I. *The Area Involved*

8. Flint, Michigan has a population of 163,143 and Genesee County, which is co-extensive with the Flint metropolitan area, has a population of 270,963. The Detroit standard metropolitan area which lies southeast of Flint, comprises Macomb, Oakland and Wayne counties and has a population of 1,849,568. The populations of Saginaw and Bay City are 92,918 and 52,523, respectively.

9. The "Flint Composite Trade Area," which for purposes of this proceeding comprises a composite of the outer limits of Flint trade area as compiled by four marketing services, extends roughly 35 miles to the east and west, 15 miles to the south and southeast, 15 to 20 miles to the north, and 35 miles to the northeast of the city boundaries of Flint. While we have doubts as to the preciseness of the areas designated by each of such services, and while exact information as to the methods and indicia used in defining such trade areas is not before us, we accept this composite as an aggregate of the opinions of some experts in marketing fields as to the reasonable merchandising influence of Flint. Such estimates will here be considered in the light of our own general experience and the evidence concerning Flint trade in this record. Flint, due to its size and to the number and quality of commercial and service establishments, is able to draw trade in varying degrees from the surrounding areas, but primarily in northerly directions where the communities are smaller than Flint. Detroit is able to draw trade, in view of its size and facilities, in the direction of Flint and will normally draw trade from Flint proper, whereas Flint normally will not be able

to draw trade from Detroit or from those communities south of the Genesee County line located between it and Detroit. As a practical matter the Flint trade area stops at about the Genesee County southern line. Pontiac, a community located to the north of Detroit, is in effect a continuation of the Detroit urban area and is contiguous thereto.

10. Flint is a community operating independently of Detroit, and with various service, charitable, philanthropic and educational institutions which also operate independently of Detroit. Flint has: a) Five AM stations, one of which is licensed to Trebit. None of these stations is affiliated with CBS radio network. WJR, Detroit, which has a substantial listener response in Flint, lays a median signal intensity of 6.8 m/vm over Flint and provides CBS network programming; b) Two FM stations, one of which is licensed to the Regents of the University of Michigan; c) Three UHF channels assigned, two of which are commercial. Construction permits have been issued for the two UHF commercial television stations; d) One daily, one Sunday, one semi-weekly and six weekly newspapers; e) 24 motion picture theatres (two of which are closed), and of which seven of the theatres (one of which is closed), are owned and operated by Butterfield. Normally the only Flint first-run theatres are three operated by Butterfield. There are also three drive-in theatres owned by non-Butterfield interests.

11. Six television channels are assigned to Detroit, VHF Channels 2, 4 and 7, all of which are assigned to existing stations and UHF Channels 50, 56 and 62 with Channel 56 being reserved for educational use. One VHF and two UHF channels are assigned to Windsor, Canada, a community contiguous to Detroit and whose stations can reasonably be expected to provide substantial service to Detroit. Pontiac has one UHF assignment. Two UHF channels are

assigned to Saginaw and one VHF and two UHF channels are assigned to Bay City of which one of the UHF channels is reserved for educational use.

II. FINANCIAL QUALIFICATIONS

12. The estimated construction costs are: WJR—$1,852,000; Trebit—$551,000; Butterfield—$838,000. Estimated operating expenses and income for the first year are: WJR—$530,000 and $800,000; Trebit—$500,000 and $500,000; Butterfield—$667,000 and $777,000, respectively. WJR has current assets in excess of current liabilities in the amount of $2,368,000 with an earned surplus of $2,200,000 of which $2,000,000 has been reserved by the Board of Directors to meet the cost of constructing the proposed station. $1,250,000 is represented by United States securities especially reserved for such construction. Trebit has several alternative means of financing the construction of this proposed station and a station in Evansville for which WFBM, Inc. is an applicant, any one or combination of which may be used depending on circumstances. One involves a credit arrangement with RCA over a period of years for the purchase of technical equipment; another is a commitment from WFBM, Inc. by which that company will furnish up to $700,000 for the purchase and construction of the station; and a third involves a line of credit to WFBM, Inc. by the Mellon National Bank and Trust Company of Pittsburgh in the amount of $750,000 which may be drawn upon for financing WFBM, Inc. affiliates. WFBM, Inc. has current assets of over $1,000,000 of which $665,000 is in cash. The current liabilities are $419,000. Butterfield has assets of more than $6,000,000 including current assets of more than $3,600,000. Of the latter, $950,000 is in cash and 2,350,000 is in United States government securities. Current liabilities are $800,000. All three applicants or their parent or affiliated corporations show substantial earnings over the past few years. On the basis of

the showing made in this record, each is financially qualified to construct and operate the television station applied for.

III. ENGINEERING CONSIDERATIONS

A. *Heights, Powers, Sites and Predicted Contours*

13. WJR and Trebit propose effective radiated power of 316 kw, visual, 158 kw, aural. Butterfield proposes 312 kw, visual, and 156 kw, aural. All three applicants propose an antenna height of approximately 1,000 feet above average terrain. The WJR and Butterfield locations are on a high plateau southeast of Flint, the only high ground around the perimeter of Flint.

14. Distances in miles from the respective sites to the boundaries of Flint and Detroit are:

	WJR	*Trebit*	*Butterfield*
Nearest Flint boundary	16.8	4.4	15
Farthest Flint boundary	24	11.1	22
Nearest Detroit boundary	27	54	29
Farthest Detroit boundary	40	66	42

Detroit lies within the predicted grade A and the 77 dbu contours of WJR and substantially all of this city lies within said contours of Butterfield. None of Detroit lies within Trebit's predicted grade A contour but a substantial portion thereof lies between the predicted grade A and grade B contours. Trebit's predicted grade A contour encompasses Saginaw and Bay City, cities approximately 30 and 40 miles, respectively, northwest of Flint. Butterfield's and WJR's predicted grade A contour encompasses only a portion of Saginaw and the remainder of Saginaw and all of Bay City lies within these applicants' grade B contours. Butterfield's and WJR's predicted grade A contour encompasses the city of Ann Arbor where the University of Michigan is located but such city lies between the grade A and grade B contours of Trebit. The United States land areas in square miles within the respective grade A and grade B contours computed pursuant to Section 3.7684(e) of the Commission's Rules, and the United States populations therein are as follows:

	WJR	*Trebit*	*Butterfield*
Grade A—area	6,320	6,320	6,514
Grade A—population	3,620,660	929,100	3,612,602
Grade B—area	10,800	11,640	11,340
Grade B—population	4,302,550	3,779,480	4,319,986

15. Each of the proposed operations meets the provisions of the Commission's Rules and Regulations regarding channel utilization and technical standards. Each applicant has established that its proposal would not constitute a hazard to air navigation provided that the painting and lighting requirements of Part 17 of the Commission's Rules and Regulations are complied with.

16. While each applicant meets the minimum 77 dbu signal required to be provided over the entire Flint community by Section 3.685 of the Commission's Rules, the Trebit signal, due to the location of the transmitter, is substantially stronger over the city and metropolitan area of Flint, than the signals of WJR and Butterfield. All of the Flint "composite trade area" as defined above, lies within the predicted grade A contour of Trebit and substantially all of such area lies within the grade A contour of the other two applicants. A higher signal intensity will be available over a greater part of the Flint "composite trade area" from the Trebit proposals than from the other two.

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17. Existing VHF stations in Detroit have on file with the Commission certain applications for increase in heights

and powers. The change of location and increase in height and power applied for will not bring the city of Flint within the WWJ-TV (affiliated with NBC) grade A contour but will bring it within the grade B contour. The same situation would obtain with respect to WXYZ and WJBK except that the WXYZ grade B contour would not encompass the city of Flint.

B. *Site Selection*

18. A. *WJR.* WJR before amendment proposed a site 21 miles from Detroit and 22 miles from the city of Flint, which site favored Detroit over Flint from a terrain standpoint. The site met the minimum requirements of the Commission's Rules and Regulations concerning service to Flint. Because of air navigation problems the site was changed to another in the same high plateau area approximately 5 miles nearer Flint. This site, as well as the original site, was selected to meet the engineering requirements of the Rules and Regulations concerning separations and minimum field intensities over Flint; to secure a high ele-elevation; and to maximize the population within the grade A and 77 dbu field intensity contours or, in other words, to cover as much of Detroit as possible with a high intensity signal.

19. B. *Butterfield.* Butterfield's site is in the same plateau area as WJR's. The site was recommended by Butterfield's consulting engineer on the basis of elevation and of meeting Commission separation and signal intensity requirements. Detroit coverage was not one of the factors considered in the choice of the Butterfield site.

20. C. *Trebit.* Trebit chose a site to the north because it felt that there would be less problems with respect to network affiliation; in order to minimize its signal to the south in the direction of Detroit and maximize it to the north; and in order to provide a strong signal over the city

of Flint and the area from which Flint normally draws trade. The site was chosen prior to the issuance of the Commission's Sixth Report and without knowledge of the tower height and powers which would be permitted.

C. Other Signals

21. Trebit offered certain exhibits concerning other signals and adjacent channel operation. These were admitted in evidence under strict caveat by the Examiner. In substance one can generalize from these exhibits, from the Commission's experience, and from the Sixth Report and Order, that more signals are now available in the Detroit area and in the area to the south of Flint than in the area to the north of Flint, and that this pattern will continue. This is due not only to only the number of stations assigned or in operation (see Paragraph 11 above) but also because it is probable that station assignments will be taken up more readily in thickly populated areas than in those areas where economic support might be more doubtful.

22. With respect to the adjacent channel interference, all transmitter locations met the minimum requirements of the Commission's rules. There are no specific provisions in our rules with respect to the computation of adjacent channel interference. However, it is axiomatic that the lesser the distance between transmitters, the greater the interference in the area between the transmitters, and vice-versa. No weight can be given to the question of adjacent channel interference on the basis of this record in view of the possibility of possible interference from the assignment to Cadillac, with respect to which the Trebit transmitter is closer than the other two sites, in comparison to similar possible interference to the other two applicants from Toledo operations; and in view of the completely spec-

ulative nature of such computations on adjacent channel interference as might be made.

D. *Studio and Transmitter Facilities*

23. WJR proposes to construct studio and transmitter buildings which it estimates will cost $766,000 and $180,000 respectively. The site of the studio building is to be determined. The proposed programming will be feasible from the new studios. In addition, the existing AM studios in the Fisher Building in Detroit will be modified so as to provide studios for the origination of remote television programs. The equipment proposed for the Flint studios is adequate for its purposes. It is substantially duplicated by equipment proposed for the Detroit studios with the exception of the fact that the lighting is more elaborate in the Flint studios and that the Detroit cameras will be portable rather than studio cameras, thereby being available for remote program purposes. Virtually all proposed programs may successfully be produced in the Detroit studios.

24. Trebit proposes the remodeling of a building in Flint which it has recently purchased and to construct a transmitter building. The proposed studio and technical facilities are adequate for its program plans. While there are no proposals for remote broadcasts, the cameras are portable and WFBM mobile equipment will be available. The cost of preparing the studios for television operation is estimated at $63,000 and will be borne by Landsmore Corporation, a WFBM subsidiary. Studio equipment is estimated at some $67,000, part of which equipment will be made available through construction by WFBM technical employees.

WFBM technical employees.

25. Butterfield proposes to remodel one of its theatres in Flint and to make certain additions thereto thereby provid-

ing adequate studio and office facilities to implement its proposed program schedule. The estimated cost of the modification and addition is about $260,000. The equipment proposed complies with the provisions of the Commission's rules relating thereto and will permit the production of the proposed programs. No mobile unit is planned. An adequate transmitter building is proposed.

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IV. CORPORATE MATTERS AND LEGAL QUALIFICATIONS

WJR

26. WJR is a Michigan corporation authorized to engage in television broadcasting. Of 800,000 authorized shares, 520,000 are issued and 516,533 are outstanding. These are held by 1,183 stockholders of whom approximately 70% reside in Michigan and own approximately 39% of the stock. Mrs. Frances C. Richards, a director and a resident of California, owns 22.4% of the stock and the Estate of G. A. Richards, of which Mrs. Richards is Executrix, owns 26.1% of the stock. Mrs. Richards and her daughter have life estates in the estate and the corpus is to be distributed in accord with various bequests only upon death of both. Mrs. Richards, therefore, controls almost 50% of the stock of the corporation and in view of the public holding of 39% by 1,171 stockholders, all of whom own less than 1% it can be considered that actual control rests in Mrs. Richards. In addition, the G. A. Richards Life Insurance Trust of which Mrs. Richards and Mrs. Moore are beneficiaries owns 8% of the stock and Mrs. Richards' daughter, Mrs. F. Sibley (Rozene) Moore owns 1½%. The WJR officers and directors and the stockholders of more than 85% of the stock are United States citizens with no statutory disqualifications.

27. *Mr. John F. Patt,* Cleveland, Ohio, is President and Director; Messrs. *Worth Kramer, George F. Leydorf* and

F. Sibley Moore are Vice-Presidents and Directors; Messrs. *George Cushing* and *Gordon Gray,* Pleasantville, New Jersey, are Vice-Presidents; *Mr. William G. Seibert* is Secretary-Treasurer and Director; and *Mr. Selden S. Dickinson* and *Mrs. Frances C. Richards,* Beverly Hills, California, are Directors. All reside in the environs of Detroit unless otherwise specified and with the exception of Mr. Moore (the husband of Rozene Moore) and Mrs. Richards, are not members of the immediate Richards family. With the exception of Messrs. Gray and Moore the foregoing are all stockholders. Each own less than 1% of the stock, with the exception of Mrs. Richards. At an annual meeting which was to be held on April 1, 1953, 40,000 shares, or approximately 7% of the then outstanding stock, was to be made available to the mentioned directors (except Mrs. Richards) and to others to be named by the Board of Directors, to provide incentive to management, and integration of ownership and management. As the proposal was originated by the controlling stockholder it can be assumed that it will meet the necessary approval of the Board of Directors and of the stockholders.

28. WJR is legally qualified to be licensee of the television station it proposes.

Trebit

29. Trebit is a Michigan corporation authorized to engage in television broadcasting. It has authorized and outstanding 3,000 shares of common stock, all of which is

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owned by WFBM, Inc., an Indiana corporation.
Lester W. Lindow, Trebit manager, has received an option for a period of five years to purchase 5% of the common stock of Trebit. WFBM, Inc. acquired a 50% interest in WFDF in 1948 and the remaining 50% in March 1952. *H. M. Bitner* of Princeton, New Jersey is Chairman of the Board,

President and Director; *H. M. Bitner, Jr.*, Indianapolis, Indiana, is Vice-President and Director; *Lester W. Lindow*, Flint, Michigan, is Secretary and Director; and *Melvin C. Green* of Indianapolis, Indiana, is Treasurer and Assistant Secretary of Trebit. All are United States citizens with no statutory disqualifications. Mr. H. M. Bitner votes the stock of Trebit held by WFBM, Inc.

30. WFBM, Inc. is authorized 100,000 shares of common stock and 10,000 shares of non-voting preferred stock of which 50,600 of the common and 4,060 of the preferred have been issued. Mr. Bitner, Sr. is Chairman of the Board and Mr. Bitner, Jr. is President and Director. Evelyn H. Bitner, the wife of Mr. Bitner, Sr., is Director. Messrs. Sharp, Green and Kiley are officers of the Corporation. None of the officers or directors have statutory disqualifications. The Bitner family group comprising Mr. Bitner, his wife, his son and his daughter, own the controlling interest in WFBM, Inc. Of the 14 stockholders, six, including H. M. Bitner, Jr., are employees of WFBM-AM. With the exception of Bitner, Jr. each owns less than 1% of the stock of the corporation. The remaining stockholders in WFBM, Inc. are either related to, or are close personal friends of, the Bitner family; or are related to employees of WFBM, Inc. None of the officers, directors or stockholders of WFBM, Inc. is a resident of Michigan.

31. Trebit is legally qualified to be the licensee of the television station it proposes.

Butterfield

32. Butterfield is a Michigan corporation authorized to engage in television broadcasting. The officers and directors are all residents of Michigan, but not of Flint, and are citizens of the United States with no statutory disqualifications. *M. F. Gowthorpe* is President, Treasurer and Director; *William A. Ruble* is Vice-President, Secretary

and Director; *Paul W. Seippel* is Vice-President and Director; *H. Edward Stuckey* is Vice-President; and *Howard Mickelson, Roscoe Bonisteele* and *J. Joseph Herbert* are Directors.

33. Butterfield is authorized to issue 200,000 shares of common and 4,000 shares of preferred stock. None of the preferred stock is issued or outstanding. The common stock is divided into Class A, B and C shares, each share being entitled to one vote. The owners of Class A stock elect three directors, the owners of Class B stock elect two directors, and the owners of Class C stock elect one director. Ninety-two thousand of 130,000 authorized shares of Class A stock; 37,500 of 40,000 authorized shares of Class B; and 15,000 of 20,000 authorized shares of Class C stock are issued and outstanding. Bijou Theatre Enterprises (hereinafter referred to as Bijou), a Michigan corporation, owns 100% of the issued and outstanding Class A and C stock of the applicant and the Regents of the University of Michigan (hereinafter referred to as Regents) owns 100% of the issued and outstanding Class B stock of the applicant. Bijou, therefore, owns 74% and Regents owns approximately 26% of the issued and outstanding stock of the applicant.

34. The officers and directors of Bijou are all citizens of the United States with no statutory disqualifications. They comprise Messrs. Gowthorpe, Ruble and Mickelson, who are also officers or directors of the applicant, and Mrs. Goodwin and Mrs. Allen, who are the widow and daughter, respectively, of W. S. Butterfield. Bijou is authorized to issue 60,000 shares of common stock, of which 51,900 are issued and outstanding and of which 49,296 are held by the Trustees of the Butterfield Trust. These shares were owned by W. S. Butterfield at the time of his death

in 1936. The Trustees are Messrs. Gowthorpe, Seth R. Bidwell, Lester Dodd and the Central Trust Company, Lansing, Michigan, all of whom possess no statutory disqualifications. The income of the trust, subject to certain bequests and annuities, is payable to the widow, children, and grandchildren of Mr. Butterfield and the corpus is to be distributed upon death of the widow and the last survivors among the children of the deceased, to the grandchildren of the decedent.

35. The Regents of the University of Michigan is a body corporate established by the Constitution of that State and comprises eight Regents, each of whom is elected by voters of the state. All Regents are citizens of the United States, with no statutory disqualifications. Messrs. Bonisteele and Herbert, two of the Regents, are also directors of the applicant corporation.

36. Butterfield is legally qualified to be the licensee of the television station it proposes.

V. Other Interests and Pertinent Background Material

37. The other interests of the applicants and pertinent background material on selected officers, directors and stockholders, including other broadcast interests, are as follows:

WJR

38. *WJR* has been the licensee since 1927 of Class 1A standard broadcast station WJR, Detroit, 760 kc, 50 kw, U., affiliated with CBS; and the licensee since 1952 of Class B FM station, WJR-FM, Detroit, Channel 242, ERP, 24 kw, U.

39. *Frances S. Richards* and the *Estate of G. A. Richards* hold a majority of the stock of The WGAR Broadcasting Company (hereinafter referred to as WGAR), WJR and WGAR are therefore under common control. WGAR is

the licensee of Class II standard broadcast station WGAR, Cleveland, Ohio, 1220 kc, 50 dk, AD-1, affiliated with CBS; the licensee of Class B FM station WGAR-FM, Cleveland, Channel 258, U., ERP, 31 kw; and has pending an application for a construction permit for a television station in Cleveland.

Mrs. Richards formerly was a stockholder and director and the Estate formerly held a controlling interest in KMPC, Los Angeles, California. Mrs. Richards did not appear at the present hearing.

40. *John F. Patt* has been in radio since 1922; was formerly President and Director of KMPC, Los Angeles, California, and is presently President, Director and minority stockholder of WGAR. In the event of a grant he will act in an executive supervisory capacity for the Flint, Detroit, and Cleveland properties. At the outset he will devote approximately one week per month in connection with the Flint station and thereafter as much time as is required.

41. *Gordon Gray* is Vice-President of WGAR, was formerly Vice-President of KMPC, and was connected with other radio stations since 1944. He is in charge of the New York office. *F. Sibley Moore* is Director and minority stockholder of WGAR, was formerly Director of KMPC, and an emplyee of WGAR. He will devote part of his time to the television operation. *Rozene R. Moore* is the daughter of Mrs. Richards and formerly a stockholder in KMPC. *Worth Kramer* has been in the broadcasting field since 1929 and was associated with various broadcast stations prior to his employment by WJR in 1946. He is general manager of WJR and in event of a grant expects to devote approximately 25% of his time to the Flint station. *George C. Leydorf* is a radio engineer and has been connected with the technical aspects of broadcasting since 1920. He

joined the staff of WJR in 1946 as Chief Engineer and is now Vice-President in Charge of Engineering. In the event of a grant he will be responsible for the construction and the technical supervision of the station. For the first year he expects to devote approximately 80% of his time to the Flint station and thereafter to devote his time to the Detroit and Flint stations. *George D. Cushing* is Vice-Presiden of WJR, moderator of one of its programs, and will appear as moderator on the television version.

42. The other officers, directors and key personnel have had assorted legal and business experience and some of those with long connection with the Richards stations have held positions or minority interests in KMPC and WGAR. Detailed biographical sketches of officers, directors and staff personnel were submitted and indicate that a substantial number have been associated with WJR for many years and have the experience necessary to fill their present positions.

Past Record of WJR

43. For the benefit of its employees, WJR maintains and pays for a pension plan, a group insurance plan, a bonus plan, a hospitalization and surgical plan, and follows the practice of maintaining employees on full salary when ill. These practices will be continued with respect to television personnel in the event a permit is granted. WJR, in general, has subscribed to the industry code of the NARTB and in instances where it felt

that the broad standards of the code were not adequate, particularly in the field of advertising, it rejected programs which it believed contained advertising excesses or objectionable material. WJR encourages its employees to participate in community affairs. Sustaining time has been made available for civic, cultural, educational, and welfare organizations without charge. Time for religious programs has not been sold and will not be sold. WJR submitted a comparison of program schedules which it has proposed in connection with various renewal applications recently filed before the Commission, and its actual program logs. There are no substantial deviations from such proposals and actual performances.

44. In the history of its AM station operation, WJR has had a very limited number of programs of local Flint interest. One, featuring the activities of the Mott foundation, a Flint institution, was carried in October 1952. Two others were aired in December 1952 and in January 1953 and involved speeches in Flint by a WJR sportscaster.

45. In January 1951, an advisory council was formed composed of representatives of civic, cultural and other community organizations to aid the station in its public service activities. The board meets at least once a year but individual members are consulted on other occasions. In the event of a grant WJR proposes to form a similar board in Flint.

Past Television Activities and Preparation for Television

46. WJR received an experimental television authorization in 1931 and carried on experiments for two years. In the late thirties or early forties, WJR again considered applying for a television authorization. An application was filed in 1944 for a channel in Detroit and dismissed in 1946. Dismissal was primarily due to the belief that the then pending CBS petition for color standards would be approved. WJR was affiliated with CBS at the time. When such standards were not approved WJR filed, in November 1947, an application for Channel 5 in Detroit, which application was the subject of a hearing held in March of 1948. Before action was taken the application was caught in the "freeze" and the channel applied for was deleted in the

Commission's Sixth Report and Order. The remaining three VHF television channels were already assigned at the time of the mentioned order.

47. WJR participated in the television allocation proceeding seeking, by various petitions, to have an additional VHF assignment made to Detroit. Briefly these pleadings attempted to secure an additional VHF channel for Detroit and opposed other petitions which might hinder such requested Detroit assignment. These included the petition of Trebit which was attempting to secure an additional VHF assignment for Flint (Paragraphs 468 to 499, Sixth Report and Order).

48. While WJR considered applying for a UHF station in Detroit, it did not apply for such a Detroit assignment because of its belief that a Channel 12 operation in Flint would offer more opportunity for a mass service and for a successful operation. In view of the overlap in grade A contours that would result from its Flint proposal and a Detroit UHF station it could not file for a Detroit channel as well.

49. In order to prepare for television, WJR executives have attended television conferences, visited existing stations and studied available technical material. In connection with the proposed Flint station, a check list was made of various Flint organizations and activities and WJR staff members visited the community and contacted representatives of these organizations. The mentioned contacts were made in the latter part of 1952, particularly at a luncheon held in Flint on December 17, 1952 at which some 25 Flint civic leaders attended.

Trebit

50. *WFBM, Inc.* is licensee of WFBM (AM), 1260 kc, 5 kw, U., CBS, and WFBM-TV, Channel 6, all four networks,

Indianapolis, Indiana; and WEOA, 1400 kc, 250 w, U., CBS, Evansville, Indiana. It has an application pending for a construction permit for a television station in Evansville. It is the owner of 95% of Grandwood Broadcasting Company, licensee of WOOD (AM), 1300 kc, 5 kw, U., NBC, and WOOD-TV, Channel 8, all four networks, Grand Rapids, Michigan. It is the sole stockholder of Landsmore Corporation, a Michigan corporation recently organized for the purpose of holding land and properties for the broadcast activities of WFBM, Inc. WFBM, Inc. has no other interest.

51. There is no overlap of the predicted grade A services between WOOD-TV and the proposed Flint station. There is a slight overlap of grade B services within the city of Lansing or its trade area. There is no other overlap among Bitner controlled television stations or applications. Each television facility will be programmed, operated, and advertising time thereon sold, independently of each other and in order to meet the needs of the community in which the station is located. No joint or combination rates are used or proposed. Programming experience and technical know how will be exchanged but will not alter the independence of the operation.

52. *H. M. Bitner, Sr.* is President and Director of Grandwood, Chairman of the Board, President and Director of Landsmore, and Chairman of the Board of Directors of WFBM, Inc. Mr. Bitner first became active in radio as a member of the Hearst organization. He was publisher of the Pittsburgh Sun-Telegraph when radio station WCAE was purchased in 1931 by Hearst. Mr. Bitner, as a Hearst official, voted the Hearst stock in WCAE and was a Director. In 1945 he disposed of his stockholdings in the Hearst corporations and severed connections with the Hearst organization and with radio station WCAE. He held an interest in radio station WFEA, Manchester, New Hamp-

shire from 1944 to 1948. Mr. Bitner, Sr. visits the various properties about once a year but he is kept advised by written and oral reports concerning the operation.

53. *H. M. Bitner, Jr.* is the son of H. M. Bitner, Sr.; President, Director and General Manager of WFBM, Inc.; and Vice-President and Director of Grandwood and Landsmore corporations. He is in charge of the over-all supervision and direction of the various WFBM properties. Mr. Bitner, Jr. keeps in touch with the various properties by written and oral reports and visits each of them from three to four times per year.

54. *Lester W. Lindow* is Secretary and Director of Trebit, and in addition Secretary and Director of Landsmore, and has been General Manager of WFDF since 1948. His first radio position was with WCAE in Pittsburgh in 1935 where he became Commercial Manager and was later General Manager of WRNY, Rochester, New York. He is presently General Manager of WFDF and will act in that capacity for the television station in the event of grant.

55. *Melvin C. Green* acts in a supervisory auditing capacity for the various Bitner interests, including Trebit.

Past Record of WFDF

56. WFDF has been a Flint institution for many years, having been first licensed in the 20's. It has received wide community acceptance and has been of significant service to the community making available, without charge, time and expert help for civic, cultural, educational, and welfare organizations and programs concerning such service groups. While the Trebit interest in the station did not begin until 1948, the established pattern of cooperation did not change on the assumption of such control. Witnesses representing service organizations which testified in this proceeding

were not even aware of changes of ownership in the station over the past years.

57. In general, WFDF has substantially met the needs of Flint and its service areas. There is no evidence of substantial deviations between the representations made to the Commission concerning programming in the various applications for transfer and for renewal, and the actual programming service delivered. Part of the religious programs have been, and are being, commercially sponsored but such sponsors are not groups attacking other faiths or groups and the sponsored programs do not contain repeated and excessive appeals for financial support. Some commercially sponsored religious programs have been refused by WFDF and aired over other local Flint stations.

Past Television Activities and Preparation for Television

58. In April of 1948 the Board of Directors of Trebit decided to apply for a television station in Flint but before the application could be prepared and filed, a freeze was imposed by the Commission. Trebit participated in the Commission's television allocation proceedings seeking to have an additional VHF channel assigned to Flint. In this connection the petitions filed by Trebit to achieve this purpose were opposed by WJR, which was attempting to secure an additional VHF channel for Detroit.

59. In the spring of 1952, Trebit organized a program advisory committee whose members represent a satisfactory cross section of Flint major groups and organizations. Three meetings of this committee were held during 1952 at which proposed television program needs and plans were discussed in some detail. The committee was formed specifically for television and not for AM inasmuch as necessary contacts and cooperation with respect to AM programming were already in existence. Similar groups were

formed about the same time in connection with WFBM's Evansville, Indiana television application but there are no such committees for the Indianapolis and Grand Rapids television or AM properties. In July of 1952 Trebit acquired two cameras on a loan basis from its affiliated company, WFBM, Inc., for the purpose of training station personnel particularly with respect to programs involving local service and charitable organizations. A substantial number of closed circuit programs have been produced since that time with the active participation of the mentioned local organization.

Butterfield

60. *W. S. Butterfield, Inc.,* directly or through affiliates, has interests in 105 motion picture theatres in 35 cities in the State of Michigan. These theatres are either owned or leased and all are operated by either Butterveld or subsidiary or affiliated companies. Butterfield owns 7 theatres in Flint of which one is closed. Three of the seven normally operate as first-run houses. Butterfield has no theatre interests in Detroit. The licensing of film for all theatres is done by Butterfield's home office. Aside from the theatre and related property interests, Butterfild has no other interests except the instant application and as an applicant for a new commercial television station at Grand Rapids, Michigan.

61. The basic reason for the purchase of stock in Butterfield by *Regents* was its belief that it would prove a sound investment in the communities they both served. While certain interest has been shown by Regents in the protection of its investment and in the over-all policies and operation of Butterfield through the two Regents who served as directors, it has not actually participated in the day-by-day operation of Butterfield or its subsidiaries and affiliates. Moreover, while Regents participated in and approved

the proposed entry into the television filed through the action of their representatives on the Butterfield board, and while it appears that some general supervisory interest will be exercised in the proposed television operations by the mentioned Regent representatives, we do not find that Regent will actively participate in the day-to-day operation of the proposed television properties. In effect Butterfield concedes that such television operations, under broad policies set by the Board, will be carried on by expert technical and executive personnel hired by Butterfield for the purpose.

62. Regents is the licensee of non-commercial FM station WUOM, Ann Arbor, Michigan and permittee of FM station WFUM, Flint, Michigan.

63. In the operation of its theatres Butterfield attempts to meet standards of good taste in its films and advertising. It has had the policy over the past years of developing amateur talent in various local communities, including Flint, and has cooperated with local AM and television stations in that connection. It is the policy to employ local

people and to promote from within the organization. It has a group life insurance program paid for by the company and maintains a general benefit fund. Television employees will be eligible to participate in these programs and the employment policy will also be applicable. It requires its theatre managers to take an active part in community life. Butterfield has had a policy of cooperating with and participating in local philanthropic, civic and service organizations and has actively implemented such policy in Flint.

64. *M. F. Gowthorpe* was born and educated in England, arriving in the United States in 1920. Shortly thereafter

he was employed as an auditor by the predecessors of Paramount Pictures, Inc. and he continued in that organization and its successors until 1948. His duties were primarily as a member of the theatre department handling financial and corporate matters. He resigned from Paramount and on February 1, 1949 became President, Treasurer, and Director of Butterfield, a position which he still holds. He first became connected with Butterfield in 1934 or 1935 as a Director representing Paramount, which then held a stock interest in Butterfield. This interest was sold to Regents in 1950.

65. *Paul W. Seippel* entered the theatre business in 1926, and in 1928, while a student at the University of Michigan, he entered the employ of Butterfield as head usher and has been employed by Butterfield since that time. He has risen to the position of Vice-President and Director in Charge of Theatre Operations. Mr. Seippel resided in Flint from September 1936 until 1951, with the exception of a period of time in the Armed Forces, and was active in several civic and charitable organizations in the community.

66. *H. Edward Stuckey* has been in the theatre field since 1923, primarily in connection with booking and licensing activities. In 1950 he left Paramount to take charge of licensing attractions for Butterfield theatres. He will not participate in the licensing of film for television. Films for television are not now obtained from distributors of films for theatres.

67. *William A. Ruble* had a business background before joining the Central Trust Company of Lansing, Michigan, in 1933. He is a lawyer and now serves as Executive Vice-President and Director of the mentioned bank. *Howard Mickelson* has been associated with the Central Trust Company of Lansing since 1928 and is now President,

Treasurer and Director. *Roscoe O. Bonisteele* is an attorney practicing law at Ann Arbor, Michigan and a member of the Board of Regents. *J. Joseph Herbert* is an attorney practicing in Manistee, Michigan and also a member of the Board of Regents.

68. None of the foregoing has had previous radio or television experience. With the exception of Mr. Gowthorpe, who will devote 75 to 90% of his time to television, the remaining officers and directors will not participate in the day-to-day operation of the station although such help and advice as may be desired from them will be made available. As a practical matter the station will be operated as an independent unit responsible to Mr. Gowthorpe and to the Board, which has over-all policy responsibility.

Past Television Activities and Preparation for Television

69. Butterfield selected Flint as one of the cities for which to apply for television because it is a growing community and in view of the identity of Butterfied therein over the past years through its theatre holdings. Butterfield originally applied for one of the UHF assignments but amended to request Channel 12. Butterfield did not participate in the allocation proceedings.

70. Mr. Gowthorpe over the past few years has familiarized himself with material on television operation and has visited a number of television stations. In the preparation of the initial application Butterfield secured the service of the program manager of an existing station in Rome, New York. A very limited on the spot exploration of local needs and potentials was made in connection with such initial program proposal. Shortly after the application was designated for hearing another consultant was employed to assist Butterfield in preparing changes in its program proposal. This consultant has had substantial

background in broadcasting and television, including experience with one of the major networks.

71. Two short trips were taken by the latter consultant in late 1952 to the Flint area at which time contacts were made with several local philanthrophic and service organizations concerning programs and obtaining their cooperation thereon. The major changes in the program format, however, had been formulated prior to the mentioned trips. A local advisory organization is proposed and although personnel has been selected and has consented to serve, the committee is not yet in operation.

Staff

72. *WJR*—Messrs. Patt, Kramer, Leydorf and other executives of the company will hold the same positions with respect to the Flint station as they now hold with WJR and will be available on a part-time basis. The present program director of WJR will become the full-time program director of the television station. A transmitter engineer of WJR will become the engineer in charge of the television transmitter. In addition to the mentioned executives serving on a part-time basis, WJR proposes to employ a staff of 53 persons to operate the station. The staff numbers were estimated from reports on staffs of existing stations, but without a detailed breakdown relating such staff to specific programs and to operating procedures. However, the proposed staff appears to be adequate to operate the facility. Changes with respect to increasing or decreasing personnel may be made as the need is indicated. Part of the Detroit AM staff will be used in the Detroit television studios on a part-time and on a when needed basis. That portion of the proposed television staff which is identified appears to have the requisite qualifications to fill the positions for which they are proposed. The sales staffs of the AM and the televi-

sion stations will be separate and distinct and different national representatives will be employed by the station.

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73. *Trebit*—It is planned to integrate the operations of the AM and the television stations, employing a single staff. This method has been found to be satisfactory in connection with the other Bitner properties. Mr. Lindow will be general manager of both operations and the present program director, chief engineer, etc. will continue in their positions for both operations. WFDF presently employs 43 persons on its staff and it is proposed to employ an additional 51 persons. The time of two employees, and part-time of a third, will be devoted to local news gathering and local news programs. The proposed staff appears to be adequate for the operation of the facility and those members identified are qualified. The sales staff will represent both the AM and television facilities. The executives of WFBM and Trebit will exercise general supervisory control over the operations, as set forth in greater detail in connection with the comments above on the individual officers and directors.

74. *Butterfield*—Butterfield proposes to employ a staff of 68 persons to operate its television station. Operating committees within the staff will be organized for regular consultations with respect to operating plans, improvement of service and carrying out of policies. The proposed staff personnel has not yet been selected but qualified individuals to fill the positions will be obtained. The number of staff proposed was reached through a detailed study of specific personnel necessary to operate and program the station in accord with the proposals and taking into consideration the hours of operation. General supervisory powers will be exercised by the Board of Directors and Mr. Gowthorpe. The television consultant who helped pre-

pare the application will be available in a non-resident advisory capacity for the first year of operation. It is planned to increase the number of meetings of the Board of Directors from two to four times per year. The officers and directors of Butterfield, aside from Mr. Gowthorpe, will not participate in the day-to-day operation of the television station, although making available such advice as may be desired.

Network Affiliation

75. All three applicants propose to affiliate with a network if possible and their program proposals envisage such affiliation. Trebit and Butterfield used NBC programs for the preparation of their proposed schedule and have had discussions with officials of this network which, in their opinion, indicate interest by such network for affiliation should the applicants be successful. Other testimony indicates disagreement as to the availability of NBC affiliation by Butterfield. WFDF, the Trebit AM station, is presently affiliated with NBC having recently made a change in affiliation from ABC.

76. WJR, a CBS Detroit radio affiliate, proposes a Dumont television affiliation and has had discussions with officials of this network which leads it to believe that possible affiliation with such network is feasible in the event of a grant. WJR has not conferred with other networks, primarily because it believes that in view of the present affiliation of such networks with existing Detroit VHF stations, and the fact that the

predicated grade A contour of WJR would cover all of Detroit and therefore result in very extensive duplication with the service of existing Detroit stations, WJR would not be able to obtain such other network affiliations. Dumont was chosen in order to provide a "new and distinctive service" to the area including in such area, metropolitan Detroit. Dumont would not have been chosen by WJR had it felt that other networks were obtainable. Should the opportunity of improving its service present itself in the future in the event of a television grant, WJR would avail itself of such opportunity, including obtaining an affiliation with another network. However, WJR would not be interested in obtaining such other network affiliation, even if available, if the network were also to continue its affiliation with a Detroit television station.

Rates

77. The following initial basic rates were proposed: WJR—$450 per hour; Trebit $250 per hour; Butterfield—national rate $300 per hour and a local rate of $250 with a 25% increase at the end of six months. All of the initial rates are at best, estimates, and subject to revision in the light of the situation in the community at the time of initial operation, and of later changed conditions. One of the basic factors in computing rates is the circulation, or potential audience, of the station. Circulaion is also affected by the quality of the signal and the availability of duplicating programs. While the potential Detroit coverage is an important factor in the formulation of rates for WJR, the record is not precise as to the extent that it would influence said rates. It would affect national rates set by Butterfield, but not local. Detroit coverage, in view of the location of the field intensity contours, is not a substantial element in the determination of Trebit's rate structure.

Program Proposals

79. A comparative analysis of the proposed typical weekly schedule of all three applicants is as follows:

Types	*WJR*	*Trebit*	*Butterfield*
Entertainment	69.86	73.9	64.91
Religious	4.28	3.8	3.28
Agricultural	2.48	2.6	2.09
Educational	4.07	3.0	6.28
News	7.55	7.5	5.65
Discussion	4.07	2.2	5.65
Talks	7.69	7.0	6.70
Sports	—	—	5.44
Total	100.00	100.0	100.00

Classes	*WJR*	*Trebit*	*Butterfield*
Network Commercial	9.95	42.9	43.75
Network Sustaining	17.41	6.4	5.65
Recorded Commercial	34.14	12.7	18.22
Recorded Sustaining	4.97	18.1	10.40
Wire Commercial	—	0.2	—
Wire Sustaining	—	2.3	—
Live Commercial	21.85	11.8	3.14
Total Commercial	65.94	67.6	65.11
Total Sustaining	34.06	32.4	34.89
Broadcast Hours	110+	117	119+
SA	224	450	329
NCSA	57	150	130

80. All three of the applicants will follow approximately the same policies with respect to news programs, discussion programs, political candidates, cooperation with local organizations, commercial time, advertising, etc., except to the extent hereinafter referred to. Moreover, as can be noted from the breakdowns above, all applicants have provided time for local religious, educational and civic programs. The local civic and service organizations will cooperate in the preparation and presentation of programs pertaining to the specific groups with whichever of the applicants receives a grant. The proposed programs are well rounded and meet substantially the needs of the community.

81. There are the following specific distinctions which merit further comment: (1) only Trebit proposes commercially sponsored religious programs. These programs will be of the same character as those commercial religious programs presently aired over its AM facilities and heretofore referred to. (2) Trebit proposes the use of part of its staff in the

capacity of local news gatherers and stresses local news sources to a substantially higher degree than either Butterfield or WJR. (3) WJR proposes programming which will result in a "new and different" service to the Detroit area where its signal is received. (4) WJR proposes to use its Detroit studios and facilities for the origination of programs in such city when such programs may not be either available from a Flint studio, or in other unspecified instances, although not to an excessive extent. Neither Butterfield nor Trebit propose remote programs although Butterfield will originate programs in Ann Arbor and establish a micro-wave link to such city at such later time as the situation so warrants in order to cooperate with the University of Michigan in the preparation and production of programs. Trebit will have available the facilities of its affiliates for remotely originated programs but has no specific plans for such use.

Conclusions

82. We have before us three applicants for the VHF television channel assigned to Flint, Michigan. The record shows, and it is conceded by all parties, that each of the three is legally, technically and financially qualified. Manifesty, as only one application may be granted, we are again faced with the familiar but nonetheless extremely difficult problem of deciding which of the applicants is to be preferred. In the ultimate analysis our function in these com-

parative cases is to choose the qualified applicant with the highest degree of probability of instituting, and of continuing to provide, the best and the most needed service to the communities proposed to be served.

83. There are many differences among applicants, and all those which have a material bearing on the quality and probability of implementation of proposals, on operating practices and policies, and on the distinctive needs of the communities to be served, must be weighed and considered in relation to each other and in the light of the circumstances of each particular case. There is no slide rule or balance which can tell us the exact degree of importance that any such difference should be given in our final choice. It is evident that any such exact mathematical measurement is not feasible, and that depending upon the factors in a specific case, any particular distinction between applicants may be of greater or lesser importance in the final determination.

84. All three applicants are corporations controlled by stockholders who are not residents of Flint or personally closely associated with that community. All three propose an operation with limited active integration between management and controlling stockholders. The option for purchase of 5% of the common stock made available to the Trebit proposed manager, or the minority holdings of certain of the active WJR directors and officers, is of insufficient importance in this over-all setting to merit decisive weight. Those controlling the beneficial majority interest in the three applicants or in the parent corporations or other legal entities, are

all persons of good moral character and can be relied upon to make a sincere effort to implement, through normal corprate channels and through the employment of competent employees, the proposals which they make in the applications. None of the applicants is entitled to a sifinificant preference on this score.

85. Trebit is licensee of a regional radio broadcasting station located in Flint and serving Genesee County and adjacent areas. WJR is licensee of a clear channel radio station located in Detroit but serving Flint and Genesee County with CBS programming. Butterfiield operates a chain of moving picture theatres in Michigan, including a substantial number of houses in Flint and in cities and towns where the proposed television service will be received, with the exception of Detroit. From the foregoing it is apparent that all three applicants have an interest in other media for the dissemination of mass communication and entertainment to Flint and its environs. Moreover, all three have interests in media competing with television for consumer time and two have interests in a medium which will also compete with television for the advertiser's dollar.

86. We believe that a regional station with the type of operation of WFDF probably has greater influence on the local community, and is more of a sounding board for community problems and projects, then the theatres of the community, or a clear channel radio broadcast station located in another city incidentally serving the community. However, it is but a question of degree and undoubtedly all three applicants through their other operations exercise a role in the dissemination of mass communications to Flint and Genesee County. But, in view of the many other vehicles for mass communication or entertainment in the area, as set forth in our findings, the licensing of the facility in question to any of the three applicants would not here result in an undesirable concentration of control. That the local radio station might be in a position to exert a greater influence on the community than the Detroit station or a number of Flint theatres is not a matter of sufficient import to be a terminative factor in this proceeding.

87. With respect to the competition for advertising expenditures, both of the applicants with radio interests have stated that they propose to push both radio and television as fully as possible, taking into consideration only sound business practice and the needs of the advertiser. Neither proposes or evisages joint rates and on the basis of this record and in the light of the other radio and television services available to the advertiser in the area of the other radio and television services available to the advertiser in the area proposed to be served, it does not appear that competition would be significantly lessened should either of the AM affiliated applicants be granted this facility. We do not believe that use of the same staff for radio and television by Trebit will here appreciably affect competition.

88. It is manifest that radio and the motion picture theatres, as well as any other media for entertainment, education, or even mere relaxation, compete with television for "consumer time," that is, time

available for the type of pursuits mentioned. This is particularly true in relation to the non-television interests of the applicants. But the mere existence of such competition for "consumer time" should not of itself create a bar to the control of competing media unless it can be shown that such control would be undesirable or unfair. There is a place for radio, television and the motion picture theatre in that each medium is more able to fulfill certain public and commercial needs than the other media. The problem of competition among these media has recently been considered by the Commission in the Paramount case (Docket 10031, *et al.*). While we do not say that the further development of television, or different factual circumstances may not, in some situations, and in other areas, indicate the desirability of there eliminating common control over television, and radio or motion picture exhibitng facilities, this record does not here reflect such a situation and the differences among applicants in this connection is not considered a deisive factor in the choice in this case.

89. Trebit is the only applicant with other operating television affiliations. The controlling interests in WJR, through WGAR, have an application pending for a television station in Evansville.

90. The only overlap among the Bitner television stations and television applications is the slight overlap in the grade B contours which would be occasioned between Trebit, if granted, and the proposed operation of WOOD-TV in Grand Rapids with higher power and antenna height. An examination of the provisions of Section 3.636* of our rules reveals that Subsection (a) does not operate as a bar to a grant to Trebit in view of the above mentioned limited nature of the overlap between the Flint and Grand

Rapids facilities. With respect to Subsection (b) (1) it is manifest that the television broadcasting service Trebt proposes at Flnt is distinct and separate from existing services. In connection with Subsection (b) (2) the record reveals that each of the two Bitner existing television stations and each of the two Bitner proposed stations will be operated and programmed independently of each other and with an effort to integrate each television station as a local community operation in the city for which it is licensed. While our rules may not be precise as to the showing which is required from an applicant under the purview of this section, it is our opinion that the showing made in this case is sufficient to meet a reasonable minimum and at least establish a presumption that the proposed operation would not be in violation of Section 3.636(b). This presumptin remains as there is no proof in the record submitted by any of the other parties showing that the ownership, operation, or control of this facility by the Bitner interests would be in manner inconsistent with public interest, convenience, and necessity. The limit of five television stations would not be reached even if both of the pending Bitner applications would be granted and in view of the non-existence of overlap with respect to the other two we do feel that the conclusion would be warranted that Section 3.636 precludes the grant in question.

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* 3.636 Multiple ownershilp.—(a) No person (including all persons under common control) shall directly or indirectly, own, operate, or control more than one television broadcast station that would serve substantially the same area as another television broadcast station owned, operated, or controlled by such person.

(b) No person (including all persons under common control) shall, directly or indirectly, own, operate, or control more than one television broadcast station, except upon a showing (1) that such ownership, operation, or control would foster competition among television broadcast stations or provide a television broadcasting service distinct and separate from existing services, and (2) that such ownership, operation, or control would not result in the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity: *Provided however,* That the Commission will consider the ownership, operation, or control of more than five television broadcast stations to constitute the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity.

91. WJR and Butterfield urge that even if Trebit may not be completely disqualified by the provisions of Section 3,636, consideration should be given thereto on a comparative basis. We have in the past indicated that some preference would be given to applicants without other broadcast facilities in order to insure continued competition through the infusion of new blood in the industry. The extent of the preference and the weight to be accorded thereto will naturally vary from case to case. Here we have one applicant with two existing television stations, and the other two applicants with pending applications which may or may not come into fruition. We also

have the additional factor of all three of the applicants in effect, being non-residents of Flint. The infusion of new blood, particularly if it is a local and highly integrated applicant, may merit substantial weight and consideration. However, this is not the case here. While on the question of lack of other operating television interests some slight edge might be given to Butterfield and WJR over Trebit, such "plus" counts are, under the factual situation in this case, so limited as not appreciably to affect the scales in the ultimate decision.

92. All three applicants propose satisfactory technical equipment and studio facilities from which the proposed programs may successfully be produced. WJR proposes a new and modern building substantially more costly and more elaborate than the facilities proposed by the other two applicants. As both Butterfield and Trebit will be able to implement their proposals for a well rounded program service from their proposed studios, we do not feel that the elaborateness and the costliness of the WJR proposal merits any significant preference. To find otherwise would be to put an unnecessary premium upon expenditures which, although desirable and useable, are to some extent superfluous.

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93. However, WJR will have remote studios in Detroit from which it could produce virtually any program proposed. The technical equipment at the Detroit location substantially duplicates the equipment in Flint with the exception of th elaborateness of the studios and the lighting equipment. This is undoubtedly an advantage for the production of programs which might normally not be available from Flint locations and normally would result in some preference. But in view of the peculiar factual circumstances in this case consideration must also be given the possibility that the availability of this equipment and studios in Detroit

might well result in the production of certain program material which, while of interest to the over-all WJR predicted service area, might be of more immediate interest to the Detroit community and of lesser interest to Flint and its environs. Moreover, in some instances programs which would be more essentially local to Flint might be replaced. The Detroit studios must also be considered in the light of the factors resulting from the WJR transmitter location and discussed in detail later. Accordingly, such preference as WJR may deserve for the Detroit studios is at least balanced by the latent risks resulting from such studios and in any event is not considered a determinative element.

94. The previous record of WJR and Trebit in the AM field lead us to the conclusion that we may reasonably rely upon their actual programming conforming substantially with their proposals. Moreover, we find no basis in this record to doubt the good faith or probable performance of Butterfield in this respect.

95. All three applicants propose the formation of community advisory groups, each of which would be substantially similar in makeup, personnel and powers. We recognize that Trebit has formed these groups but recently and only in those areas where it has television applications pending, and that these groups, as such, are not being used in connection with their AM operations. WJR has established one of these groups for its Detroit AM operation but such group too is of recent vintage. Butterfield, not being a broadcaster, has not heretofore formed any broadcasting advisory group and has not attempted to establish a similar organization with respect to its motion picture operations. We are not unmindful of the fact that the establishment of, or proposal to establish, these groups might well have been motivated by a desire to impress this Commission favorably in comparative hearings. On the other hand we are aware of the history of informal cooperation

among all three applicants with local service and civic organizations and that in substance the proposed advisory groups would merely formalize an existing and necessary relationship, although insuring even closer cooperation and continuation of existing contacts. We cannot prefer any of the applicants over the others in this connection. However, we will give recognition to the degree of preparation for proposed "public service programs" by Trebit through the existence and development of closer contact with local Flint organizations and referred to hereinafter in more detail.

96. Regents, through the testimony of the two of its members acting as Butterfield directors, indicates a broad interest in the development of television and the use of such facilities by the University of Michigan. Perhaps a closer liaison might result between Regents and a television licensee should Butterfield be granted the license, but this liaison would not occur on an operating level. In view of the willingness of Regents to cooperate with any grantee, we cannot conclude the Regents' interest in Butterfield would substantially affect the operation levels of the University and the station, no matter which of the three applicants were to be preferred. Such preference as Butterfield may merit in this connection is too slight to exercise much weight in our ultimate decision.

97. All three applicants propose satisfactory staffs which will be able to implement the program proposals and operate the station in the event of a grant. The Trebit staff, inasmuch as it will be integrated with the AM stations, is identified in greater detail than WJR which proposes only a limited integration of its AM staff with television operation. Moreover, that portion of the proposed Trebit television staff which is now employed in the AM operation is better rooted in Flint and more cognizant with local prob-

lems because of its residence and its daily contacts in the community. WJR also designated various specific individuals who will fill key positions in the new enterprise. Butterfield, on the other hand, does not name specific persons to fill the staff positions that will be open and proposes to employ qualified personnel. While some preference must be shown to both Trebit and WJR on staff, inasmuch as those identified appear to be qualified substantially for the proposed positions, and in view of the local character of part of the identificed Trebit staff, we recognize that Butterfield will be able to employ competent personnel and that such distinctions in staff as exist are not sufficient to be determinative.

98. There are, however, two substantial difference among the three applicants which, upon consideration, point the way to the grant to one of them as better serving public interest, convenience, and necessity. Broadly, these two significant differences fall in two fields. The first concerns the site chosen for the transmitter location and the effects flowing therefrom; and the second proposed programming and preparation.

99. With respect to the transmitter sites, two are located in the high area some 16 miles southeast while one is located some 5 miles to the northwest of the limits of Flint. The predicted contours from the two southern sites make available another VHF service to substantially all of Detroit. While the engineering minimums of our rules are met by all three applicants, the strength of the signal laid over a substantially greater part of the Flint "composite trade area" is subsantially stronger from the Trebit location.

100. WJR candidly admits being motivated by a desire to make its service available to Detroit in choosing its transmitter site by stating that its purpose was to "maximize"

population within its service area. Butterfield, on the other hand, maintains that the Detroit coverage is fortuitous and was not a factor in choosing the site and that the principal element, aside from meeting technical minimums, was height. Trebit placed its site to the north of Flint and closer to the city limits in order to have a stronger signal in the city and to maximize its service towards the north and minimize it towards the south of Flint in order better to serve the Flint "trade area." While the record is not as complete as might be desired in this connection it is our belief that the Trebit contentions with respect to the sources of trade are sufficiently established by the testimony of local witnesses and by the economic facts of life of which we may take notice to warrant our conclusion that the trading area of Flint will normally extend primarily in directions away from Detroit. That is to the east, to the north, and to the west of Flint.

101. Aside from separation requirements, our rules are not precise with respect to the criteria which is to be fofowed by applicants in choosing transmitter sites other than specifying certain minimum field intensity signals over the entire principal community to be served. Section 3.685(b) states that "In general, the transmtting antenna of the station should be located at the most central point in the highest elevation available." That this language is subject to various interpretations is apparent in view of the differences in engineering advice received by the applicants and the dissimilar interpretations in the record concerning the meaning of this clause. However, we may say that it is only Butterfield who apparently chose the southeast site primarily on the basis of height. Trebit did not interpret the height provision as requiring a site located at a substantial distance from the main community to be served solely because of the existence of such high ground.

102. It appears to us that a reasonable interpretation of such language, as applicable to this case, is that the "cen-

tral point" referred to should be associated with the immediate area of the community to be served. In other words, while this language would not require the location of a transmitter on top of the highest point within a stone's throw of the main post office, it would also not require the location of the transmitter at a site so far from the community as to result in low signal intensity over the community solely because greater height would be obtainable at that point. Moreover, the results flowing from the selection of the southern sites, which results will be discussed in detail, impel us to conclude that Trebit is to be given significant and substantial preference on the basis of site selection. This conclusion is not in conflict with our previous holdings in that the distances between the transmitter sites here are so substantial, and the consequences resulting from the choice of such transmitter sites are so important, as to make the difference one of the decisive elements in this case.

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103. Our attention has been invited to the construction permits granted by us for sites located some distances from stations assigned to Muskegon and Galveston, respectively, which also permit a strong signal to other communities. It should be noted that the grant in each of those cases was not the result of a comparative hearing and moreover, the site location was such as to result in a considerably larger land area coverage and in the elimination of wasted signal over water. Accordingly, we do not consider these two prior grants as establishing precedents applicable to the present case.

104. There are six factors affected by the choice of sites to which we wish to direct attention and on which we base our conclusion that Trebit is to be preferred on this point. The first is in the differences in signal strengths over the principal community to be served and over its trading area.

The second is that the southern location will in all probability make available a signal receivable by a substantially greater number of people than may be expected from the location to the north of Flint. We will not and we cannot make any determination as to the number of people who may receive service from any of the locations. As stated in our decision on the petition in the *Westinghouse, et al.* case (Docket No. 9138) "our tools are not sufficiently sharp to permit such precise determination." However, the situation here is such that it can reasonably be concluded that substantially more people will receive service from the southern than from the northern transmitter location. Moreover, the differences in populations residing in the predicted grade A intensity areas is so great as to override normal error factors. While conceding that service may be available to a larger number of persons from the southern site, we cannot limit our consideration to that quanitative factor. We must also consider the qualitative elements, one of which is the needs of the different areas which are proposed to be served as viewed from the standpoint of other services available.

105. In our Sixth Report and Order we listed certain principles to be followed in the assignment of television facilities. In accordance with these principles we assigned to Detroit six channels. We were also cognizant of the three channels available to Windsor, Canada, and the assignment to Pontiac, contiguous communities, all of whose stations may reasonably be expected to provide a strong signal to the Detroit area. We passed upon the contentions of WJR and others to make available another VHF channel to Detroit and the present allocation table reflects our final decision concerning the distribution of channels to the general Michigan areas involved. We must not lose sight of the fact that Channel 12 was assigned to *Flint,* and not to *Detroit and Flint.*

106. Reference to our existing permittees and licensees and a glance at our assignment table is sufficient to show that substantially more services are now available to the residents of the south of Flint and in the Detroit area than to those residing to the north of Flint. We may also assume that in the development of the television station pattern, this situation will undoubtedly continue. Accordingly, we cannot say that the fact that more persons might be served through the southern location of the transmitter site outweighs the fact that the persons who would be served to the north of Flint by the northern transmitting location would be persons receiving less service than those to the south.

107. But we are not only limited to the comparison of population within predicted contours and to the services available. A third effect directly attributable to the transmitter location is on the possibility of nework affiliation by the Flint VHF station, and on the reception of certain network programs in Flint and in Genesee County. To summarize, WJR and Butterfield, from their sites, can encompass Detroit within their grade A contours, while Trebit can not. Moreover, Flint proper will not fall within the grade A contours of the Detroit VHF stations with either present or proposed heights and powers. The three Detroit VHF stations are presently basic affiliates of NBC, CBS and ABC.

108. Section 3.658(d) of the Commission's Rules prohibits territorial exclusivity clauses in network agreements, from preventing another station serving a substantially different area, from affiliating with the network in question. Therefore, to the extent that the applicants herein may be considered as serving "a substantially different area." Detroit affiliation by a network would not necessarily preclude a Flint affiliation as well. However, the mentioned rule

further states that it is "not to be construed to prohibit any contract, arrangement, or understanding beween a station and a network organization pursuant to which the station is granted the first consideration in its area upon the programs of the network organizations." We are not here required to pass on the applicability of this section to the proposed network affiliations of the three applicants, nor is any language herein to be construed as final determination of any question which might arise pursuant to the provisions of the mentioned section of the rules. However, in view of the substantial overlap of grade A signals within the Detroit metropolitan area of Detroit stations and of WJR and Butterfield's proposed stations, it appears to us that such overlap might well result in precluding affiliation by WJR or Butterfield with networks affiliated with Detroit VHF stations. It is reasonable to assume that the Detroit network affiliate would object to the duplication of its signal in Detroit with another signal of grade A intensity or better; would maintain that "substantially different" areas would not be served; and would therefore, invoke the "first consideration" clause. This situation might not necessarily occur with respect to the Trebit operation as none of the city of Detroit falls within its grade A contour, and none of the Detroit stations covers the city of Flint wih a grade A signal. WJR tacitly agrees to the first of these premises in view of its failure to contact the other networks and the candid reason which it advances for choosing Dumont; mainly, that it is presently not affiliated with a Detroit VHF station and that it did not believe the other networks would be available. Another factor to be considered in this connection is that based

on existing Detroit rates, and on proposed Flint rates, it is apparent that returns to a network would be substantially higher as a result of affiliation with a Detroit station rather than a Flint station, if only one of the two were available. We believe it probable that under the normal operation of economic laws such affiliation would go to the Detroit statin in preference to Flint. Although the testimony of Butterfield's witness on this subject indicates his belief that an NBC affiliation is possible despite the existence of the NBC Detroit affiliation, it appears to us on the basis of the foregoing that such affiliation would be doubtful and would definitely be less probable than the affiliations proposed by the other two applicants.

109. The result of the probable unavailability to WJR or Butterfield of a network affiliation duplicating a Detroit affiliation would be to preclude the city of Flint and the contiguous area northeast and west of Flint from obtaining a locally originated VHF signal with programs of networks affiliated with Detroit stations, and might also result in having such network programs available to such area only from the Detroit station with an appreciably weaker signal and with possibly unsatisfactory reception. While we do not express any opinion as to the relative merits of networks and programs it is interesting to note that although WJR in its program proposals selected Dumont so as to have a "new and different program for the area" it admitted that its choice of networks would have been different had it not been precluded by duplication of coverage with existing Detroit stations. Moreover, even if available, a network affiliation duplicated in Detroit would be rejected by WJR despite the fact that it felt the programming afforded by such network was preferable.

110. A fourth effect which might reasonably be expected to flow from the selection of transmitter sites is the effort, as specifically conceded by WJR, to program in such a way as to provide "a different and desirable" program to the Detroit area. WJR candidly admits that it will attempt to secure such business as it can from advertisers desiring

to serve the Detroit area and that it will provide the type of service which will result in substantial viewer appeal to such area. Moreover, it will promote its station in the Detroit area if the programming and the situation warrant such promotion. While in many instances such program of wide spread interest may not necessarily be incompatible with the best service to the local Flint community, we feel that it creates an unnecessary and undesirable situation whereby, wittingly or not, the big Detroit service "tail" may eventually wind up by wagging the much smaller Flint service "dog." Despite the protestations of WJR management, and giving both WJR and Butterfield the benefit of every doubt with respect to their aims in programming for Flint, it is obvious that in attempting to provide programs of general interest, some programs of purely local interest to the Flint area, consciously or not, might be reduced or eilminated. We are aware that Trebit's grade A field intensity contours cover Bay City and Saginaw. However, there is much less likelihood of that northern coverage affecting Flint local programs in view of the preponderance of population in the Flint area as compared to the northern coverage. The situation reverses with respect to Detroit as the Flint population becomes relatively insignificant when compared to the latter's. While Butterfield, unlike WJR, does not now propose the type of special programming aimed at wide Detroit area acceptance we must recognize the possibility that it may be found desirable by management at some later date.

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111. A fifth effect directly attributable to the choice of the southern sites which might substantially affect the character of the operation of the proposed station is the impact of the Detroit area population on the rate base of the proposed stations. Under our system of broadcasting,

we must take into account, not only the service rendered to the receiving public but also the advertising service made available to the business community of the area to which a station is assigned. It is not completely clear from this record the exact method by which the rate structure of the proposed stations is to be formulated. However, there is sufficient reliable testimony to the effect that one of the important factors in a rate base is circulation, or in other words, the extent of the potential audience within what might be loosely termed the primary service area. Extensive audiences, regardless of locations, are highly desirable to national advertisers, and, to some extent, to regional advertisers. However, local advertisers receive little, if any, benefit from circulation in areas from which they cannot reasonably expect to draw trade. While we believe that this statement may be made categorically on the basis of general economic facts of which we may take notice, it is further corroborated by the evidence in this record. To the extent, therefore, that the Detroit area circulation might increase the advertising costs to local Flint advertisers it can be said that such Detroit circulation is a detriment to the Flint local advertisers. Despite the possibility of differences in natonal and local advertising rates which might limit such circulation effect on the local rate, and despite well meant assurances that such Detroit area impact in rates would be neither extreme or undesirable, we feel that this is another latent and unnecessary danger flowing from the transmitter site location. Another point in this connection is the possibility that the higher returns from national rates, if the above mentioned rate differential were placed in effect, might result in reducing the opportunity for the local advertiser to use the facilities of the station in question. We recognize that despite the possibility of a 100% commercial saturation in programming, the rules of reason and sound broadcasting practice limit commercial programs to a substantially smaller figure. When that figure is reached, the economic pull of the higher rates could well act to displace the local advertiser, or to give preference to the national advertiser. Even though efforts may be made by management to eliminate such preference, an unnecessary element of risk always remains.

112. A sixth factor to be considered is one that we have seen operate over the years in the field of aural broadcasting. While we do not here imply that WJR or Butterfield are not sincere in their proposals to provide a Flint rather than a Detroit station, we cannot blind ourselves to the obvious pressures which may be exercised in the future by economic and other factors which may later develop. Nor can we disregard the mentioned long history in aural broadcasting where stations so located as to provide service to large metropolitan areas make every effort to become identified with, to gravitate to, and to locate in, such metropolitan areas. We concede that in some of the instances the moves have been made after changes in ownership. However, there is nothing which would guarantee us that the present ownership or management of the applicants' stations will continue, and there is always the danger that subsequent controlling interests would not feel as bound by commitments as the initially licensed parties.

113. We have discussed in considerable detail the various results which we believe may naturally be expected to flow from the differences in transmitter sites. We have done so because we feel that this difference is one of such substance as to merit significant and decisive preference of Trebit over the other two applicants. While we do not mean to doubt or to cast any aspersions on the promises or on the good faith of Butterfield or WJR we feel that the results hereinabove enumerated and the

attendant latent dangers are such that Trebit should be preferred and that the mentioned risks are necessary to be assumed, particularly in view of the alternative proposal before us.

114. With respect to the subject of programming which we consider to be the second point of significant difference, a cursory examination of the proposed programming of the three applicants indicates that on their face there is really little difference in substance. All three appear to be sufficiently well rounded and balanced to meet substantially the needs of Flint and of the areas which the applicants propose to serve. The broad program policies are substantially identical in nature despite some slight difference in language in certain of the policies or in the emphasis placed thereon.

115. It is evident that all three applicants have shown that they recognized many of the basic needs of the communities in which they operate. It is difficult to say that any of the three has been demonstratively more responsible to such needs. We recognize that the licensing provisions of the legislation under which the Commission operates imposes a need for well rounded programming meeting the basic requirements of the areas to be served. The operation of theatres, while not influenced by similar indirect sanctions on the part of a supervisory body, is affected by the fact that sound community relations are required for sound business returns. The day-to-day operation of WFDF has made it necessary for it to be more closely attuned to the needs of the Flint area than the type of operations of the other two applicants and therefore Trebit's record with respect to active participation in Flint community life is more impressive, than either WJR's or Butterfield's. However, the record of WJR's activities in the Detroit areas is satisfactory and so is Butterfield's in Flint. Although some preference might be shown to

Trebit in this connection we do not consider it a deciding element.

116. Trebit alone of the three applicants proposes to have commercially sponsored religious programs. As we have stated in our findings, the existing commercially sponsored religious AM programs are such as not to fall within the category which has been considered as objectionable by many groups and by the Commission due to attacks on other faiths or excessive fund-raising appeals. However, this policy of commercially sponsored religious programs does result in some preference to the other applicants, but is not of sufficient importance to outweigh other elements concerning programming.

117. Another distinction is in the stress on local news and the provision for local news gathering facilities on the part of Trebit. These provisions appear to meet the local news needs in Flint to a greater extent than those proposed by WJR and Butterfield and to that extent preference can be shown for Trebit.

118. However, the item concerning programming which in our opinion tips the balances in favor of Trebit is the fact that those proposed programs which may be loosely termed "public service programs" are more closely geared to the needs of Flint as they were carefully developed over a period of time and after excessive consultation with the various civic and service organizations of Flint. Proposing what appears to be a well palanced program substantially in the abstract, despite the fact that it may in all probability meet the major needs of an average community, can not be considered as satisfactory as plans and programs developed after extensive studies of the community to which a service is proposed in order to ascertain the needs; to custom tailor the program struc-

ture to fit such needs; and to insure the cooperation of, and explore the actual programming potentials of, the various agencies whose help will be needed and whose causes will be furthered. In this particular Trebit makes by far the best showing. That it had the undeniable advantage of having its personnel on the scene and of having previous extensive contacts and experience with the various interested groups through its AM operation is admittedly fortuitous. On the other hand, it did take full advantage of the favorable situation as it existed and as a result was able to make a more precise and impressive showing. WJR made some effort to ascertain in Flint needs and to cog its proposals with specific requirements. However, this effort does not meet the standards set by Trebit in that it was much more limited in scope and certainly in time and development. Butterfield, perhaps due to the lack of practical broadcast experience of its corporate officers and personnel, made no substantial on the spot survey until after the initial program was proposed. Thereafter, through the services of a television consultant, it made certain changes which it felt would more closely approximate the needs of the community but based on studies which were even more limited in scope than WJR's. We do not mean to condemn or to cast any aspersions on the use of professional or expert advice by applicants. All three of the applicants in this case have had their applications prepared almost completely by experts either within their organizations or hired in a consultative capacity. However, it is apparent that Trebit made better and more complete use of the expertise available to it with respect to its showing on the applicability of its proposed "service" programs to the needs of the community.

119. Moreover, the proposed "service" programs of Trebit can be presumed to be subject to full and immediate implementation through cooperation by the local agencies

involved and on the basis of the experience of the proposed staff and the staffs of the local agencies. This is due to the program of practical closed circuit experimentation to which we referred in our findings. We recognize that the on-the-spot day-to-day operation of Trabit and the availability of closed circuit equipment from its affiliated organization made this approach more feasible than would have been possble to the other two applicants. However, full credit should not be denied to Trebit for such advantages as it possesses, and has made use of, merely because it finds itself in the fortuitous situation of being the only applicant in this case who is also an AM operator in Flint.

Summary

120. From the foregoing we have concluded that despite the existence of a number of differences among the applicants, there are two which impress us as being of such magnitude as to require the choice of Trebit for the grant. The first is our belief that the site chosen by Trabit will better serve the needs of Flint; will insure the use and continuation of this assignment as a Flint station; and will substantially eliminate the dangers resulting from the influence which might be exercised by the Detroit coverage available from the other two sites. The second is the greater degree of actual preparation and implementation of Trebit's "service" program proposals.

121. In view of the foregoing and upon consideration of the entire record it is determined that the public interest, convenience, and necessity would be served by a grant of the application of the Trebit Corporation and the consequent denials of the applications of WJR, The Goodwill Station, Inc. and W. S. Butterfield Theatres, Inc.

122. Accordingly, IT IS ORDERED, This 29th day of April, 1953, that the application of Trebit Corporation for construction permit to establish a new commercial television station in Flint, Michigan using Channel 12 (316 kw, visual, and 158 kw, aural) BE AND IT IS HEREBY GRANTED subject to the condition that its antenna structure shall be painted and lighted in accordance with Section 17.25 of the Commission's Rules; and IT IS FURTHER ORDERED that the applications of WJR, The Goodwill Station, Inc. and W. S. Butterfield Theatres, Inc. ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
BENITO GAGUINE
Hearing Examiner

Released April 30, 1953

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Federal Communications Commission June 15, 1953

Exceptions of Chief, Broadcast Bureau, to Initial Decision

The Chief, Broadcast Bureau, excepts to the Initial Decision herein released on April 30, 1953, in the following particulars: To the conclusion in paragraph 120 that Trebit Corporation should be preferred on the basis of (1) the location of its antenna site; and (2) the greater degree of its actual preparation of its program proposals.

1. Since all applicants selected sites which meet the requirements of the Commission's Rules, the location of a particular site does not constitute a material or significant difference sufficient to form the basis for preference among the applicants.

2. In paragraph 114 it is concluded that:

"With respect to the subject programming which we consider to be the second point of significant difference, a cursory examination of the proposed programming of the three applicants indicates that on their face there is little real difference in substance. All three appear to be sufficiently well rounded and balanced to meet substantially the needs of Flint and of the areas and populations which the

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"applicants propose to serve. The broad program policies are substantially identical in nature despite some slight difference in language in certain of the policies or in the emphasis placed thereon."

In view of this conclusion, the fact that experts of Trebit engaged to a greater degree than experts of WJR in interviews and planning with local organizations does not justify using that factor as one of the two significant and determining differences among the applicants.

3. Oral argument is requested.

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Separate Brief Accompanying Exceptions of Curtis B. Plummer, Chief, Broadcast Bureau to the Initial Decision Released in Above-Entitled Proceeding in April 30, 1953

This proceeding involves the applications of two existing stations, WJR, The Goodwill Station, Inc. and Trebit Corporation, and one newcomer to the broadcasting field, W. S. Butterfield Theatres, Inc. WJR, The Goodwill Station, Inc. operates an AM station in Detroit with an affiliated company operating an AM station in Cleveland, Ohio. Trebit Corporation and affiliated corporations operate AM and TV stations in Indianapolis and Grand Rapids and an AM station in Evansville, Indiana, as well as radio station WFBM in Flint.

Basis of Initial Decision

1. It was conceded by all parties and the Examiner found each applicant legally, financially and technically qualified

to construct and operate its proposed television station. Accordingly, the Examiner proceeded to a consideration of the many differences between the applicants. In considering these differences, the Examiner concluded that none of them were determinative except (1) the location of the antenna site of Trebit compared with the

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location of the antenna sites of the other two applicants; and (2) the greater active preparation and implementation of Trebit's "service" program proposals compared with that of the other two applicants.

2. The reasons relied upon in concluding that these two points constitute the determinative differences between the applicants will be set forth followed by a recital of the other differences and the disposition which was made of them.

3. The Examiner found six factors affected by the choice of antenna sites by the applicants which are substantially as follows:

(1) The difference in the signal strength of the three applicants over the City of Flint and over its trading area;

(2) The southern location (Butterfield and WJR) will in all probability make available a signal receivable by a substantially greater number of people than may be expected from the location to the north of Flint (Trebit); This factor was discounted because the assignment table and existing permits and licenses show that the area south of Flint will receive substantially more signals than the area to the north of Flint. The Examiner balanced "greater population coverage" against "need for service" and concluded that the former did not outweigh the latter;

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(3) The possibility of network affiliation by a VHF station in Flint. In effect it is concluded that because both Butterfield and WJR will encompass Detroit within their Grade A contours they might well be precluded from affiliation with a net work already having a primary outlet in Detroit, thus depriving Flint, of a station possessing such a program advantage;

(4) It might reasonably be expected that the location of the antenna sites of Butterfield and WJR, being 29 and 27 miles from the nearest Detroit boundary and 15 and 16.8 miles from the nearest Flint boundary, would eventually result in the "big Detroit service 'tail' " wagging "the much smaller Flint service 'dog'."

(5) The impact of the antenna sites of WJR and Butterfield on the rate structure would be likely to exclude Flint advertisers for the Flint station in favor of Detroit advertisers;

(6) Experience has shown that stations so located as to provide service to large metropolitan areas make every effort to become identified with, gravitate to, and to locate in such metropolitan areas.

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4. The Examiner found that there is little difference in substance on the face of the program proposals of the three applicants. He observed the commercial religious programs of Trebit as a disadvantage to it, but found their superior plans for local news programs favorable to Trebit. It was then concluded that the extensive studies of the Flint community by Trebit to ascertain its needs, to tailor its program proposal to those needs, to explore the actual program possibilities in the community were more satisfactory than a program proposal developed

substantially in the abstract even though such a proposal probably would meet the needs of the average community. The experience of Trebit's staff with local groups was considered an advantage in achieving immediate implementation of its service programs.

5. The other principal differences which were considered in the Initial Decision, but which were not considered significant were the following:

(1) All three applicants have interests in other media in Flint and its environs. Station WJR places a 6.8 mv/m signal over the entire city. Trebit operates Station WFBM in Flint, and Butterfield owns a number of theatres in Flint and its environs, including all the first-run theatres. Therefore, this factor was not considered determinative;

(2) Trebit operates a TV station in Grand Rapids whose Grade B contour will overlap with that of the proposed Flint operation, but that was not considered to preclude

a grant under the Commission's multiple ownership rules (Section 3.636). On a comparative basis, this disadvantage to Trebit was considered very limited;

(3) The superior studio plans of WJR were not considered to merit any significance. The remote studios of WJR in Detroit were found to contain a latent risk of replacement of programs local to Flint by programs of more interest to Detroit;

(4) The ownership interest to the Regents of the University of Michigan in Butterfield was considered to merit slight weight in the ultimate choice;

(5) The distinctions in the degree of training and employment of staffs was likewise not considered to be determinative.

6. The Examiner apparently bases his decision on the conviction that Trebit is more likely to program directly for Flint and the area to the north of Flint, but the reasons assigned for so doing would establish a precedent which would cause endless difficulties. Reasoning from site and contour locations engineering conclusions are drawn and they in turn form the basis for conclusions with respect to service to populations, advertisers, networks, programming, etc. The present state of the art does not permit substantiation of the Examiner's engineering conclusions and as a result any conclusions derived thereform are too speculative to be significant.

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7. The Commission has established a minimum signal intensity over the principal city in order to require a relative geographical proximity of the antenna to the city to be served. This means that an electrical device was used to tie a station to its city instead of a mileage table. Other than for this purpose the "city contour" has no significance.

8. Guessing as to which applicant will actually serve more people within its Grade A contour based on the population within that contour is futile when there is no significant difference to the total population within the Grade B contours of these three applicants for there are no tools to tell how many people will actually receive service from any of the three stations.

9. It is not proper to speculate on the effect of site location on network affiliation and use such speculation for determinative purposes. Too many other factors that could be involved in a net work affiliating with a given station are thereby ignored.

10. The effect of Detroit being within the Grade A contour of Butterfield and WJR is used to indicate their probable programming for Detroit while no consideration is given to Trebit's B contour which includes most of Detroit.

11. If the Commission believes that the factors isolated and discounted in the Initial Decision are not of sufficient merit to be weighed with the conclusion that Trebit is more likely to serve Flint and the Flint trade area and also that that conclusion is justified, then the decision should be placed on a different basis than the two points specified in the Initial Decision.

Respectfully submitted,

Curtis B. Plummer
Chief, Broadcast Bureau
Frederick W. Ford

By Frederick W. Ford
Chief, Hearing Division

Stanley B. Cohen
Stanley B. Cohen
Attorney
Federal Communications Commission

June 15, 1953

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 15, 1953

Exceptions of WJR, The Goodwill Station, Inc.* and Request for Oral Argument

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30. *Finding 49.* Exception is made to the incompleteness of the Finding. The record supports WJR Proposed Findings 37 and 37a. In addition, as shown in WJR Proposed Findings 37 and 37a, the last sentence of Finding 49 of the Initial Decision is inaccurate and incomplete. WJR's Flint application was executed July 3, 1952. Before that date, WJR made up "a check list of various human interests, various community interests and activities, which our previous experience in operating radio stations led us to feel would be a good list to pursue in approaching and inviting representatives of Flint organizations to participate on local Flint programs. This check list took in all manner of civic activity—religious, educational, fraternal, sports, adult education, and numerous other classifications with which you are familiar—agricultural, of course. Then we gave this check list to a task force, you might call it, people in our executive organization, and our program department public

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service field, to go to Flint and to find out what organizations were active there and to meet them, to tell them of our plans for a television station, and to invite their participation." (Patt, Tr. 372). The results of the work were incorporated into the program plans presented at the hearing (Patt, Tr. 373). The Public Service Director of WJR, one member of the "task" force, visited Flint on several occasions and talked to some twenty-seven Flint civic leaders respecting the specific proposed programs and public service programming in general (Hornung, Tr. 648-49 and WJR Exh. 43). The December 17, 1952 Flint luncheon was held *after* the above contacts had been made (Patt, Tr. 373, as the depositions—WJR Exh. 65—were taken December 17 and 18, 1952).

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* Where references are made to WJR Proposed Findings and Conclusions, they and the record citations contained therein are incorporated herein by reference.

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72. *Conclusion 118.* Exception is made to the conclusion that Trebit's "public service programs" are "more closely geared to the needs of Flint". The Examiner bases this conclusion on the steps taken to prepare for television and ascertain the needs and desires of Flint. As set forth in the exceptions herein to Conclusions 118 and 119 under that heading, WJR and Trebit are to be preferred to Butterfield, but as between the two, there is no significant difference respecting this factor. Therefore, the Examiner's basis for the conclusion and the conclusion are in error. As to the merits of the proposed public service programs themselves, there is no significant difference among the applicants as indicated in the Initial Decision at Paragraph 80 ("The proposed programs are well rounded and meet substantially the needs of the community") and 114 ("all three (program proposals) appear to be sufficiently well rounded and balanced to meet substantially the needs of Flint").

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74. *Conclusion 119.* Exception is made to the implication in the conclusion that the Commission can rely with

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67. *Conclusion 114.* Exception is made to the first sentence. Even a "cursory" look at the proposed program proposals indicates the following substantial differences, all of which are apparent from the Examiner's findings: (1) WJR proposes substantially more live programming (33.53 percent as compared to 17.4 percent for Trebit and 21.98 for Butterfield); (2) WJR is the sole applicant which proposes a network service which would be new to Flint and the entire area to be served; (3) only WJR proposes remote programs; (4) as set forth in Trebit Proposed Finding 133, "There are no substantial differences between the programs proposed to be carried by Trebit and those which are presently being carried by WFBM-TV and WOOD-TV;" and (5) only Trebit proposes to carry commercial religious programs. For these reasons, WJR must be preferred.

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86. *Conclusion 92.* Exception is made to the conclusion that the superior WJR physical facilities do not merit "any significant preference." The record shows (see WJR Proposed Findings, Parts IIIH, IVH, VH, and VI) that WJR is the only applicant which proposes (1) a new main studio building in Flint designed especially for television, (2) a studio and studio equipment in its transmitter building, (3) a new custom built mobile studio to be based in Flint, and (4) a remote studio with equipment. It is erroneous and prejudicial to characterize WJR's superiority in proposed physical facilities as being due to "elaborateness and costliness." A comparison of the physical facilities proposed by the three applicants shows not only the four factors set forth above but also that WJR proposes

more studio space, more efficient and functional studios, offices, and transmitter facilities and more physical equipment than either of the other two applicants.

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88. *Conclusion 93.* Exception is made to the ultimate conclusion which is based entirely on unfounded, illogical, and specious conclusions. The WJR proposed Detroit studio is one aspect of the superiority of WJR's proposed facilities, and for the reasons set forth above, WJR is entitled to a significant preference because of the superiority of its proposed physical facilities. Turning now to some of the errors contained in Conclusion 93, the following is noted.

89. *Conclusion 93, First Sentence.* WJR does not propose remote *studios,* rather it proposes a *Detroit studio* (Tr. 555). It is erroneous to conclude that "virtually any program proposed" by WJR could be produced in the Detroit studio. The conclusion is no more valid than a conclusion that virtually any program proposed by Trebit could be produced in WFBM-TV's studios or in WOOD-TV's studios or in the studios proposed by WEOA or in studios that could be used in Saginaw or Bay City. An inspection of WJR Exhibits 53, 21A, 56, and 57 shows the impossibility of producing the programs proposed by WJR at its proposed Detroit studio. The conclusion also ignores WJR's representations as to origination of programs (See WJR Exhs. 57 and 58, Tr. 390, 410, 427, 432, 543, and 555, and WJR Proposed Findings 38a, 47, and 56).

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greater assurance on the implementation of the Trebit proposed "service" programs. For the reasons set forth above, the Commission can rely on WJR to implement its proposed programs (including public service programs) to a substantially greater degree than it can rely on either Trebit or Butterfield. The record affirmatively shows that WJR in the past has carried out its program representations to the Commission. This factor obviously outweighs the fact that Trebit (which made no such showing) conducted twelve closed circuit telecasts with equipment borrowed from WFBM during the period between August and December 1952. In addition, as set forth in the exceptions under the heading "Preparation for Television, Etc." the record shows that the successful applicant will receive the cooperation of local Flint organizations in connection with public service programming.

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D. Location of Sites (99-113)

In General

96. *Conclusions 113 and 102.* Exception is made to the conclusion in Paragraph 113 that Trebit merits "significant and decisive preference" over WJR and Butterfield and to the similar conclusion in Paragraph 102. The conclusion is evidently based on the matters discussed in Conclusions 99-112. The conclusion is erroneous as (1) the reasons for the conclusion are not clearly stated and (2) neither the conclusions nor the matters in support thereof can be deduced rationally from any findings of fact for which there is substantial evidence. The Examiner's "reasons" for the conclusions are discussed under the appropriate headings below following the discussion immediately below of the conclusions which do not appear to fit into any of the "six factors."

97. *Conclusions 100 and 101.* Exception is made to the summaries of the reasons for each applicant choosing its particular site which are inaccurate and incomplete. WJR Findings 14-16 are accurate and complete and are supported by the record citations given therein.

98. *Conclusion 100.* Exception is made to the conclusion that the "trading area of Flint will normally extend primarily in directions away from Detroit." In the first place, there is no probative evidence in the record to support the conclusion. Not a single expert on the subject of trade areas testified. In the second place, the location of the Flint trade area is not relevant to a determination in this matter.

99. *Conclusions 101 and 102.* Exception is made to the discussions and conclusions respecting Rule 3.685(b) which is inadequate and erroneous. To say that the "central point" should be associated with the immediate area of the community is completely meaningless. It is impossible to discuss the meaning of the rule in such a context. The rule refers to *one* of the technical elements in the selection of a site. Other elements, which must be considered in connection therewith include (1) required co-channel and adjacent channel separations, (2) avoidance of air navigation hazards, (3) required minimum field intensity signal over the city to be served, and (4) obtaining maximum height. WJR's site complies with all of these technical criteria more completely than does Trebit's.

Signal Strength over Flint (99 and 104)

100. *Conclusion 99.* Exception is made to the conclusion that Trebit's signal is "substantially stronger" over Flint and Genessee County and over a substantial greater part of the Flint "composite trade area." For the reasons set forth in the exceptions to Findings 9 and 16 of the Initial De-

cision, there is no basis set forth for such a conclusion and the conclusion is meaningless. As pointed out previously, each of the applicants "exceed" rather than "meet" the minimum field strength requirements over the City of Flint.

101. *Conclusion 104.* For the reasons set forth immediately above, exception is made to the conclusion that the difference in field strengths over Flint affords a basis for decision herein. Even to be considered a factor in the decision requires a specification of what the differences are and the significance, if any, of said differences. Such specifications are not set forth in the Initial Decision.

Grade A and B Areas and Populations (104-106)

102. *Conclusions 104 and 106.* Exception is made to the conclusion (1) that the question of "other services" available is a factor in this matter, (2) that substantially more services are and will be available to the south of Flint than to the north of Flint, and (3) that this balances the advantage accruing to WJR and Butterfield in view of the substantially larger areas and populations within their Grade A and Grade B contours. In the first place, no basic findings are set forth in the Initial Decision as to what "other services" are available to the pertinent areas. Finding 21, the only finding on the subject, states that "one can generalize" that more signals are now available in Detroit and the area south of Flint than in the area north of Flint and that "this pattern will continue." This is hardly a finding upon which can be based the "qualitative" effect on the fact that substantially more areas and populations are encompassed by the WJR and Butterfield Grade A (over 2½ million) and Grade B (over one-half million) contours than those of Trebit. Before "other services" could be considered, the record would have to contain probative evidence based upon which the following basic findings could be made: (1) under what circumstances does a

Grade A signal give "service", (2) the same re Grade B signals, and (3) the same re less than a Grade B signal. As stated in Conclusion 104, this is impossible as the available "tools are not sufficiently sharp" to adduce probative evidence concerning the above

and the record is devoid of any such probative evidence. Even if the record contained such probative evidence and findings on the above, the following additional findings would have to be made before "other services" could be a basis for conclusions: (1) the areas and populations that would receive "service" from but one of the proposed operations, (2) the number of "other services" (and the character and type of each) available to each such area and the populations within based on existing operating stations, on existing authorized but yet to be constructed stations, on pending applications, on unapplied-for assignments, and even on possible future changes in the table of assignments. The record herein does not contain probative evidence concerning the above. In view of the above, none of the excepted-to conclusions is valid and WJR is entitled to significant preference over Trebit because of the substantially larger populations within its proposed Grade A and Grade B contours.

103. *Conclusion 105.* Exception is made to the entire conclusion which is irrelevant to a decision in this matter. In addition, the entire paragraph creates the false impression that WJR's petition to add an additional VHF channel to Detroit was conditioned on deleting Channel 12 from Flint.

Network Affiliation (107-109).

104. *Conclusions 107-109.* Reference is made to the exception to those paragraphs set forth above under the heading "Proposed Operation—Network Affiliation."

Local Flint Programs (110)

105. *Conclusion 110.* Exception is made to the conclusion that WJR might reduce or eliminate "some programs of purely local interest to the Flint area." This conclusion is based completely on unfounded conjecture. There is no basis for concluding that because WJR proposes a service which will be entirely new to Flint and the entire area proposed to be served (not just Detroit) "an unnecessary and undesirable situation" is created which leads to the above conclusion. It is a half truth to say that WJR "will provide the type of service which will result in substantial viewer appeal" to the Detroit area. WJR proposes to provide a service which will result in substantial viewer appeal to Flint and the

entire area to be served. The only programs which will be designed to be of interest to one community to the exclusion of others in the area are local Flint programs (see exceptions to Conclusion 93 under the heading "Physical Facilities"). The conclusion questions the good faith of WJR which is the only applicant to have affirmatively proved that its representations to the Commission have been fulfilled (see exceptions under the heading of "Broadcast Experience, etc."). The conclusion also ignores the fact that the WJR proposed Flint public service programs are sustaining.

106. *Conclusion 110.* Exception is made to the conclusion that "Butterfield, unlike WJR, does not propose the type of special programming aimed at wide Detroit area acceptance." It is obvious that, making due provision for local Flint programs (many of which may be of interest to the entire area), all applicants would hope to have substantial listener response in the entire area to be served. Thus, with respect to non-network programs, either WJR

or Butterfield would hope to attract listeners in Flint and the entire area served, including Detroit. With respect to network programs, the situation is different as WJR proposes a service not otherwise available in Detroit, whereas the service proposed by Butterfield is already being provided by a Detroit station. Thus, it is natural that WJR would expect to attract listeners in Detroit respecting both non-network and network programs, whereas Butterfield's attraction would be confined to non-network programs (See Tr. 1766 ff re Butterfield). WJR does not expect to be competitive with Detroit stations in any large measure (Patt, Tr. 1896).

Rates (111)

107. *Conclusion 111.* Exception is made to the entire conclusion which is premised on the thought that the Commission "must take into account . . . the advertising service made available . . ." to Flint and the advertising rates to be charged. The subject of rates is within the Commission's jurisdiction only to the extent it is necessary to a determination of the issue of financial ability. This necessity is not present in this case. Therefore, any conclusions concerning rates are beyond the Commission's jurisdiction as it is beyond question that television stations are not common carriers. Even if the Commission

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could consider the "rate" factor, the conclusion is erroneous as it ignores the following matters of record: (1) two UHF grants have been made to Flint; (2) rates are a function of the economic law of supply and demand and any conclusion as to rates to be charged would have to be based on a more complete and thorough analysis than is contained in the Initial Decision; (3) Trebit and Butterfield witnesses testified to the obvious, namely that their rates will be based on the law of supply and demand, *i.e.,* on what the "traffic will bear" (Bitner, Jr., Tr. 1485; and Kersta, Tr. 1637); both would have basic rates of $600 per hour if they could be obtained (Tr. 1637 and 1094); (4) WJR's rate will always be competitive in Flint to other Flint media (Patt, Tr. 1894) and (5) Trebit's rate, insofar as circulation is concerned, was based on RTMA figures showing some 18,000 receivers in Genessee County (Tr. 1127 and 1213), yet a check by Trebit prior to the hearing showed some 23,000 receivers per RTMA figures (Tr. 1212).

Change of Location to Detroit (112)

108. *Conclusion 112.* Exception is made to the entire conclusion which is based on unfounded speculation concerning WJR and Butterfield which is equally applicable to Trebit. If there is a danger that Butterfield or WJR (or their imagined successors) will move their main studios to Detroit, there is an equal danger that Trebit (or its imagined successor) will likewise move its main studio and change the location of its transmitter. In fact, the same is true respecting the two Flint UHF grantees. What is more likely, is that Trebit, if successful, will move its site to the high ground in the vicinity of the WJR and Butterfield proposed sites. In addition to being based on unfounded speculation (applied to two of the applicants although equally applicable to the third), the conclusion ignores the fact that the successful applicant could neither transfer nor assign its license nor move its main studio unless the Commission found in advance that the "public interest, convenience and necessity" would be served thereby.

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 25, 1953

Reply to Exceptions of W. S. Butterfield Theatres, Inc. and WJR, The Goodwill Station, Inc.

1. Examination of the Exceptions to the Initial Decision submitted by Butterfield and WJR and the brief submitted in support of WJR's exceptions indicates that all of the points raised by these parties were advanced in their findings of fact and conclusions and rejected by the Examiner in his Initial Decision.

2. Trebit's proposed findings of fact and conclusions and its comments concerning the findings and conclusions of WJR and Butterfield, which completely refute the points raised in the exceptions, are fully documented and are part of this record. It is unnecessary, therefore, to retiterate these matters by way of further reply.

3. Written notice is hereby given of the intention of Trebit to appear and participate in the oral argument if the request for same by WJR and Butterfield is granted.

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4370

FEDERAL COMMUNICATIONS COMMISSION

JUNE 25, 1953

Motion to Strike Exceptions of Chief, Broadcast Bureau

Comes now TREBIT CORPORATION, applicant in the above-entitled proceeding by its attorneys and moves to strike Exceptions of Chief, Broadcast Bureau for the reasons set out below:

1. At the pre-hearing conference of October 31, 1952 the Examiner outlined a tentative procedure for the filing of proposed findings of fact and conclusions as well as comments or replies thereto. This exchange of opposing points of view was designed to assist the Examiner in his preparation of the Initial Decision and to expedite issuance of same. The Examiner announced he would not at that point request the Broadcast Bureau to file proposed findings and conclusions but left the subject open for later discussion. He did, however, clearly indicate that he would expect the Broadcast Bureau to file comments as to the Bureau's views on the points raised by the parties that might be considered by the Bureau to be erroneous or inconsistent with Commission policy. At that time, counsel for Trebit made clear its position that the Broadcast Bureau should be required to at least comment on the findings of the parties and not be allowed to wait until the initial decision had been issued and then take exception to some point in the decision on which the Bureau had never asked the Examiner to make a finding. (See Transcript of October 31, Pre-Hearing Conference, pages 61 through 65).

2. Counsel for the Broadcast Bureau thereafter attended every session of the hearing as well as the oral arguments on various motions introduced during the course of the trial and participated in these proceedings to the fullest extent.

3. The Examiner, at the conclusion of the proceedings and prior to closing the record, announced that he would require all of the parties, with the exception of the Broadcast Bureau, to file proposed findings and conclusions and indicated that if the Broadcast Bureau desired, it could file proposed findings and conclusions either on the entire record or portions thereof. At the same time, he *directed* all of the parties, *including the Commission's Broadcast*

Bureau, to file comments, answers or replies to the proposed findings. At that time counsel for the Broadcast Bureau indicated that it did not intend to file proposed findings but stated that the Bureau would file its comments or reply to the findings of the parties. (Tr. 2005, 2006, 2007)

4. The hearing record was closed on February 27, 1953 and the proposed findings of the parties were due to be filed on March 30, 1953. A period of seven days after March 30th, or April 6, 1953, was provided by the Examiner for the filing of comments. The parties, except for the Broadcast Bureau, met these deadlines. The Broadcast Bureau requested and received an extension of one more week within which to file its reply.

5. On April 13, 1953, in lieu of its reply for which additional time had been provided, Chief, Broadcast Bureau filed a statement indicating that a period of two weeks (the parties complied with the Examiner's directions and filed their replies within the one week provided) was inadequate and that "in effect this experimental procedure of filing comments on the merits of the case in the form of a reply to the proposed findings and facts and conclusions by the applicants required more time than the initial preparation of the Proposed Findings of Facts and Conclusions". Chief, Broadcast Bureau thereupon indicated that the Bureau would not file such a reply or comment.

6. The Examiner's initial decision was released on April 30, 1953 and proposes to grant the application of Trebit Corporation. After several extensions of time within which to file exceptions was granted at

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the request of parties other than Trebit, exceptions of WJR, Butterfield and Chief, Broadcast Bureau were filed on June 15, 1953. All three have requested oral argument.

7. The Broadcast Bureau's exceptions and brief accompanying same comprise approximately nine letter-size pages of double spaced type and are directed to conclusions reached by the Examiner that Trebit should be preferred on the basis of (1) the location of its antenna site; and (2) the greater degree of its actual preparation of its program proposals.

8. Trebit moves to strike the exceptions of Chief, Broadcast Bureau for the following reasons:

(a) Chief, Broadcast Bureau is in default under the provisions of Section 1.849(c) of the Commission's Rules and Regulations which provide that: "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when directed to do so, may be deemed a waiver of the right to participate further in the proceeding." It is submitted that the reply or comments directed to the proposed findings and conclusions which the Examined instructed the Broadcast Bureau to file is synonomous with "briefs or memoranda of law" and are obviously contemplated under Section 1.849(c). Chief, Broadcast Bureau makes no attempt to meet the "good cause" requirement of this rule. As is evident from the above recital of facts of record the Broadcast Bureau was clearly on notice from the very first day of the pre-hearing conference that it would be expected to file a reply under the procedure outlined by the Examiner. Moreover, at the conclusion of the hearing, the Broadcast Bureau was *directed* to file a reply, indicated that it would file such a reply and, even after an extension of time to comply with this direction, failed to do so. The reasons set forth in the statement of Chief, Broadcast Bureau dated April 13, 1953 should not be held to constitute a reason for failure to file a reply any more than would a similar reason if advanced by one of the parties to this proceeding. The Broadcast Bureau's

exceptions consume only a few pages of paper and the position it takes could have been made known to the Examiner and the parties in the way of a reply with no more expenditure of time than it took to prepare these exceptions. Therefore, in the absence of any allegation of good cause, the exceptions filed have failed to meet the test of Rule 1.849(c).

(b) The Broadcast Bureau's behavior in light of all the facts of this case should compel the Commission, out of a sense of equity and fair play, to deny the Broadcast Bureau the right to further participate in these proceedings. As noted above, the Broadcast Bureau was on constant notice that the Examiner did desire some expression of the Bureau's views on the proposed findings of facts and conclusions advanced by the parties in this proceeding. Moreover, it was perfectly obvious throughout the course of this proceeding (and was so announced during hearing by counsel for Trebit) that two of the salient features of Trebit's case were the comparative considerations involving site and coverage and its superiority in the actual preparation of programs. Also, these points were dealt with extensively by Trebit and the other applicants in their proposed findings. It is manifestly unfair to the Examiner and to the parties to permit the Broadcast Bureau to sit back and wait until the initial decision is issued before it takes exception to matters which were clearly in issue throughout the entire course of the proceedings. The procedures outlined by the Examiner in this case for filing proposed findings and replies, the Examiner's expeditious conduct of the case, as well as the excellent cooperation of WJR, Butterfield and Trebit was designed to expedite decision and in the final analysis, to provide the proposed VHF television service to the City of Flint as soon as possible. The Broadcast Bureau's "mousetrap" technique can have no other result than to slow down all of the Commission's processes and thereby prolong the proceedings and deny early VHF television service to Flint.

(c) The position of the Broadcast Bureau in these proceedings is not superior to that of any of the other parties. Each of the other parties, by extreme hard work and diligence, met the Examiner's requirements for filing proposed findings and conclusions and their comments on same.

It was just as difficult for private counsel to comply with the directions of the Examiner and to meet the deadlines established as it was for the Chief, Broadcast Bureau. If any purpose is to be served by the participation of counsel for the Broadcast Bureau in an adversary proceeding such as this one, it is incumbent upon the Broadcast Bureau to make an effective contribution to the outcome of the proceedings by voicing its objections or enunciating its position in that part of the proceeding which will most effectively contribute to a proper decision by the Examiner. That point was reached when the Bureau was supposed to file its comments or reply to the Proposed Findings of the applicants, and failed to do so. We submit that the Bureau has forfeited any right to further participation in this proceeding.

Therefore, for the reasons stated above, it is respectfully requested that the Commission strike the exceptions filed by the Chief, Broadcast Bureau.

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4375

FEDERAL COMMUNICATIONS COMMISSION

JULY 3, 1953

Opposition to Motion to Strike Exceptions of Chief, Broadcast Bureau

The Initial Decision in the instant proceeding was released on April 30, 1953. On June 15, 1953, the Chief, Broadcast Bureau filed certain exceptions to the said decision. One June 25, 1953, Trebit Corporation filed a motion to strike the said exceptions and gave as reasons therefor:

(a) That the Chief, Broadcast Bureau is in default under the provisions of Section 1.849(c) of the Commission's Rules and Regulations;

(b) That the Broadcast Bureau's behavior in light of all the facts of this case should compel the Commission, out of a sense of equity and fair play, to deny the Broadcast Bureau the right to further participate in these proceedings; and

(c) That if any purpose is to be served by the participation of Counsel for the Broadcast Bureau in an adversary proceeding such as this one, it is incumbent upon the Broadcast Bureau to make an effective contribution to the outcome of the proceedings by voicing its

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objections or enunciating its position in that part of the proceeding which will most effectively contribute to a proper decision by the Examiner.

The Chief, Broadcast Bureau herewith opposes the said motion to strike.

1. The Examiner did not direct the Broadcast Bureau to file Proposed Findings in the instant case because of his apparent knowledge of the then existing budget and personnel situation at the Commission. He did, however, indicate that he would expect the Broadcast Bureau as well as the parties to file a reply to the Proposed Findings that were submitted. As originally scheduled, proposed findings were to be filed by March 23, 1953, and the replies were due by April 6, 1953. Subsequently, one or more of the parties requested an extension of time within which to file Proposed Findings. The Examiner indicated that he would be agreeable to extending the time for the filing of Proposed Findings provided that the parties agreed to retain the April 6, 1953, date as the time for filing replies. It was readily apparent that the three applicants would be agreeable to this proviso; however, inasmuch as Counsel for the Broadcast Bureau had not prepared Proposed Findings and done the work attendant thereto it appeared that it would be relatively impossible for him to produce an adequate document in a week. Accordingly, the Examiner and the parties agreed that the time for filing of Proposed Findings would be extended to March 30, 1953, and that all replies would be due by April 6, 1953, but that, if Counsel for the Broadcast Bureau could not meet the April 6th deadline, the Examiner would extend the time to April 13, 1953. In fact, this was what occurred.

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2. The Commission's Rules do not contemplate any procedure such as a Reply to Proposed Findings. Nevertheless, the Broadcast Bureau in good faith undertook the preparation of such a document. Recognizing the practical impossibility of attempting to submit Proposed Findings in all the current comparative hearings, the Broadcast Bureau sincerely hoped that the technique of a Reply could be developed into a concise and valuable tool for the

expeditious presentation of its views to the parties and the Examiner.

3. Accordingly, a conscientious attempt was made to comply with the Examiner's request. Initially, it was contemplated that the reply would in effect be a reply to the contentions raised in the Proposed Findings. The parties effectively precluded this technique by submitting Proposed Findings, each approximately one hundred pages in length. Next the thought was to have the reply assume the color of a proposed conclusion of the Chief, Broadcast Bureau. In attempting to effectuate this plan it soon became apparent that no adequate pleading of this type could be produced without the intensive preparation and thinking that characterize Proposed Findings and Conclusions. Conclusions are meaningless without a proper factual foundation. Without having undergone the tortuous process of making findings of basic fact, the Broadcast Bureau did not have the perspective necessary for evaluating the various possible conclusions and the relative weight they should be given in the over-all scheme of a complete decision.

4. The press of other business effectively precluded the submission of Proposed Findings. Experience taught that no reply could be prepared without the same effort and time necessary for Proposed Findings. In the light of the above, the Chief of the Broadcast Bureau urges:

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(a) That the technique of a Reply to Proposed Findings is not contemplated by the Commission's Rules; that, therefore, the Reply as requested by the Examiner could not be deemed synonomous with "briefs" or memoranda of law as used in Rule 1.849(c). It therefore follows that Rule 1.849(c) is inapplicable for the purpose cited in the said Motion to Strike; and

(b) Even assuming *arguendo* that the above discussed Rule is applicable, the sincere effort of the Broadcast Bureau to comply with the Examiner's mandate taken in conjunction with the general public knowledge as to the current press of other business constitute the "good cause" contemplated by the above described Rule.

Moreover, the Broadcast Bureau submits that the techniques and needs incident to the preparation of Exceptions are sufficiently different from those incident to the contemplated reply as to vitiate any possible comparison. The exceptions filed herein are for the purpose of permitting the Broadcast Bureau to present its views to the Commission on the Initial Decision for whatever assistance they may be in resolving in the public interest the matters raised thereby and not to "mousetrap" any of the parties to the proceeding.

Therefore, it is respectfully requested that the Commission deny the said Motion to Strike Exceptions.

* * * * * * * * * *

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FEDERAL COMMUNICATIONS COMMISSION

JULY 3, 1953

Opposition to Motion to Strike Exceptions

WJR, The Goodwill Station, Inc., by its attorneys, hereby opposes the pleading filed June 25, 1953, by Trebit Corporation entitled "Motion to Strike Exceptions of Chief, Broadcast Bureau." In support thereof, it is stated as follows:

1. The Broadcast Bureau is not "in default under the provisions of Section 1.849(c) of the Commission's Rules and Regulations" as alleged in the subject motion. For the reasons set forth below, Rule 1.849(c) is not applicable and even if it were, the Commission should exercise its discretion so as to deny the motion filed by Trebit Corporation.

2. A reading of Rule 1.849 in its entirety makes it clear that the "default" provisions of Rule 1.849(c) apply only in those instances where a party fails to file proposed findings or other pleadings within 20 days after the record is closed or any extension of said period when (1) directed to do so and (2) no showing of good cause is made for the failure so to file. In the instant case, the Examiner did not direct the Broadcast Bureau to file proposed findings or other pleadings contemplated by Rule 1.849, and therefore Rule 1.849(c) is inapplicable. The Examiner said at page 2005 of the transcript:

> "I will expect that all parties, *with the exception of the Commission Broadcast Bureau,* will file proposed findings and conclusions . . ." (Emphasis added.)

3. The pleading in question is not one contemplated by Rule 1.849. The Examiner "expected" all parties, including the Broadcast Bureau, to file a pleading in response to the proposed findings filed by the applicants (Tr. 2005). Neither Rule 1.849 nor any other rule contemplates such a pleading. Even assuming, *arguendo,* that the pleading was one the examiner "directed" to be filed

and was one within the purview of the rule, the statement filed in this proceeding by the Broadcast Bureau under date of April 13, 1953, constituted a showing of "good cause" and therefore the "default" provisions of Rule 1.849(c) are inapplicable.

4. Therefore, it is clear that Rule 1.849(c) is not applicable. Even if the rule and the "default" provisions thereof were applicable, it is clear that it is within the Commission's discretion to determine whether or not the Broadcast Bureau's right to proceed further in the proceeding has been waived. Under the circumstances of the instant case, the Commission should exercise its discretion so as to have the benefit of the viewpoint of all participants in the case (*The Fort Industry Company,* 7 Pike and Fisher 757).

WHEREFORE, THE PREMISES CONSIDERED, it is respectfully urged that the Commission deny the motion of Trebit Corporation to strike the exceptions of the Broadcast Bureau.

Respectfully submitted,

WJR, THE GOODWILL STATION, INC.

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Transcript of Oral Argument

The Chairman: Are there any questions before we proceed to the argument?

Mr. Dempsey: Mr. Chairman, I have a question. We have a motion which is, I understand, a part of the matter to be considered today to strike the exceptions of the Chief of the Broadcast Bureau. The motion is based on procedural grounds, failure of the Broadcast Bureau to participate in proposed findings or comments on them before the Examiner.

We are in a little difficult position to know whether to respond to the exceptions on the merits as a part of the argument on the question of whether they should be considered at all, and I wonder if there is some method by which that might not be disposed of first.

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FEDERAL COMMUNICATIONS COMMISSION
MAY 14, 1954

Decision

By the Commission: Commissioners Webster and Lee not participating; Commissioner Hennock dissenting and issuing an opinion.

Preliminary Statement

1. This proceeding involves three applicants, WJR, The Goodwill Station, Inc., Trebit Corporation and W. S. Butterfield Theatres, Inc. (hereinafter sometimes referred to as WJR, Trebit and Butterfield, respectively) applying for permits to construct new commercial television stations to operate on Channel 12 at Flint, Michigan. Since the applications each seek the same frequency, they are mutually exclusive. The WJR and Trebit applications were designated for hearing in a consolidated proceeding on July 11, 1952, and the Butterfield application was consolidated in the proceeding on November 5, 1952.

2. The following issues were specified in the order of designation:

(1) To determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations;

(2) To determine the type and character of the program services proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours;

(3) To determine whether the construction and operation of the proposed stations would be in compliance with the Commission's Rules and Regulations governing television broadcast stations;

(4) To determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation; and

(5) To determine on a comparative basis which, if any, of the above-entitled applications should be granted.

3. On August 11, 1952, Trebit filed a Motion to Strike all issues except Issue No. 5. The Commission denied this Motion by Order of October 15, 1952 (FCC 52-1325). On January 9, 1943, WJR filed a petition requesting authority to amend its application to specify a new transmitter site. Both Trebit and Butterfield opposed this petition. On January 14, 1953, the petition was granted by the Examiner (FCC 53M-26); Trebit and Butterfield filed petitions seeking review of this action by the Commission. These petitions were denied on January 29, 1953, and the Commission's Memorandum Opinion and Order relating to this action was released on March 9, 1953 (FCC 53-99).

4. The Examiner conducted hearings in this proceeding during the period November 17, 1952 to February 27, 1953, with the three applicants and the Broadcast Bureau of the Commission participating. At the termination of the hearings, Proposed Findings of Fact and Conclusions of Law were submitted by the three applicants. While the Examiner did not direct the Broadcast Bureau to file Proposed Findings and Conclusions, he did indicate his expectation that all parties, including the Broadcast Bureau, would file comments, answers or replies to the Proposed Findings and Conclusions submitted by the parties; and the Broadcast

Bureau represented that it would file such pleadings. Subsequently, however, the Broadcast Bureau filed a document indicating that the press of other duties precluded it from filing either Proposed Findings and Conclusions or Replies to such Proposed Findings and Conclusions which were filed by the other parties.

5. On April 29, 1953, the Examiner rendered an Initial Decision granting the Trebit application and denying the WJR and Butterfield applications. The Initial Decision was released April 30, 1953. Exceptions to the Initial Decision were filed by WJR, Butterfield and the Broadcast Bureau. Trebit filed a Reply to the WJR and Butterfield exceptions, and a Motion to Strike the exceptions of the Broadcast Bureau. The Broadcast Bureau and WJR opposed Trebit's Motion to Strike. All of the parties participated in an oral argument on the exceptions before the Commission *en banc* on August 31, 1953. Argument on Trebit's Motion to Strike the Broadcast Bureau's exceptions was also heard by the Commission at that time. The Commission's rulings on the exceptions to the Initial Decision are set forth in an appendix attached hereto.

Trebits Motion to Strike Broadcast Bureau's Exceptions

6. Trebit states that the Examiner directed all parties, including the Broadcast Bureau, to file "comments, answers or replies" to the proposed findings submitted by the applicants and that, despite its representation that it would submit such material, the Broadcast Bureau has not done so. Trebit contends that by failing to comply with the Examiner's direction, the Broadcast Bureau, pursuant to the provisions of Section 1.849(c) of the Rules[1], has waived its

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[1] Section 1.849(c) provides that: "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs or memoranda of law, when directed to do so, may be determined, a waiver of the right to participate further in the proceeding."

right to further participation in this proceeding and, accordingly, its exceptions should be stricken. Trebit urges that it would be unfair to both the Examiner and the other parties to permit the Broadcast Bureau to await the issuance of the Initial Decision prior to excepting to matters clearly in issue throughout the course of the proceeding. In its opposition, the Broadcast Bureau argues that the Examiner, because of his cognizance of the Commission's budget and personnel situation, did not direct the Broadcast Bureau to file proposed findings and conclusions, but indicated that he expected the Broadcast Bureau would be in a position to file replies to such proposed findings and conclusions submitted by the applicants. The Broadcast Bureau alleges that it made a conscientious effort to comply with the Examiner's direction with respect to replies to findings and conclusions, but that it became apparent that an adequate pleading could not be produced without the intensive preparation and effort required for the preparation of proposed findings and conclusions; and that, accordingly, the short period of time available and the press of other business precluded the Broadcast Bureau from filing the requested document. The Broadcast Bureau contends, further, that the provisions of Section 1.849(c) are inapplicable in this instance, and that, in any case, the sincere effort of the Broadcast Bureau to comply with the Examiner's mandate, when considered in conjunction with the press of other business, constitutes the "good cause" contemplated by the rule. While we are of the view that the reply to proposed findings and conclusions here involved clearly comes within the purview of Section 1.849(c), we believe that the Broadcast Bureau has demonstrated good cause within the meaning of that rule for its failure to file the requested pleading. Trebit's Motion to Strike the Broadcast Bureau's exception is therefore being denied.

FINDINGS OF FACT

I. The Area Involved

7. The City of Flint has a population of 163,143 persons; and Genesee County, which is co-extensive with the Flint metropolitan area, has a population of 270,963 persons. The City of Detroit, 57 miles southeast of Flint, has a population of 1,849,568 persons. Saginaw, 31 miles from Flint, and Bay City, 42 miles from Flint, both generally northwest of the City, have populations of 92,918 and 52,523 persons, respectively.

8. The Flint trade area extends roughly 35 miles to the east and west, 15 miles to the south and southeast, 15 to 20 miles to the north, and 35 miles to the northeast of Flint's city boundaries. Flint, due to its size and to the number and quality of commercial and service establishments, draws trade in varying degrees from the surrounding areas, but primarily in northerly directions where the communities are smaller than Flint. Detroit, on the other hand, in view of its size and facilities, is able to draw trade in the direction of Flint and from Flint proper. Flint, however, normally will not draw trade from Detroit or from those communities south of the Genesee County line. The Flint trade area, as a practical matter, ends at approximately the southern boundary of Genesee County. Pontiac, a community situated north of Detroit, is a continuation of the Detroit urban area and is contiguous thereto.

9. Flint constitutes a separate and distinct community with its own service, charitable, philanthropic and educational institutions. The City has five standard broadcast stations, one of which, WFDF, is licensed to Trebit. WJR's standard broadcast station in Detroit, which lays a median signal intensity of 6.8 mv/m over Flint and provides CBS network programming, has a substantial listener response

in Flint. Flint also has two FM stations, one of which, WFUM, is licensed to the Board of Regents of the University of Michigan. Four television channels, in all, are assigned to Flint: VHF Channel 12 involved in this proceeding, and three UHF channels, one of which is reserved for non-commercial educational use. Construction permits have already been issued for the two commercial UHF assignments. Flint has one daily and one Sunday newspaper, as well as six weekly and one semi-weekly newspapers. There are twenty-four motion picture theatres in Flint (two of which are closed) with a total seating capacity of 20,361. Of the twenty-four, seven (one of which is closed), with a total seating capacity of 8,004 are owned by Butterfield. There are, in addition, four drive-in theatres in Flint which are not owned by Butterfield. Three of the Butterfield theatres are the only ones in Flint normally displaying "first-run pictures."

10. Six television channels are assigned to Detroit: VHF Channels 2, 4 and 7, all of which are being utilized for operating stations and UTF Channels 50, 56 and 62, with Channel 56 reserved for educational use. Pontiac has one UHF assignment, Saginaw two UHF assignments, and Bay City one VHF and two UHF assignments, with one of the UHF channels reserved for educational use.

II. Financial Qualifications

11. The estimated construction costs, operating expenses, and income for the first year are as follows:

	WJR	*Trebit*	*Butterfield*
Estimated Construction Costs:	$1,852,000	$551,000	$838,000
Estimated Operating Expenses:	530,000	500,000	667,000
Income for First Year:	800,000	500,000	777,000

12. (a) *WJR* has current assets in excess of current liabilities in the amount of $2,368,000, with an earned surplus of $2,200,000. $2,000,000 has been reserved by the Board of Directors to meet the costs of constructing the proposed station. Of this amount so reserved, $1,250,000 consists of United States securities.

(b) *Trebit* and WFBM, Inc., its parent corporation, have several alternative means under consideration for financing the construction of their proposed stations in Flint and Evansville, Ind. Any one or a combination of these alternatives may be employed depending on the circumstances. One method would entail a credit arrangement with RCA extending over a period of years for the purchase of technical equipment . Another is a commitment from WFBM, Inc. to furnish up to $700,000 for the construction of the Flint station. A third means of financing would utilize a line of credit to WFBM, Inc. by the Mellon National Bank and Trust Company of Pittsburgh in the amount of fi750,000 which may be drawn upon for financing affiliates of WFBM, Inc. WFBM, Inc., itself has current assets of over $1,000,000 of which fi665,000 is in cash, and current liabilities of $419,000.

(c) *Butterfield* has assets of more than $6,000,000 including current assets of more than $3,600,000. Of the latter amount, $950,000 is in cash and $2,350,000 in United States government securities. Its current liabilities are $800,000.

(d) All three applicants and their parent or affiliated corporations have achieved substantial earnings over the past few years. Each of the applicants is financially qualified to construct and operate its proposed television station.

III. ENGINEERING CONSTRUCTION

A. *Heights, Powers, Sites and Predicted Contours.*

13. All three applicants propose to operate at the maximum height and power permitted by the rules for Channel 12. WJR and Trebit both propose to

operate with effective radiated powers of 316 kw, visual, 158 kw, aural. The antenna heights above average terrain are 1000 feet for both WJR and Trebit, and 1011 feet for Butterfield, necessitating a slight reduction in power for Butterfield. The WJR and Butterfield transmitter sites are situated on a high plateau southeast of Flint, the only high terrain around the perimeter of Flint. The heights above mean sea level of the WJR and Butterfield sites are 1100 and 1103 feet, respectively. The Trebit site is situated north of Flint on lower ground with a height above mean sea level of 810 feet. Flint, itself, is approximately 750 feet above mean sea level.

14. The distances in miles from the respective sites to the boundaries of Flint and Detroit are as follows:

	WJR	*Trebit*	*Butterfield*
Nearest Flint boundary	16.8	4.4	19
Farthest Flint boundary	24	11.1	22
Nearest Detroit boundary	27	54	29
Farthest Detroit boundary	40	66	42

15. Section 3.685 of the Commission's Rules requires that the applicants place a minimum signal of 77 dbu over Flint, the principal city to be served. The proposals of each applicant well exceed this minimum, with signal strengths of 86.5 dbu, 99 dbu, and 88 dbu placed over Flint by WJR, Trebit and Butterfield, respectively.

16. The United States land areas in square miles within the respective Grade A and Grade B contours computed in accordance with Section 3.684 of the Commission's Rules, and the persons residing within the contours, are as follows:

	WJR	*Trebit*	*Butterfield*
Grade A—area	6,320	6,320	6,514
Grade A—population	3,620,660	929,100	3,612,602
Grade B—area	10,800	11,640	11,340
Grade B—population	4,302,550	3,779,480	4,319,986

17. Detroit lies within the predicted Grade A and 77 dbu contours of WJR and the predicted Grade A contour of Butterfield, and substantially all of Detroit lies within Butterfield's 77 dbu contour. None of Detroit lies within Trebit's predicted Grade A contour, but a substantial portion does lie within its Grade B contour. Trebit's predicted Grade A contour encompasses Saginaw and Bay City. Butterfield and WJR's predicted Grade A contour encompasses only a portion of Saginaw, but all of Saginaw and Bay City lies within their predicted Grade B contour. The predicted Grade A contour of WJR and Butterfield and the predicted Grade B contour of Trebit encompass the City of Ann Arbor where the University of Michigan is located. All of what has been termed the Flint trade area lies within the Trebit predicted Grade A contour, and substantially all of such area lies

within the Grade A contour of the other two applicants.

18. Each of the proposed operations would meet the requirements of the Commission's Rules and Regulations regarding channel utilization and technical standards. Each applicant has established that its proposed operation would not constitute a hazard to air navigation, provided it complies with the painting and lighting requirements of Part 17 of the Commission's Rules and Regulations.

B. *Site Selection.*

19. *WJR.* WJR first proposed a transmitter site situated on a high plateau roughly midway between Flint and Detroit (22 miles from Flint and 21 miles from Detroit), but Airspace Subcommittee clearance could not be obtained. WJR then amended its application to specify its presently proposed transmitter site located on the same high plateau as its prior site but approximately 5 miles closer to Flint. This site was selected by WJR on the basis of several fac-

tors: to meet the required minimum mileage spacing requirements; to place the required minimum field intensity over Flint; to secure a high elevation; to avoid an air-navigation hazard problem; and to maximize the population residing within its predicted Grade A and B field intensity contours.

20. *Butterfield.* The transmitter site proposed by Butterfield (selected upon advice of its consulting engineer with a maximum height and power operation for Flint in mind) lies within the same general area southeast of Flint as that of WJR. The site was chosen with a view to obtaining the highest possible elevation while meeting the Commission's mileage separation and field intensity requirements. Coverage of Detroit was not a consideration in the choice of Butterfield's site.

21. *Trebit.* The transmitter site proposed by Trebit, located north of Flint, was selected upon advice of engineering and legal counsel. The site was chosen with a view to minimizing Trebit's signal to the south in the direction of Detroit and maximizing it to the north in order to facilitate affiliation with a network which is also represented in Detroit; and in an effort to provide a strong signal over the City of Flint and the area from which Flint normally draws trade. However, Trebit's site was chosen prior to the issuance of the Sixth Report and without knowledge of the increased antenna height and power which were to be permitted by the amended rules.

C. *Studio and Transmitter Facilities.*

22. *WJR* proposes to expend an estimated $776,000 in the construction of a new, two-story main studio building at a site to be determined in Flint. This structure, to be specially designed for television, will house among other things, three separate studios, a film projection room and an engineering laboratory. In its Flint studios, WJR will

supply two studio cameras, two film cameras, two film projectors, two (portable) field cameras, a custom-built mobile unit, and microwave relay equipment, as well as appropriate lighting, switching, audio and other technical equipment. WJR's proposed studios in Flint and its associated equipment

are adequate to accomplish its programming proposals. In addition to the above, WJR will modify one of its existing AM studios in the Fisher Building in Detroit to the extent requred for installing television cameras and related equipment in order that it might be employed as an auxiliary studio. The Detroit auxiliary studio, to be utilized as a remote pick-up point, will contain two field cameras, two film cameras, two film projectors, and necessary lighting, switching, audio and other technical equipment. WJR proposes to construct a new transmitter building at an estimated cost of $180,000. In addition to the transmitter room, WJR's transmitter building will house, among other things, a television studio, projection room and film vault. A film camera, studio camera, film projector, basic audio control equipment, and appropriate lighting, switching audio and technical equipment will be located at the transmitter.

23. *Trebit,* for its television studio, proposes the remodeling of a three-story structure presently housing its AM studios in downtown Flint. This building is leased by Landsmore Corporation, a WFBM, Inc. subsidiary, and Landsmore will bear the estimated $63,000 expense as a leasehold improvement and will be compensated by charging a higher rental to Trebit. Among other features, Trebit's television studio will contain two studios, film projection and screening rooms, a film servicing and storage room, office space, and control rooms. The equipment to be located at Trebit's studio will include four field cameras, one film camera together with associated equip-

ment, and basic studio-control and other technical equipment. Trebit does not propose remote programming for the present but expects eventually to conduct such broadcasts, and the portable field cameras would be available for such use. The four field cameras and certain other equipment will be made available to Trebit by its parent or affiliated corporations. The cost of additional studio equipment to be purchased is estimated at $67,500. Trebit proposes to erect a new transmitter building at an estimated cost of $57,000. The proposed studio and technical facilities are adequate for carrying out Trebit's program plans.

24. *Butterfield* proposes to provide television studios by remodeling and adding to one of its theatres in Flint. The cost of the proposed modification and addition is estimated at $260,000. Butterfield's converted studio building will house, among other things, two studios, a film projection room, and office space. A film camera, two studio cameras, two field cameras, a micro-wave relay link, and necessary test, lighting, audio and switching equipment will be located at the studio. Butterfield does not specifically propose remote programs at present but has provided for undertaking such programs in the future by including among its equipment portable field cameras, and a micro-wave link, and by providing a contingent fund for securing a vehicle for use as a mobile unit. The construction of a new transmitter building is proposed by Butterfield at an estimated cost of $35,000. Butterfield's proposed studio, transmitter building, and associated equipment are adequate for accomplishing its proposed programming.

4511

IV. CORPORATE MATTERS AND LEGAL QUALIFICATIONS

WJR

25. WJR is a Michigan corporation authorized to engage in television broadcasting. 800,000 shares are authorized,

with 520,000 issued and 516,533 outstanding. The outstanding shares are held by 1,183 stockholders, approximately 70% of whom reside in Michigan and own 29.4% of the stock. *Mrs. Frances S. Richards* (now Mrs. Walton Parker), a Director, is a California resident owning 22.4% of the stock. Mrs. Richards also holds a contingent life interest in the testamentary trust of G. A. Richards, deceased, the will providing that the net income of the trust (after certain monthly bequests to relatives) be paid to Mrs. Richards' daughter *Mrs. F. Sibley* (*Rozene R.*) *Moore* for life and to Mrs. Richards during her life if she survives her daughter. The corpus is to be distributed in accordance with various bequests upon the death of both. The testamentary trustees are *Mr. L. R. Jackson,* Akron, Ohio, and the Bank of America National Trust and Savings Association of Los Angeles, California. The Estate of G. A. Richards, of which Mrs. Richards is Executrix, owns 26.1% of the stock; and Mrs. Richards' daughter owns 1½% of the stock. In addition, the G. A. Richards Life Insurance Trust of which Mrs. Richards and her daughter are beneficiaries, owns 8% of the stock. In view of the public holding of 39% of the stock by some 1,171 stockholders, all of whom own less than 1%, it can be considered that actual control of WJR rests in Mrs. Richards. The WJR officers and directors and the stockholders of more than 85% of the stock are United States citizens. There are no statutory disqualifications.

26. *Mr. John F. Patt,* Cleveland, Ohio, is President and Director of WJR; *Messrs. Worth Kramer, George F. Leydorf* and *F. Sibley Moore* are Vice-Presidents and Directors; *Messrs. George Cushing* and *Gordon Gray,* Pleasantville, New York, are Vice-Presidents; *Mr. William G. Siebert* is Secretary-Treasurer and Director; and *Mr. Selden S. Dickenson* and *Mrs. Frances S. Richards,* Beverly Hills, California, are Directors. Unless otherwise specified, all

of the above officers and directors reside in Detroit or its environs. With the exception of Mrs. Richards and Mr. Moore (the husband of Rozene Moore), none of the foregoing is a member of the immediate Richards family. With the exception of Messrs. Gray and Moore, all of WJR's officers and directors are stockholders, each owning less than 1% of the stock, with the exception of Mrs. Richards. 54 members of the WJR staff are stockholders, all with holdings of less than 1%. At an annual meeting which was to be held on April 1, 1953, 40,000 shares, or roughly 7% of the then outstanding stock, was to be made available to the mentioned directors (except Mrs. Richards) and to others to be designated by the Board of Directors, in order to encourage management incentive and to foster integration of ownership and management. This proposal was originated by the controlling stockholder and it can be assumed that it will have met the necessary approval of the Board of Directors and of the stockholders.

27. WJR is legally qualified to be licensee of its proposed television station.

4512

Trebit

28. Trebit is a Michigan corporation authorized to engage in television broadcasting. 3,000 shares of common stock, all owned by WFBM, Inc., an Indiana corporation, are authorized and outstanding. WFBM, Inc. acquired a 50% interest in WFDF in 1948 and the remaining 50% in March, 1952. Trebit's officers and directors are: *Mr. H. M. Bitner, Sr.,* Princeton, New Jersey, Chairman of the Board, President and Director; *Mr. H. M. Bitner, Jr.,* Indianapolis, Indiana, Vice-President and Director; *Mr. Lester W. Lindow,* Flint, Michigan, Secretary and Director; and *Mr. Melvin C. Green,* Indianapolis, Indiana, Treasurer and Assistant Secretary. All of the above officers and directors are United

States citizens with no statutory disqualifications. H. M. Bitner, Sr. votes the Trebit stock held by WFBM, Inc. Lester W. Lindow, who is also the Trebit General Manager, received a 5-year option on May 1, 1952 to purchase 5% of Trebit's common stock.

29. WFBM, Inc. is authorized to issue 100,000 shares of common stock and 10,000 shares of non-voting preferred stock, with 50,600 common and 4,060 preferred shares issued. H. M. Bitner, Sr. owns 32.02% of the voting stock of WFBM, Inc.; H. M. Bitner, Jr. his son 13.34%; Evelyn H. Bitner, wife of H. M. Bitner, Sr. 13.34%; Evelyn H. Pearson, daughter of H. M. Bitner, Sr., 13.34%, and Jeanne E. Bitner, former wife of H. M. Bitner, Jr. 13.34%. The Bitner family group, consisting of Mr. Bitner, Sr., his wife, son and daughter, hold the controlling interest in the corporation, owning more than 72% of the voting stock. WFBM, Inc. has 14 stockholders in all, 6 of which are employees of WFBM-AM in Indianapolis. With the exception of H. M. Bitner, Jr., each of these employees owns less than 1% of the stock. *Mrs. Ralph S. Euler,* Sewickley, Pennsylvania and *Mrs. Dorothy Y. Kapner,* Fox Chapel, Pennsylvania, each owns 5.33% of the voting stock. The remaining stockholders not here listed own less than 1% of the voting stock and are either related to, or are close personal friends of the Bitner family, or are related to employees of WFBM, Inc. The officers and directors of WFBM, Inc. are: *Mr. H. M. Bitner, Sr.,* Chairman of the Board and Director; *Mr. H. M. Bitner, Jr.* President and a Director; *Mrs. Evelyn H. Bitner,* Director; *Mr. Frank O. Sharp,* Indianapolis, Indiana, Vice-President; *Mr. Melvin C. Green,* Secretary-Treasurer; and *Mr. William H. Kiley, Jr.,* Indianapolis, Indiana, Vice-President - Sales. The officers, directors and stockholders of WFBM, Inc. are citizens of the United States. None of the officers, directors or stockholders of WFBM, Inc. is a Michigan resident.

30. Trebit is legally qualified to be licensee of its proposed television station.

Butterfield

31. Butterfield is a Michigan corporation authorized to engage in television broadcasting. The officers and directors, who are all residents of Michigan, but not of Flint, are: *Mr. M. F. Gowthorpe,* Gross Pointe Farms, Michigan, President, Treasurer and Director; *Mr. William A. Ruble,* Lansing, Michigan, Vice-President, Secretary and Director; *Mr. Paul W. Seippel,* Ann Arbor, Michigan, Vice-President and Director; *Mr. H. Edward Stuckey,* Grosse Pointe Farms, Michigan, Vice-President; and *Messrs. Howard Nickelson,* East Lansing, Michigan; *Roscoe O. Bonisteel,* Ann Arbor, Michigan; and *J. Joseph Herbert,* Manistique, Michigan, Directors. The officers and directors are all citizens of the United States with no statutory disqualifications.

32. Butterfield is authorized to issue 200,000 shares of common and 5,000 shares of preferred stock. No preferred stock is issued or outstanding. There are 3 classes of common stock, A, B and C. 130,000 shares of Class A, 50,000 shares of Class B, and 20,000 shares of Class C stock are authorized; 92,804 shares of Class A, 37,500 shares of Class B, and 15,000 shares of Class C stock are issued and outstanding; and 4,696 shares of Class A stock are held in the treasury. Each share of common stock has one vote, with the owners of Class A stock entitled to elect 3 directors, the owners of Class B stock, 2 directors, and the owners of Class C stock, 1 director. Bijou Theatrical Enterprise Company (hereinafter referred to as Bijou), a Michigan corporation, owns 100% of the Butterfield Class A and C stock issued and outstanding, and the Board of Regents of the University of Michigan (hereinafter sometimes referred to as Regents) owns 100% of the Class B stock issued and

outstanding. Bijou, therefore, owns 74% of the applicant's issued and outstanding stock, and elects 4 directors; and Regents own 26% of the issued and outstanding stock, and elects two directors.

33. The officers and directors of Bijou are all citizens of the United States with no statutory disqualifications. They include some members who are also officers and directors of Butterfield, with *Mr. Gowthorpe,* functioning as President, Treasurer and Director; *Mr. Ruble* as Vice-President, Secretary and Director; and *Mr. Mickelson* as Director of Bijou. In addition, *Mrs. Irene B. Goodwin,* Chicago, Illinois, and *Mrs. Caroline B. Allen,* Grand Rapids, Michigan, the widow and daughter of W. S. Butterfield, respectively, are Directors of Bijou. Bijou is authorized to issue 60,000 shares of common stock, of which 51,900 are issued and outstanding. 49,296 shares, which were owned by W. S. Butterfield at the time of his death in 1936, are now held by the Trustees of the Butterfield Trust. The individual trustees are *Messrs. Gowthorpe, Seth R. Bidwell,* Lansing, Michigan, and *Lester P. Dodd,* Detroit Michigan, and the corporate trustee is Central Trust Company, Lansing, Michigan. Central Trust Company is chartered pursuant to Michigan law, with the sole business of acting as a fiduciary; and all of its officers and directors are Michigan residents. The trustees are all United States citizens and possess no statutory disqualifications. The income of the Trust, subject to certain bequests and annuities, is payable to the widow, children, and grandchildren of W. S. Butterfield, and upon the death of the widow and the last survivor of the children of the decedent, the corpus is to be distributed to the grandchildren of the decedent.

34. The Board of Regents of the University of Michigan is a corporate body established by the state constitution and is comprised of 8 Regents elected by the voters of the state. The Regents are charged with the general supervision of the University and the direction and control of all expendi-

tures from University funds. The Regents are all citizens of the United States with no statutory disqualifications. Two of the Regents, *Messrs. Bonisteel* and *Herbert,* are Directors of Butterfield.

35 Butterfield is legally qualified to be licensee of its proposed television station.

V. Other Interests and Background Material

36. The other interests of the applicants, including broadcast, and pertinent background material on selected officers, directors and stockholders, are as follows:

WJR

37. *WJR,* since 1927, has been the licensee of Class 1A standard broadcast station WJR, Detroit, operating on 760 kc, with 50 kw power, unlimited time, and affiliated with the CBS network. Since 1952, WJR has been the licensee of Class B FM station WJR-FM, Detroit, operating on Channel 242, with 24 kw ERP, unlimited time.

38. *Frances S. Richards* and the Estate of *G. A. Richards* hold a majority of the stock of the WGAR Broadcasting Company (hereinafter referred to as WGAR), and WJR and WGAR are therefore under common control. WGAR is the licensee of Class II standard broadcast station WGAR, Cleveland, Ohio, operating on 1220 kc, with 50 kw power, DA-1, and affiliated with the CBS network; and the licensee of Class B FM station WGAR-FM, Cleveland, Ohio, operating on Channel 258, with 31 kw ERP, unlimited time.[2] Mrs. Richards formerly was a stockholder and direc-

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[2] After the closing of the record in this proceeding, an application by WGAR for a television station in Cleveland was dismissed at its own request and will not be considered further by the Commission in this proceeding. The Commission's records also indicate that on December 30, 1953, WGAR and WGAR-FM were transferred to Peoples Broadcasting Corporation. However, this factor will not be considered for purpose of the record in this proceeding.

tor, and the Estate formerly held a controlling interest in, standard broadcast station KMPC, Los Angeles, California. The interests in KMPC were relinquished in 1952. Mrs. Richards did not appear at the hearing in this proceeding.

39. *John F. Patt* has been actively engaged in the radio field since 1922, starting as an announcer and assistant radio editor while still at college. In 1926, he joined WJR in Detroit as Assistant Manager, and in 1930 became Vice-President and General Manager of WGAR in Cleveland. In 1950, Mr. Patt became President of WJR, WGAR and KMPC, his association with KMPC terminating in 1952. He has been associated with numerous civic organizations and activities in Cleveland where he has resided since 1930; and since becoming President of WJR in 1950, has become identified with a number of Detroit civic organizations. In the event of a grant, Mr. Patt will act in an executive supervisory capacity for the Flint, Detroit and Cleveland properties. At the outset, he will devote approximately one week per month in connection with the Flint station, and thereafter as much time as is required.

40. *Worth Kramer* has been in the broadcasting field since 1929 and was associated with various broadcast stations prior to his employment as Program Director of WJR in 1946. He became Vice-President and General Manager of WJR in 1950, and a Director in 1951. Mr. Kramer has been active in Detroit civic organizations and activities. In the event of a grant, he expects to move to a location between Flint and Detroit and will exercise general supervision over the television organization. He expects to devote approximately 25% of his time to the Flint station.

41. *George C. Leydorf,* a radio engineer, has been associated with the technical aspects of broadcasting since 1920. He joined the staff of WJR as Chief Engineer in 1946 and

is now Vice-President in charge of Engineering. Mr. Leydorf has been active in various engineering committees and organiations and has participated in local and national defense work. In the event of a grant, Mr. Leydorf will be responsible for the construction and installation of the station, the organization and staffing of the engineering department and the technical supervision of the station. During the first year of operation, he expects to devote approximately 80% of his time to the Flint station and thereafter to share his time between the Detroit and Flint stations.

42. *George W. Cushing* functions as moderator of one of WJR's discussion programs; and in the event of a grant, will appear as moderator of the television version of this program. Mr. Cushing joined WJR in 1941 and has been active in public service activities and organizations. *Gordon Gray* is Vice-President of WGAR, was formerly Vice-President of KMPC, and was connected with other radio stations since 1944. He is in charge of the New York Office. *F. Sibley Moore* is Director and minority stockholder of WGAR, was formerly Director of KMPC, and was an employee of WGAR, working as record librarian, traffic manager and salesman. He is presently functioning as a general executive assisting other Officers of WJR and, in the event of a grant, expects to divide his time equally between the television and radio stations. *William G. Siebert* has been associated with WJR since 1929 when he joined the organization as an auditor. He has been active in Detroit community and civic affairs. Mr. Siebert will continue his present functions with respect to television as well as radio. *Rozene R. Moore* is the daughter of Mrs. Richards and was formerly a stockholder in KMPC. *Selden S. Dickinson* has been WJR General Counsel since 1949 and a Director since 1951. He has been active in Detroit civic activities. *Franklin C. Mitchell,* WJR Program Director, has been with that

organization since 1936. He has been active in local civic activities. *Dale B. Hornung,* who joined the WJR organization in 1946, has served on the special events staff and as Educational Director, and, since 1952, has served as Public Service Director. He has been active in Detroit civic activities.

43. The other key personnel of WJR have had varying degrees of experience, and some have had long connection with the Richards stations. Detailed biographical sketches of officers, directors and staff personnel submitted by WJR indicate that a substantial number have been associated with WJR for many years and have the experience necessary to fill their present position.

Past Record of WJR

44. For the benefit of its employees, WJR maintains a pension plan, a group insurance plan, a bonus plan, a hospitalization and surgical plan, and follows the practice of retaining employees on full salary when ill. WJR encourages its employees to participate in community affairs. These practices will be continued in connection with its television personnel.

45. In general, WJR has subscribed to the industry code of the NARTB. However, where it is felt that the broad standards of this code are inadequate, particularly in the advertising field, WJR maintains its own more rigid code and has rejected programs which it believed to contain advertising excesses or objectionable material. Sustaining time has been made available for civic, cultural, educational, and welfare organizations without charge. WJR supplied for the record a comparison between proposed program schedules submitted in connection with various renewal applications recently filed with the Commission and WJR's

actual program logs. No substantial deviations from the proposals are disclosed.

46. In January 1951, WJR formed an advisory council composed of representatives of civic, cultural and other community organizations to aid the station in its public service activities. The Council meets at least once a year, and individual members are consulted on other occasions. In the event of a grant, WJR proposes to form a similar board in Flint for assistance in the operation of its television station.

Past Television Activities and Preparation for Television

47. WJR's background in television extends back to 1931 when it received an experimental television authorization and conducted experimentation over a two-year period. In the late thirties and early forties, WJR again considered applying for a television authorization, and in 1944 submitted an application for a station in Detroit on Channel 6. In 1946, WJR sought dismissal of its application when Channel 6 was not assigned to Detroit under the 1945 allocations. WJR was at that time affiliated with the CBS network whose first petition for the adoption of standards for color television was then filed, and WJR held off filing a new application on the belief that the proposed CBS color standards would be adopted. In November 1947, after the CBS color standards were rejected, WJR filed an application for a television station on Channel 5 in Detroit. The latter application was the subject of a hearing held in March, 1948, but the television "freeze" was imposed prior to final Commission action and the frequency sought was eventually deleted from the community. WJR participated in the recent television allocation proceeding, seeking the assignment of additional VHF channels in Detroit, and opposing conflicting proposals which would preclude such assignments, including Trebit's proposal for an additional

VHF channel in Flint. WJR's counterproposals were not adopted, however; and all three VHF channels finally assigned to Detroit by the Sixth Report and Order were already in operation, thus leaving only UHF channels available upon application in that community.

48. WJR initially considered applying for a UHF station in Detroit in addition to a station on Channel 12 in Flint; but in view of the resulting overlap of the Grade A contours, decided to prosecute only an application for Flint. In choosing Flint, WJR concluded that operation of a station on Channel 12 in Flint would offer greater opportunity for affording more service to more people and greater likelihood for successful operation.

49. In order to prepare for television, WJR executives have participated in television conferences, visited numerous existing stations, studied available technical material and attended demonstrations by television manufacturers.

50. In order to achieve a program schedule designed to provide a television outlet for local Flint activities, WJR, based on its extensive broadcasting experience, prepared a check list of Flint human and community interests and activities for use by its officials in discussing program plans with Flint residents. The check list was supplied to WJR personnel in order that they might discuss the WJR program plans with Flint residents and invite their participation. The results of this work were to a large degree incorporated into WJR's final program plans. The Public Service Director of WJR made several visits to Flint to ascertain the public service requirements of the community and to consult with some 27 civic leaders respecting specified proposed television programs and public service programming in general. WJR, through its President, discussed its television plans at a luncheon held in Flint on December 17, 1952, at which some 25 Flint civic leaders attended.

Trebit

51. *Trebit* is a licensee of standard broadcast station WFDF operating on 910 kc in Flint with 1 kw power, unlimited time, and affiliated with the ABC radio network. *WFBM, Inc.* is the licensee of television broadcast station WFBM-TV operating on Channel 6 in Indianapolis, Indiana, and of standard broadcast station WFBM operating in the same community on 1260 kc with 5 kw power, unlimited time. WFBM (AM) is affiliated with CBS, while WFBM-TV carries programs of all 4 television networks. WFBM, Inc. is also the licensee of standard broadcast station WEOA operating in Evansville, Indiana, on 1400 kc with 250 watts power, unlimited time (CBS), and is an applicant for a construction permit for a television station in Evansville. WFBM, Inc. is the owner of 95% of Grandwood Broadcasting Company, (hereinafter referred to as Grandwood) licensee of standard broadcast station WOOD operating in Grand Rapids, Michigan on 1300 kc with 5 kw power, unlimited time, and television station WOOD-TV on Channel 8 in the same community. WOOD (AM) is affiliated with NBC, and WOOD-TV carries programs of all four television networks. In summary, the Bitner interests own four standard broadcast and two television stations, and are an applicant for two additional television stations. WFBM, Inc. is also the sole stockholder of Landsmore Corporation, a Michigan corporation recently organized for the purpose of holding land and properties for the broadcast activities of WFBM, Inc. WFBM, Inc. has no other interests.

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52. Flint is approximately 100 miles east of Grand Rapids and 258 miles northeast of Indianapolis. No Grade A overlap would result between WOOD-TV in Grand Rapids and the proposed Flint station, but there would be a slight Grade B overlap falling within the City of Lansing or its

trade area. There would be no other overlap between Bitner controlled television stations and the station proposed in Flint. Each television facility will be programmed, operated, and advertising time sold thereon, on an individual basis in order to meet the needs of the community in which the station is located. Joint or combination rates are not presently employed or proposed. While programming experience and technical know-how will be exchanged among the stations, the operation of the station as an independent Flint station will not be altered.

53. *H. M. Bitner, Sr.* is President and Director of Grandwood, Chairman of the Board, President and Director of Landsmore, and Chairman of the Board of of Directors of WFBM, Inc. Mr. Bitner first became active in the radio field as a member of the Hearst organization. He was publisher of the Pittsburgh Sun-Telegraph when radio station WCAE was purchased in 1931 by Hearst; and after becoming a Director, voted the Hearst stock in WCAE. In 1945, Mr. Bitner disposed of his stockholdings and severed connections with station WCAE and the Hearst organization. He held an interest in radio station WFEA, Manchester, New Hampshire, from 1944 to 1948, and was President and Director of WFEA, Inc. Mr. Bitner spend approximately 3½ hours a day in broadcasting work and activities in connection with the Bitner stations. He has frequent telephone conversations with various key personnel, receives written reports concerning the operation of the several stations and visits each station at least once each year.

54. *H. M. Bitner, Jr.* is President, Director and General Manager of WFBM, Inc. and Vice-President and Director of Grandwood and Landsmore. He is charged with the overall supervision and direction of the various WFBM properties. Although based in Indianapolis, Mr. Bitner is in frequent contact with stations outside of Indianapolis and receives several weekly reports regarding the commercial

and public service activities of the stations. He visits the other stations about three or four times a year. Mr. Bitner is active in community affairs in Indianapolis.

55. *Lester W. Lindow,* Secretary and Director of Trebit, is also Secretary and Director of Landsmore and has been General Manager of station WFDF in Flint since 1948. Mr. Lindow first became active in the radio field in 1935 with WCAE, Pittsburgh, where he became Commercial Manager. Prior to World War II, he was appointed Secretary of WFBM, Inc. and General Manager of WFBM in Indianapolis. After the war, Mr. Lindow was for a short period General Manager of WRNY, Rochester, New York prior to his present association with WFDF. Mr. Lindow, who now resides permanently in Flint, is active in local Flint civic and public service organizations, as well as state and national broadcast organizations. He will function as General Manager of the proposed television station in the event of a grant.

56. *Melvin C. Green,* in addition to his positions with Trebit, is Secretary and Treasurer of WFBM, Inc. and Treasurer and Assistant Secretary of Grandwood and Landsmore. Mr. Green acts in a supervisory auditing capacity for the various Bitner interests, including Trebit. He is in constant touch with Trebit and the other Bitner stations by telephone and visits them at least once every other month.

57. *Harold S. Holland* is Chief Engineer of WFBM and WFBM-TV and is Executive Chief Engineer of Grandwood, Trebit and WEOA. In the event of a grant, Mr. Holland will supervise the installation of television facilities of the Flint station and during the first year, expects to be in Flint from 30 days to three months. Mr. Holland visits the other stations frequently.

58. *Evelyn H. Bitner* is a Director of WFBM, Inc. and Grandwood. *Frank O. Sharp* is Vice-President of WFBM, Inc. and Program Manager of Station WFBM. *Ralph S. Euler* is a Director of Grandwood and a Director of the Mellon National Bank and Trust Company, Pittsburgh. *Dorothy Y. Kapner* is the wife of Leonard Kapner, who is President of WCAE, Inc. and General Manager of station WCAE, Pittsburgh. *William F. Kiley, Jr.* is Vice-President in Charge of Sales of WFBM, Inc. *E. Gilbert Forbes* is News Editor of WFBM and WFBM-TV.

Past Record of WFDF

59. WFDF has been a Flint institution for many years, having been first licensed in the 20's. It has received wide community acceptance and has rendered significant service to the community, making available without charge, time and expert help for civic, cultural, educational, and welfare organizations. Although the Trebit interest in the station was not acquired until 1948, the established pattern of cooperation did not change when Trebit assumed control, and Trebit has maintained a good record of cooperation with civic groups in the community. No showing or analysis has been made of any typical weekly program schedule of WFDF, nor was any evidence adduced respecting the manner in which past representations made to the Commission by WFDF were in fact carried out. However, the record contains no evidence of any significant deviation from the representations advanced by WFDF concerning its proposed programming as set out in various transfer and renewal applications. The record does demonstrate that WFDF, in general, has substantially met the needs of the Flint community and of the population residing within its service area.

60. Some of WFDF's religious programs have been, and still are, commercially sponsored; but the sponsors of these

programs are not groups attacking other faiths, nor do the sponsored programs contain repeated and excessive appeals for financial support. Some commercially sponsored religious programs have been refused by WFDF.

Past Television Activities and Preparation for Television

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61. In April 1948, the Board of Directors of Trebit decided to apply for a television station in Flint, but the "freeze" was imposed by the Commission before an application could be prepared and filed. Trebit participated in the recent television allocation proceeding, seeking the assignment of an additional VHF channel to Flint.

62. Early in 1952, Trebit organized a program advisory committee whose members represent a cross section of the major groups and organizations of the Flint community. This committee held three meetings during 1952 during which it proposed television program needs and plans were discussed in some detail. The committee was formed specifically for television rather than for AM, inasmuch as Trebit believed that such contacts and cooperation with reference to AM programming as were necessary were already in existence. A similar group was formed about the same time in connection with WFBM's Evansville television application, which is involved in a comparative hearing; but such committees have not been established for the Indianapolis and Grand Rapids television or standard broadcast stations, or for the Evansville standard broadcast station.

63. In July 1952, Trebit acquired two television cameras on loan from WFBM, Inc. for the purpose of training station personnel, particularly with respect to programs involving local service and charitable organizations. A substantial number of closed circuit programs have been pro-

duced since that time with the active participation and cooperation of the various local organizations.

Butterfield

64. *W. S. Butterfield, Inc.,* directly or through affiliates, holds interests in 105 motion theatres in Michigan communities. All of these theatres are operated by, and are either owned or leased by, Butterfield or its subsidiary or affiliated organizations. As noted above, Butterfield owns seven theatres in Flint, one of which is closed. Three of the seven normally operate as the only first-run houses in Flint. Butterfield has no theatre interests in Detroit. The licensing of film for all its theatres is accomplished by Butterfield through its home office. Aside from its theatre and related property interests, Butterfield has no other interests.[3]

65. The *Board of Regents of the University of Michigan* owns a 26% interest in Butterfield purchased in 1950 from Paramount. Regents' motive in acquiring this interest—which was obtained prior to Butterfield's determination to apply for a television station—was its belief that the interest in Butterfield would

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prove a sound investment in the communities served by both. Regents has not actually participated in the day-by-day operation of Butterfield, its subsidiaries or affiliates; although through its two members serving as Directors, it has displayed an interest in the protection of its investment and in the over-all policies and operation of Butterfield. Moreover, although through its two representatives on the Board, Regents participated in and approved of Butterfield's proposed entry into the television field, and while it appears that some general supervisory interest will be maintained in the proposed television operations, Regents will not actively participate in the day-to-day operation of the proposed television station. Under broad policies established and promulgated by the Board of Directors, expert technical and executive personnel hired by Butterfield for this purpose will carry out its television operations.

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[3] After the closing of the record in this proceeding, an application for a television station in Grand Rapids, by Butterfield was dismissed at its own request. This application is not being further considered by the Commission in this proceeding.

66. Regents is the licensee of non-commercial FM broadcast station WUOM, Ann Arbor, Michigan, and the permittee of FM station WFUM, Flint, Michigan.[4] No showing concerning the operation of these stations was made.

67. *W. S. Butterfield Theatres, Inc.* was established in Detroit in 1926. The operation of its many theatres is conducted through a central office by means of various departments. Butterfield currently has no regular live talent policy in the operation of its theatres; although live talent is occasionally employed. Butterfield licenses film for its theatres from distributors' exchanges in Detroit, which license film for motion picture theatres only. Each film is screened in advance by Butterfield executives in order to determine its commercial value and whether the films are in good taste. Butterfield endeavors to meet standards of good taste in the operation of its theatres and in the choice of films and advertising employed, and, upon occasion, has refused to show certain pictures because of offensive advertising of the films. Over the past years, Butterfield has maintained a policy of developing amateur talent in the various local communities, including Flint, and, in this connection, has cooperated with local AM and television stations. It is Butterfield's policy to employ local people in its

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[4] After the closing of the record in this proceeding, the Board of Regents of the University of Michigan was granted a permit to construct a non-commercial educational television station (WUOM-TV) on Channel 26 in Ann Arbor. In this connection see Footnote 7, *infra*.

theatres and to promote from within its own organization. Butterfield has a group life insurance program paid for by the company and maintains a general benefit fund for its employees. In the event of a grant, television employees will be eligible to participate in these programs, and Butterfield's employment policy will be made applicable to its television operation. Butterfield strives to integrate its theatres and organization into the life and activities of the community it serves, requiring its theatre managers to take an active part in community life. Through its local theatre managers, Butterfield has followed a policy of cooperating with and participating in, local philanthropic, civic, religious and service organizations, and has actively implemented this policy in Flint.

68. *Mr. M. F. Gowthorpe,* born and educated in England, arrived in the United States in 1920. Shortly thereafter, he was employed as an auditor by the predecessor of Paramount Pictures, Inc., and, with one brief hiatus, continued in that organization and its successors until 1948. After 1935, Mr. Gowthorpe served as a member of Paramount's Theatre Department, handling financial and corporate matters. His first official connection with Butterfield was in 1934 or 1935 at which time he served as a Director representing Paramount, who then held the stock interest subsequently purchased by Regents. In 1949, after resigning from Paramount, Mr. Gowthorpe became President, Treasurer and Director of Butterfield, which positions he still holds. He is also an officer and director of Butterfield's subsidiary and affiliated companies. Mr. Gowthorpe has been active in local civic activities.

69. *Mr. Paul W. Seippel's* career in the theatre business began in 1926. In 1928, while still a student at the University of Michigan, he entered Butterfield's employ as a head usher and has been employed by Butterfield since that time.

He served as manager of a number of theatres in Michigan communities, including the Capitol Theatre in Flint, and in 1941, served as City Manager for the Butterfield Theatres in Flint. Mr. Seippel has now risen to the position of Vice-President and Director in charge of theatre operations. He resided in Flint from 1936 until 1951, with the exception of time spent in the Armed Forces, and was active in civic and charitable organizations in the community.

70. *Mr. H. Edward Stuckey* has been in the theatre field since 1923, when he joined Paramount primarily in connection with booking, licensing, and sales activities. From 1946 until 1950, he was Manager of Paramount's Detroit Exchange. In 1950 Mr. Stuckey left Paramount to take his present position as Vice-President in charge of licensing attractions for the Butterfield theatres. He will not participate in the licensing of film for television. Mr. Stuckey has been active in local civic and charitable organizations.

71. *Mr. William A. Ruble* had a business background before joining the Central Trust Company of Lansing, Michigan, in 1933. He is an attorney and now serves as Executive Vice-President and Director of the mentioned bank, as well as an officer or director of the affiliated companies of Butterfield, and an officer and/or director of three other Lansing concerns. Mr. Ruble is active in local civic and charitable organizations in the Lansing community.

72. *Mr. Howard Mickelson* has been associated with the Central Trust Company of Lansing since 1928, and is now President, Treasurer and Director of that organization. He is also Director of three of the affiliated Butterfield companies and a Director in two other Lansing concerns. Mr. Mickelson has been active in local civic and charitable organizations in the Lansing community.

73. *Mr. Roscoe O. Bonisteel* is a practicing attorney in Ann Arbor, Michigan, and has been a member of the Board

of Regents of the University since 1946. He is a director of two banks, a surety company, a life insurance company and an industrial concern. Mr. Bonisteel has been active in University, civic and professional associations.

74. *Mr. J. Joseph Herbert* is a practicing attorney in Manistique, Michigan, and is also a member of the Board of Regents. He has been active in local religious, civic, fraternal, professional and educational organizations.

75. In the event of a grant, the Butterfield station will be operated as an independent unit, with the staff responsible to Mr. Gowthorpe and the Board of Directors, which will have responsibility for over-all policy. None of the foregoing Butterfield officers or directors has had previous radio or television experience. With the exception of Mr. Gowthorpe, who will devote from 75 to 90% of his time to the proposed television operation, the remaining officers and directors will not participate in the day-to-day operation of the station, although such help and advice as may be desired from them will be forthcoming. Mr. Ruble presently devotes 10 to 20% of his time to Butterfield business. While Mr. Stuckey will not participate in the day-to-day operation of the television station, he will lend advice regarding the type of entertainment popular in Flint. Mr. Seippel also will not participate in the day-to-day operation of the station, but will assist in the operation by way of offering advice and suggestions as to Flint and its interests. The Board of Directors presently meets at least twice a year; and it is planned, for the future, to increase the number of meetings to four annually.

Past Television Activities and Preparation for Television

76. Butterfield desires to enter the television field because it believes it is a rowing and a good business, and will provide a diversification in the activities of the company.

Flint was selected as one of the cities for which to apply for a station since it is a growing community, and in light of Butterfield's identity with Flint by reason of its operation of theatres in the community for many years. Butterfield initially applied for one of the UHF channels assigned to Flint but later amended to specify Channel 12.

77. Mr. Gowthorpe over the past few years has familiarized himself with material on television and has visited a number of television stations to study their operation. In the preparation of the initial application, Butterfield obtained the consultation and advice of the program manager of an existing station. A very limited on-the-spot exploration of local needs and potentials was undertaken in connection with this first program proposal. Shortly after Butterfield's application was designated for hearing in this proceeding, another consultant, Mr. Kersta, was employed to assist Butterfield in preparing various changes in its program proposal. This consultant has had substantial experience in broadcasting and television, having served as Director of Television for one of the major networks. It is proposed, in the event of a grant, that he will serve for a period of one year in assisting the station to get on the air and to carry out its plans. Two short trips to the Flint area were taken by the above consultant in late 1952, at which time contacts were established with several local philanthropic and service organizations with reference to programs and to the possibility of obtaining the cooperation of such ororganizations. The major changes in the program format, however, had been formulated prior to these trips. Butterfield proposes to organize a Program Advisory Committee to be compsed of

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representatives of Flint civil, educational, religious, business, labor, agricultural, women's and philanthropic organizations. Although personnel have been selected and have consented to serve, this committee is not yet functioning. The committee, which will meet about once a month, will act only in an advisory capacity.

VI. Proposed Staffs

78. *WJR*—Messrs. Patt, Kramer, Leydorf, Siebert, Cushing and Moore, and other WJR executives will retain the same positions with relation to the Flint television station that they presently hold with the AM station, and they will be available for the television operation on a part-time basis. Dale B. Hornung, WJR Public Service Director; Donald E. Large, Assistant Music Director; Marshall Wells, Farm Editor, and Edgard A. Guest, Jr. will function at the television station on a part-time basis. In addition, WJR proposes to employ a staff of 53 persons to operate its television station. Franklin C. Mitchell, the current WJR Program Director, will become full time Program Director for television. Robert K. Clark, a WJR transmitter engineer, will assume the duties of engineer in charge of the television transmitter. The number of staff members to be employed was determined by WJR after examining reports on the staffs of existing stations but has been arrived at without a detailed breakdown relating the staff to specific programs and to operating procedures. The proposed staff appears to be adequate to operate the television facility and to carry out WJR's program proposal. Changes in the number of personnel will be made as the need for such changes is indicated. Part of the Detroit AM staff will be employed in the Detroit television studio on a part-time basis when needed. That portion of the staff which has been identified appears to have the requisite qualifications for filling the positions for which they are proposed. The sales staffs of the AM and television stations will be separate and distinct, and different national representatives will be employed.

79. *Trebit*—Trebit plans to integrate the operations of its AM and television stations in Flint, employing a single staff. This method has been used in connection with other Bitner properties and found satisfactory by Bitner. Mr. Lindow will serve as General Manager of both operations. Elmer A. Knopf, current WFDF Program Director, and Gerald C. Wolpert, current Chief Engineer of WFDF, as well as other WFDF executives, will continue in their present positions serving both operations. WFDF presently employs a staff of 43 persons, and Trebit proposes to add an additional 51 persons. This includes 5 employees currently engaged in closed circuit television work. The time of two employees, and part time of a third, will be devoted to local news gathering and local news programs. The proposed staff appears adequate for the operation of the facility, and to carry out Trebit's program proposals; and those members identified appear qualified for their proposed functions. The sales staff will represent both the AM and television stations. Trebit's Executive Chief Engineer will spend a substantial amount of time during the first year of operation in Flint supervising construction and getting the station ready for operation.

80. *Butterfield*—Butterfield proposes to operate its television station with a staff of 68 persons. The proposed staff personnel have not yet been selected, but it appears that qualified individuals will be employed to fill the various positions. The proposed number of staff members was arrived at after a detailed study of the specific personnel necessary to operate and program the type of television station indicated by Butterfield's proposals, including its proposed hours of operation. General supervisory powers will be exercised over the operation by the Board of Directors and Mr. Gowthorpe. The television consultant who

assisted in the preparation of the application will be available, in a non-resident advisory capacity, for the first year of operation. Butterfield's officers and directors, aside from Mr. Gowthorpe, will not participate in the day-to-day operation on the television station, but will furnish such advice as may be desired.

VII. Network Affliation

81. Each of the three applicants proposes network affiliation, if available; and all three program proposals contemplate such affiliation. Trebit and Butterfield propose NBC affiliation and, for purpose of preparing proposed program schedules, have used NBC programs. They have had discussions with officials of this network relating to possible affiliation. These discussions indicate interest on the part of NBC in affiliating with a Flint station, but other testimony indicates disagreement as to the availability of an NBC affiliation for Butterfield. WFDF, the Terbit AM station in Flint, recently became affiliated with NBC.

82. WJR proposes to affiliate with the DuMont television network, and has had discussions with DuMont officials which lead it to believe that such affiliation is feasible in the event of a grant. DuMont was chosen in order to provide what is termed *"a new and distinctive" service* to the entire area to be served, including Detroit. The three existing television stations in Detroit presently have basic affiliations with the other three television networks. WJR believes that, in view of such affiliations and the overlap that would result between its station in Flint and the Detroit stations, an affiliation with a network other than DuMont could not be obtained. No discussions with other networks have been held by WJR. A WJR official indicated that it would not have selected DuMont if all networks were available, and that WJR would make a change in its affiliation to improve its competitive position, but would not consider

affiliating with a network having an affiliate in Detroit unless the Detroit station's signal was not receivable in Flint.

VIII. RATES

83. All of the initial rates are, at best, estimates and are subject to revision in light of the situation prevailing in the community at the time of initial operation. The following initial basic rates are proposed: WJR—$450 per hour; Trebit—$250 per hour; and Butterfield—national rate, $300 per hour and local rate, $250 per hour, with a 25% increase at the end of six months. The same national and local rate is proposed by Trebit. WJR and Butterfield would, if necessary, place into effect distinctions between national and local advertisers in its rate structure.

IX. PROGRAM PROPOSALS

84. A comparative analysis of the proposed typical weekly schedule of all three applicants is as follows:

Types	*WJR*	*Trebit*	*Butterfield*
Entertainment	69.86%	73.9%	64.91%
Religious	4.28	3.8	3.28
Agricultural	2.48	2.6	2.09
Educational	4.07	3.0	6.28
News	7.55	7.5	5.65
Discussion	4.07	2.2	5.65
Talks	7.69	7.0	6.70
Sports	—	—	5.44
Total	100.00%	100.00%	100.00%

Classes	*WJR*	*Trebit*	*Butterfield*
Network Commercial	9.95%	42.9%	43.75%
Network Sustaining	17.41	6.4	5.65
Recorded Commercial	34.14	12.7	18.22
Recorded Sustaining	4.97	18.1	10.40
Wire Commercial	—	0.2	—
Wire Sustaining	—	2.3	—
Live Commercial	21.85	11.8	3.14
Live Sustaining	11.68	5.6	18.84
Total Commercial	65.94	67.9	65.11
Total Sustaining	34.06	32.4	34.89
Broadcast Hours	110+	117	119+
SA	224	450	329
NCSA	57	150	130

85. The proposed programs of each of the applicants are well rounded and substantially meet the needs of the community. All three applicants will follow approximately the same policies with respect to such matters as news programs, discussion programs, political candidates, cooperation with local organizations, commercial time, and advertising, except to the extent hereinafter noted. WJR maintains a written code of operations pursuant to which it has operated its AM station and, in the event of a grant, will operate its television station. The applicants propose approximately the same total number of hours of operation, with Butterfield proposing slightly more than Trebit and WJR. As will be noted from the percentage breakdown set out above, each applicant has provided time for local, religious, agricultural, educational and civic programs; and it has been established that whichever applicant receives a grant will receive the cooperation of the local civic and service organizations in the preparation of programs.

There are no significant differences between the applicants in the time to be devoted to the several types of programs such as news, educational, religious, and agricultural programs. *There is no substantial distinction between the applicants in the amount of local news or in the size of the staff to be engaged in local news gathering and editing.* Nor do the ratios between commercial and sustaining time differ significantly among the applicants' proposals. However, with 33.53% of its broadcast time devoted to local live programs, WJR proposes substantially more local live programming than either Trebit, with 17.4%, or Butterfield, with 21.98%; Butterfield, on the other hand, proposes 18.84% live sustaining, as compared with 5.6% of Trebit and 11.68% for WJR. Butterfield and Trebit, with 49.40% and 49.3%, respectively, propose substantially more network time than does WJR, with 27.36%. WJR proposes 39.11% recorded time and Butterfield, 28.62% recorded time, while Trebit proposes a total of 33.3% recorded and wire.

86. Trebit is the only applicant proposing commercially sponsored religious programs, with approximately one-third of its religious programs to be so sponsored. These programs will be of the same character as the commercial religious program presently transmitted by Trebit over its AM facilities in Flint. These programs are not objectionable in the sense that other faiths are attacked or that excessive fund-raising appeals are conducted.

87. WJR proposes to use its auxiliary studio in Detroit as a remote pickup point so that programs that would not otherwise be available can be telecast over the Flint station. All but a very few of WJR's live programs will originate at its Flint studios. WJR is the only applicant proposing, at the outset, to employ a custom-built mobile unit for remote pickup transmissions. Neither Butterfield nor Trebit propose remote programs in the initial stages of

operation; although Butterfield, in order to cooperate with the University of Michigan in the preparation and production of programs, will originate programs in Ann Arbor and establish a micro-wave link to that community at such time in the future as the situation warrants. Trebit will have some facilities for remote programs such as field cameras available but has no specific or immediate plans for such programs.

88. The non-network programs proposed by WJR, other than the usual news and entertainment programs, are the following:

(a) *Bible Lesson* (Sunday 8:15-10:00 A.M.). A non-denominational Bible reading with descriptive slides for children.

(b) *Hour of Faith* (Sunday, 10:00-11:00 A.M.). A church service originating in a different church each Sunday. All denominations will be represented and requested to participate.

(c) *Chapel Voices* (Sunday, 11:00-11:30 A.M.). Church choirs representing all faiths.

(d) *Religion in the News* (Sunday, 11:00-11:45 A.M.). A regular feature, utilizing established religious news services, to be delivered by either a staff member or a representative of one of the religious organizations in Flint.

(e) *Mothers' Album* (Sunday, 11:45-12 noon). Inspirational music with readings, both poetry and philosophy.

(f) *In Our Opinion* (Sunday, 12:30-1:00 P.M.). A discussion program on which leaders of various phases of civic, business, industrial and professional life will discuss matters of current interest.

(g) *Weekly Farm Review* (Sunday, 2:00-2:30 P.M.). A review of the week's farm news, including film highlights relating to agricultural matters such as machine operations, livestock handling, etc., including films obtained from Michigan State College and similar sources.

(h) *Symphony at Work* (Sunday, 4:00-4:30 P.M.). This program will be filmed at the Wednesday night symphony rehearsals.

(i) *This You Should Know* (Sunday, 4:30-4:45 P.M.). Time will be made available to institutions of higher learning in the area to describe the educational facilities available to viewers, and to publicize educational telecourses.

(j) *Thought for the Day* (Monday through Friday, 8:55-9:00 A.M.; Saturday 9:40-9:45 A.M.). An inspirational thought or non-denominational prayer to introduce the day's telecasting.

(k) *Mott Foundation for Adult Education* (Monday through Friday, 12:30-12:45 P.M.). In conjunction with the Mott Foundation, WJR plans to explore the many facets of this organization's work in the field of adult education.

(l) *Your Government* (Monday through Friday: 1:30-2:00 P.M.). This series each week will take a facet of government through the local, state and federal levels.

(m) *Michigan State College Farm Developments* (Monday, Wednesday, Friday, 5:30-5:45 P.M.). This program, to be directed at the farmer, will be prepared in connection with Michigan State Agricultural College. The newest agricultural techniques and developments will be discussed and demonstrated.

(n) *Know Your America* (Monday, Wednesday, Friday 6:45-7:00 P.M.). A program to portray incidents in American history either in vignette or dramatic form.

(o) *One Moment Please* (Monday through Saturday, 5:55-8:00 P.M.). A moment for reflection with an inspirational reading.

(p) *Flint Spotlight* (Tuesday, 7:30-8:00 P.M.). This program will be made available to Flint civic organizations and will be based on a discussion format. Each civic organization will be afforded opportunity to highlight some forthcoming or current event.

(q) *Junior Town Meeting* (Wednesday, 8:00-8:30 P.M.). This program will originate at a high school assembly in metropolitan Flint, and the cooperation of public and parochial high schools is anticipated. A panel of four students will make formal presentation of their opinions pro and con on a current topic with a portion of the program to be devoted to a question and answer session involving the students in the audience and the panel members.

(r) *Understanding our World* (Wednesday, 9:30-10:00 P.M.). This program will be prepared by, and will probably originate at, the University of Michigan in Ann Arbor.

(s) *Wings Over Michigan* (Wednesday 10:00-10:30 P.M.). This program is geared to present to the viewer both commercial and military aviation activities in Michigan.

(t) *Crossroads-Michigan* (Thursday, 8:00-8:30 P.M.). The schools of higher learning, such as Flint Junior College, the University of Michigan, Michigan State College, the University of Detroit and Wayne University, will be afforded an opportunity to highlight features they would consider to be of local interest. Each college or university would be concerned with one program every five weeks on a rotating basis.

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(u) *Let's Get Around* (Friday, 9:30-10:00 P.M.). This will be a remotely filmed program designed to highlight unusual occupations, experiences and events within the local viewing area.

(v) *Kids Sports' Clinic* (Saturday, 10:30-11:00 A.M.). This program will endeavor to present local and regional sports figures, who would demonstrate the latest athletic techniques and safety practices.

(w) *RFD-TV* (Saturday, 12:15-12:30 P.M.). This program will be a weekly composite of important agricultural news.

(x) *Your City in Focus* (Saturday, 12:30-1:00 P.M.). This program will incorporate the particular interests of civic organizations in Flint and surrounding communities.

(y) *Music Has a Story* (Saturday, 1:00-1:30 P.M.). This program will develop interest in the background of leading composers and musical compositions. The directors of the Flint Symphony and the Detroit Symphony have agreed to participate in this service.

(z) *This is Flint* (Saturday, 5:00-5:30 P.M.). This program would present entertainment activities of surrounding civic organizations.

(aa) *The Hobby Shop* (Saturday, 5:30-5:55 P.M.). This program would highlight hobby interests for the entire family.

(bb) *TV Camera Club* (Saturday, 6:15-6:30 P.M.). Through the employment of professional and amateur camera enthusiasts, this program would encourage interest in photography.

(cc) *Industrial Review* (Saturday, 7:00-7:30 P.M.) This program will be made available to all interested organizations having a general interest in the story of industrial achievement.

(dd) *Make Way for Youth* (Saturday, 8:00-8:30 P.M.). This program would make professional training in choral and solo singing available to teenagers. The recruitment of personnel for this program would be conducted in cooperation with the Flint public and parochial high schools.

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89. WJR's proposed network programs, other than the usual entertainment programs, would include the following:

TITLE	TIME
This Week in Religion	Sunday, 5:00-6:00 P.M.
New York Times Youth Forum	Sunday, 6:00-7:00 P.M.
Georgetown University Forum	Sunday, 7:00-7:30 P.M.
Youth on the March	Sunday, 10:30-11:00 P.M.
Pentagon Washington	Monday, 8:00-8:30 P.M.
Johns Hopkins Science Review	Monday, 8:30-9:00 P.M.
Keep Posted	Tuesday, 8:30-9:00 P.M.
Author Meets the Critic	Thursday10:30-11:00P.M.
Life is Worth Living	Friday 8:30-9:00 P.M.

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90. In addition to the approximately 50% of network programs proposed by Trebit, a substantial number of live and film programs are contemplated. Film will be obtained from the usual sources available to television stations. Provision has been made for regular live programs on behalf of the various Flint educational, religious, agricultural and

public service organizations. Included in Trebit's programs would be the following:

(a) *Agricultural Programs.* A 15-minute program at 9:00 A.M., Monday through Saturday, entitled *"Farm Report"* will present farm news on the various markets of interest such as grain, livestock, dairy and poultry, and will feature bulletins from Michigan State College. Each day, Monday through Saturday, at 12:15 P.M., Trebit will present an agricultural program entitled *"Farmers Question Box."* This will be a live program produced in connection with the County Agricultural Office and will feature interviews and demonstrations by leading Michigan State College authorities on subjects of interest to farmers. Trebit plans to utilize the Genesee County Agricultural organizations, as well as agricultural agencies of other counties proposed to be covered. Michigan State College will make available interesting program features in the form of still photos, kinescope and 16 mm film; and members of the faculty have consented to appear on Trebit's station. Considerable material for agricultural programs is also available from 4-H groups and other farm organizations. Programs featuring county and state fairs are also contemplated. The Women's Extension Service of the Genesee County Agricultural Office, which currently presents a regular program on WFDF-AM, will continue with its work in television. Trebit has conducted closed circuit demonstrations in connection with Michigan State College and the county agricultural agent.

(b) *Educational Programs.* Each Wednesday from 9:15 to 9:45 A.M., Trebit will present a half-hour educational program entitled *"Michigan State College on TV."* This program will cover the scope of educational activities of the College, and upon occasion, will be live as well as film and kinescope. A time segment has been provided at 1:00 P.M. on Thursday for a half-hour educational program in cooperation with Michigan State College to be directed to adults. This program, which will be produced by the college on film and kinescope, will be directed to such subjects as liberal arts, sciences, psychology, political science, etc. Monday through Friday from 3:30 to 4:00 P.M., Trebit will present a program entitled *"School Workshop,"* a local live educational program presented in cooperation with the Flint public school system. For this program, Trebit proposes to utilize the radio speech classes of the Flint schools. Some of this time will be devoted to discussion through the medium of *"The Youth Forum,"* which will present a debate on current events and problems of the youth of the community. The schools will also present music programs and will air problems of the school system before the parents. Faculty members of the elementary school system will demonstrate how to prepare small children for school and how to meet many of the psychological problems that arise during early school years. Representatives of the school system and civic minded leaders will be invited to discuss major school issues on this program. 7:30 to 8:00 P.M., Monday through Friday, will be made available for local programs. On Mondays and Wednesdays, this program will be devoted to education. Monday, Trebit, in cooperation with the Mott Foundation,

will carry a live program entitled *"Imagination Unlimited,"* a program devoted to practical adult education. On Wednesday, Trebit will carry the *"University of the Air,"* an educational program in cooperation with the University of Michigan. This program will be either live or film, depending upon the wishes of the University. Generally, the University will furnish film and kinescopes related to general informational matters such as courses in the sciences, hobbies, sports, plays for children, teen-age recreational programs and dramatics. On Saturday from 2:30 to 3:00

P.M., Trebit will carry *"Saturday School"* a local live educational program presented in cooperation with the Flint Junior College, Flint Parochial Schools and Michigan School for the Deaf, as well as other schools in Genesee County. Trebit proposes to work with these institutions to develop and produce a series of programs which will demonstrate educational activities typical to each group. The schools will be afforded an opportunity to present dramatic, musical, and other types of programs. Closed circuit programs have been conducted by Trebit in connection with the Mott Foundation and the Flint schools.

(c) *Religious Programs.* Of the broadcast time to be devoted to religious programs by Trebit, 1.26% will be commercial. This will consist of three half-hour programs. A half-hour program by *Bishop Sheen* will be a commercially-sponsored program. The other two commercial programs will be religious films available for sponsorship. Other religious films will be carried on a sustaining basis. The *Morning Prayer* with which Trebit proposes to sign on, and the *Evening Prayer* with which it will sign off, will be films presented on a sustaining basis. A half-hour program at 6:00 P.M. each Saturday, *"Frontier of Faith,"* will be obtained from the network on a sustaining basis. On Sunday, Trebit will televise *"TV Sunday School,"* a half-hour local sustaining show, with the various Flint religious organizations participating on a rotating basis. Another half-hour sustaining religious program will be carried at 11:00 A.M. on Sunday entitled *"Church in Your Home."* This will be a live program directed to adults, and will be presented in cooperation with the Flint Council of Churches on a sustaining basis. The program *"TV Sunday School"* was tested by means of closed circuit.

(d) *Discussion Programs.* At 7:30 P.M. each Tuesday, Trebit will televise a half-hour program entitled *"Let's Look at the Question."* This will be a local live, public service program consisting of a panel discussion at which current local, regional, state and national problems will be discussed. Participants will be drawn from the entire area within the station's coverage and will include civic minded leaders and representatives of city, county and state governments and school systems. During the period 2:00 to 2:30 P.M. each Saturday, Trebit will present the *"Flint Forum,"* a youth forum for discussion of schools, social, and recreational problems of interest to the youth of the community. At 5:00 P.M. each Saturday, Trebit will carry a network sustaining program entitled *"Youth Wants to Know."* On Sunday from 2:00 to 2:30 P.M., Trebit will carry a discussion program entitled *"Parents Forum,"* a local live program in the interests of the Flint Parent Teachers Association. The main topics of discussion will relate to problems between parents and their children, and the panel will consist of a juvenile judge, an educator, a psychiatrist and a guest mother.

(e) *News Programs.* Trebit will carry the network program *"Today"* from 7:00 to 9:00 A.M., Monday through Friday. This program presents news of national and international scope. Another news program is scheduled for 10:15 to 10:30 A.M., Monday through Friday. This will be a network program on a sustaining basis. At noon, Monday through Friday, Trebit will televise the program *"News at Noon,"* a 10-minute live presentation featuring world, national, state and local news. The local news will be prepared and written by Trebit's own news men. The next five minutes each day will be a live program entitled *"The Weatherman,"* at 6:00 P.M., Trebit will carry a local live news show prepared by its staff to consist of still and motion pictures as well as live material. This program will also be followed at 6:10 P.M. by a five-minute weather program. Each Monday through Friday from 6:15 to 6:30

P.M., Trebit will carry a program entitled *"The Sports Picture,"* presenting sports news as well as local sports and visiting sports personalities. A 15-minute live news program will be carried each evening, Monday through Friday at 11:00 P.M., to be followed by a five-minute weather program. Again, at midnight, Trebit will carry a five-minute news summary of local and regional news, as well as national news. On Saturday, Trebit proposes to carry the same schedule of news programs, except that the program scheduled for 12 midnight will follow the feature film program and will be carried at 1:00 A.M. On Sunday, a live news program is scheduled for 12 noon, a weather program at 12:15 P.M., and a 15-minute news program at 11:00 P.M., with a five minute roundup of news at midnight.

(f) *Talks.* Trebit proposes to carry talks at various times during the broadcast day, each day in the week. These programs will be broadcast in conjunction with various local public service groups, with many carried on a regular basis. Agencies which are not equipped to do a regular program will be accommodated from time to time by specific programs.

(g) *Entertainment.* In addition to the foregoing, Trebit, during its typical week, will carry approximately 74% entertainment programs, consisting of network and local live and film programs.

91. Typical of the local programs which Butterfield proposes are the following:

(a) *Religious Programs.* Butterfield proposes to open and close its broadcast day with a 5-minute religious message, generally recorded by local clergymen. The video portion of this program, consisting of motion picture films and slides, will be geared to create an appropriate atmosphere. A 30-minute religious musical program by choirs of the area will be televised each Sunday morning at 10:00

A.M., with Butterfield providing the appropriate video background. A regular 30-minute church service is proposed for 11:00 A.M. each Sunday, with all faiths participating on a rotating basis. While proposed as a studio program, it is contemplated that upon occasion regular services may be picked up at the various churches, with the facilities and background provided by Butterfield. A 15-minute religious program designed to promote understanding is proposed at

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10:45 A.M., Monday through Friday, to be devoted primarily to the history, origin, traditions, customs, etc., of the various religions.

(b) *Educational Programs.* The objective of Butterfield's educational programs is to provide such programs for all age groups. Its 6.28% of educational programs is comprised of special programs for pre-school children, primary and secondary school children, and adults. In addition, educational programs of interest to all groups are proposed as follows:

(1) At 5:00 P.M., Monday through Friday, a pre-school educational program designed to prepare children for school is proposed. This program, which will be produced in conjunction with the local schools, will include the telling of stories, instruction in how to make articles or things of interest to children, safety hints, etc.

(2) At 9:30 A.M., Monday through Friday, a 30-minute educational program for "shut-ins" is proposed, designed for primary and secondary school children. This program, which will also be presented in conjunction with the local schools, will be a direct-teaching program and may on occasion be a direct broadcast from the school.

(3) A regular 15-minute program for direct adult teaching is proposed for Monday through Thursday at 10:30 P.M. and will be produced in conjunction with the University of Michigan, Michigan State College and adult education organizations in the area.

(4) Educational programs of general interest will be presented Monday through Friday, 7:00-7:15 P.M., in cooperation with the University of Michigan, Michigan State, and other educational organizations, featuring educatonal leaders in an interview or discussion type program. Two 30-minute programs on Sunday afternoon are proposed for the universities to promote their activities and for diversion programs.

(5) A weekly 30-minute educational program is proposed on Saturday at 11:15 A.M. in cooperation primarily with Michigan State, to demonstrate the latest agricultural techniques and developments.

(c) *Agricultural Programs.* A 30-minute agricultural program is proposed Monday through Friday at noon. Butterfield proposes to employ an agricultural expert to coordinate this program with the local agricultural agent in Michigan State College.

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(d) *Discussion Programs.* Specific provision has been made for the presentation of discussion of forum type programs dealing with matters of special interest. For example, three 15-minute programs at 7:15 P.M. have been designated for this type of program.

(e) In addition to the above, specific time has been proposed for the broadcast of national and local news throughout the day; suitable children's movies will be shown at appropriate hours; a regular sports program featuring local persons is proposed; a regular "homemakers" program featuring subjects such as fashions, domestic science and child care will be produced; a regular series relating to the activities of various women's organizations is contemplated; a regular series of local talent shows and fine music programs are planned. In connection with the above, Butterfield will provide necessary staff assistance, film backgrounds, slides, sets, etc.

CONCLUSIONS

1. This proceeding concerns three mutually exclusive applications for television stations to operate on Channel 12 in Flint, Michigan. The record demonstrates that each of the applicants is legally, technically, financially and otherwise qualified to construct and operate its proposed television facility, and that none of the proposed construction would constitute a hazard to air navigation. We have further concluded, for reasons detailed below, that the construction and operation of each of the proposed stations would comply with our pertinent rules. Our function, therefore, becomes the difficult one of determining on a comparative basis which of the applicants is to be preferred.

2. Before evaluating the three applicants on a comparative basis, we must first direct our attention to one matter going to the possible disqualification of Trebit. A grant of Trebit's application for Flint would afford a third television station to the Bitner interests, since WFBM-TV in Indianapolis is licensed to WFBM, Inc., Trebit's parent corporation, and WOOD-TV in Grand Rapids, is licensed to Grandwood, an affiliated company. Section 3.636(a) of the Rules[5]

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[5] Section 3.636 was amended by Order of November 25, 1953. Prior to this amendment, Section 3.636 provided:

> "(a) No person (including all persons under common control) shall directly, or indirectly, own, operate, or control more than one television broadcast station that would serve substantially the same area as another television broadcast station owned, operated, or controlled by such person.
>
> "(b) No person (including all persons under common control) shall, directly or indirectly, own, operate, or control more than one

provides that a television authorization will not be granted to any party "if (1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area . . . ." Section 3.636(a) also proscribes the granting of any multiple television authorization that "would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity," and imposes an absolute limit of five stations that may be owned by the same party. No overlap would result between WFBM-TV in Indianapolis and Trebit's proposed station in Flint. Some overlap of the Grade B contours would be occasioned between Trebit's proposed station in Flint and WOOD-TV in Grand Rapids, Flint and Grand Rapids being approximately 100 miles apart. In light of the limited nature of the overlap that would result, however, it cannot be held that the Trebit station in Flint and WOOD-TV in Grand Rapids would serve "substantially the same area" within the meaning of Section 3.636(a) (1); and Trebit is not to be disqualified on that score. In re *The Enterprise Co.*, 9 RR 77; *WGAL, Inc.*, 9 RR 110. With respect to the remaining provisions of Section 3.636 relating to multiple ownership, WJR and Butterfield both contend that, although a grant in Flint would not put the Bitner interests over the maximum of five stations, Trebit has not met the

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television broadcast station, except upon a showing (1) that such ownership, operation, or control would foster competition among television broadcast stations or provide a television broadcasting service distinct and separate from existing services, and (2) that such ownership, operation, or control would not result in the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity: Provided however, That the Commission will consider the ownership, operation, or control of more than five television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity."

burden imposed by the rule to establish affirmatively that a grant of the Flint application would not result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity; and that, accordingly, Trebit's application must be denied independently of any comparative consideration with the other applicants.

3. WJR and Butterfield misconstrue the nature of the showing required by an applicant seeking an additional television facility. It is apparently their contention that an applicant must direct a specific portion of its case to the provisions of the multiple ownership rules, singling out the evidence adduced in this regard. Section 3.636 does not require or even contemplate such a showing. Rather, the showing in such cases is to be gleaned from an examination of *all* of the evidence of record relating to the application, including data concerning the applicant's other existing television interests as well as details of its proposed operation. In re *WIS-TV Corp.,* 9 RR 607, at 610, fn 2. Thus, in the instant case, in determining whether Trebit has made a showing pursuant to the provisions

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of Section 3.636 sufficient to warrant the grant of a third television authorization, we must examine all of the evidence advanced by Trebit in support of its application, including that relating to its other television interests and to the nature of its proposed operation in Flint. The record indicates that the existing Bitner stations in Indianapolis and Grand Rapids, and the proposed station in Flint, will be operated and programmed independently. Only a small amount of Grade B overlap between two of the stations would occur. The record contains no basis for concluding that the Trebit station in Flint would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In our view, Trebit has made a showing sufficient to satisfy the requirements of Section 3.636 and is, therefore, entitled to comparative consideration with the other applicants.

4. The task of choosing one applicant over another is an effort to select the applicant whose operation would best serve the public interest, convenience and necessity. Our choice must be based on a comparative evaluation of all relevant and material differences among the applicants, as reflected by the record. All differences bearing materially on such matters as the quality of the proposals, the probability of successful implementation, the operating practices and policies, and whether the distinctive needs of the community to be served would be met, must be weighed and considered in relation to each other, with particular reference to the circumstances of the individual case. The ultimate judgment cannot be accomplished by means of any precise, mathematical formula; for, in the final determination, any particular distinction among applicants may, in light of the factors in any specific case, merit a greater or lesser significance.

5. Although Trebit has satisfied the requirements of the multiple ownership rules sufficient to avoid disqualification, the matter of Trebit's other broadcast interests is, of course, still to be considered as a comparative factor in the evaluation of the applicants. See In re *The Enterprse Co.,* 9 RR 77, 84; *WGAL, Inc.,* 9 RR 110, 116. Where we are faced with a choice between two applicants, one of whom has a television station and another who does not, it is our view that, other factors being substantially equal, the public interest is better served by a grant to the applicant without a television station. See *Bamberger Broadcasting Service, Inc.,* 3 RR 914, 925. Also to be considered is the important factor of the concentration of control of the media of mass communications within any particular area, including media

other than broadcast facilities. In applying the foregoing principles to the instant case, we have concluded that while all three applicants have interests in other media for the dissemination of mass communications and entertainment in Flint and its environs, both WJR and Butterfield merit a distinct and significant preference over Trebit.

6. Trebit is the licensee of a regional radio broadcast station in Flint serving Genesee County and the adjacent areas. The Bitner interests also own standard broadcast stations in Grand Rapids, Indianapolis and Evansville, and television stations in Grand Rapids and Evansville.[6] Thus the Bitner interests presently control four AM and two television stations, all within the relatively concentrated southern Michigan-Indiana area. A grant of its Flint application would afford Trebit a third television station in this area, as well as a station in the community where it now has an AM station. Moreover, some overlap of the Grade B contours of the Flint and Grand Rapids stations would occur. While, as we have noted above, such a concentration of media of mass communications does not require a disqualification of Trebit pursuant to Section 3.636, it does acquire greater significance in a comparative proceeding. WJR, in comparison, is the licensee of a 50 kw clear channel radio station in Detroit, which also serves Flint and Genesee County, and an FM station in Detroit. Also under common control are a 50 kw standard broadcast station and an FM station in Cleveland. Butterfield has no broadcast interests but operates a large chain of motion picture theatres in the southern Michigan area, including a substantial number of

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[6] The record indicates that the Bitner interests are also applicants for a television station in Evansville and are participants in a comparative hearing in that community. However, in light of the status of this application, this factor is not relevant to the issue of diversification of communications mass media in the instant proceeding.

theatres in Flint itself and other communities in the Flint area. The only theatres in Flint normally displaying first-run films, moreover are owned by Butterfield interests. We conclude, from the foregoing, that both WJR and Butterfield warrant a clear preference over Trebit on the matter of both concentration and diversification of the media of mass communications. We believe that a grant of the application of Butterfield, which has no other broadcast interests, or of the application of WJR, which has only AM-FM operations in Detroit and Cleveland, would better serve the Commission's policy of diversification. Similarly, in light of the concentration of control of communication mass media that would result from a grant of the Trebit application, we believe that WJR and Butterfield are to be preferred on this score also. Although Butterfield has no other broadcast interests and WJR does, Butterfield, through its vast theatre operations in Flint and the southern Michigan area, does control a substantial segment of mass communication media in this area. Balancing the factor of such concentration of control against WJR's other broadcast interests, we are of the opinion that, as between WJR and Butterfield, neither is entitled to a preference in this area of comparison.

7. All three applicants have interests in media competing with television for "consumer time," and Trebit and WJR have interests in a medium that will compete with television for advertising, however, both WJR and Trebit, who have radio interests serving

Flint, have represented that they will endeavor to further both radio and television as fully as possible. Neither proposes or envisages joint rates. The record indicates that competition would not be significantly lessened should either of the applicants with radio stations receive a television grant. Moreover, we do not believe, on the basis of the record in this proceeding, that the use of the same staff for radio and television, as contemplated by Trebit, will adversely affect competition. We see no basis, therefore, for preferring Butterfield in this regard. Nor, on the other hand, do we see any basis for penalizing Butterfield because it is a motion picture exhibitor in Flint. While moton pictures and radio manifestly compete with television for "consumer time," the mere existence of such competition should not, in and of itself, create a bar to the control of competing media, unless it can be demonstrated that such control would be undesirable or unfair. The record does not support a conclusion that Butterfield or persons engaged in exhibiting motion pictures are unqualified as television licensees, or that such persons are less qualified to function as television licensees than persons not so engaged. *Cf. Aladdin Radio and Television, Inc.,* 9 RR 1. There is a place in the communication and entertainment fields for radio, television and motion pictures, with each medium fulfilling its own particular role more capably than the others. This result reflects the position taken by the Commission in the recent *Paramount* case (8 RR 541), where the problem of competition among competing media was considered. While further development of television, or different factual circumstances, may indicate the desirability of eliminating common control over television and radio, or television and motion picture exhibiting facilities, the record in the instant case does not reflect such a situation, and the differences among the applicants in this connection are not decisive.

8. The Commission, in evaluating applicants in comparative proceedings, considers such matters as local residence of the applicants, their participation in public service and community affairs, and the extent to which ownership and management of the proposed stations will be integrated. We afford importance to such factors since, in our view, they lend assurance of a more complete and effective re-

sponse to the needs of the community, and increase the probability that the promise and commitments advanced by the applicants will in fact be effectuated. See *Hearst Radio, Inc.*, 6 RR 994. However, where a record establishing the past performance of the applicants in this regard is available, such factors become less determinative. *Ibid.* Thus, when a record of an applicant's past performance in the operation of a broadcast station is available, such factors as local residence, participation in local community affairs, and integration of ownership and management become less critical. In the instant case, the previous records of both WJR and Trebit in the broadcast field support the conclusion that we may reasonably rely upon these applicants to adhere to their proposals and representations. To this extent, their record of past performance offsets their absence of local residence and lack of integration of ownership and management. While the record in this proceeding presents no basis for doubting the good faith or probable performance of Butterfield in carrying out its commitments, and although Butterfield's theatre operations in Flint and other communities are conducted in the public interest, we do not, as in the case of WJR and Trebit, have a record of past performance *in the broadcast field* on which to rely. We are presented with three applicants, all with no local residence and little integration of ownership and management. Two of the applicants, however, WJR and Trebit, have demonstrated satisfactory past performance in the broadcast field.

9. Each of the three applicant corporations is controlled by stockholders who are neither residents of Flint nor are closely associated, on a personal basis, with the Flint community. The various officers, directors, stockholders and employees of the applicants, or their parent or affiliated organizations, have been equally active in the local civic

and service organizations of the communities in which they reside, as well as associated with local and national trade and professional groups in their respective fields of endeavor. The parties controlling the beneficial majority interests in the three applicants, or in the parent corporations or other legal entities, are all persons of good moral character and can be relied upon to make a sincere effort to implement the proposals advanced in their applications. Each applicant contemplates only a limited integration of ownership in the actual day-to-day management of its proposed station. While a number of the WJR officers, directors and employees who will participate actively in the management of the proposed station do have minority stock interests in WJR, and although Trebit's proposed General Manager holds an unexercised option to purchase 5% of Trebit's stock, such minor stockholdings lack sufficient significance to form a basis for preference. None of the Butterfield officers or directors, other than Mr. Gowthorpe, will devote any time to the active day-to-day operation of the proposed Flint station. With respect to Trebit, the proposed General Manager of the station, who is Secretary and Director of the Corporation, will be the only active participant in the day-to-day operation of the proposed station. More of WJR's principals on the other hand, will expend time and effort in getting the station on the air, in its initial operation, and in the station's daily operation thereafter. Mr. Patt, President and Director, and Mr. Kramer, a Vice-President and Director who will exercise general supervision over the television organization in Flint, initially will devote approximately 25% of their time to the Flint operation. Mr. Leydorf, Vice-President and Director, will be responsible for the construction and installation of the station, the organization and staffing of the Engineering Department, and the technical supervision of the station, devoting approximately 80% of his time to the Flint station during the first year of operation. Other officers and directors will play varying roles in the actual operation of the station and will devote portions of their time and effort to such operation. While by no means decisive, WJR is entitled to some preference on this score.

10. The studio facilities and technical equipment of all of the applicants are adequate for accomplishing their proposed program proposals. WJR, however, proposes a new and modern studio building in Flint, designed especially for television, and a transmitter structure substantially more elaborate than the facilities proposed by the other two applicants. WJR also proposes to establish a studio at its transmitter, and a completely equipped studio in Detroit from which it can produce remote programs not available in Flint. WJR, in addition, proposes a custom-built mobile unit to be based at Flint. In our opinion, superior studio facilities and equipment does not, in and of itself, form a

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proper basis for preference. However, when such superior facilities are related to the applicant's programming proposal, they become important and should be considered. Although Butterfield and Trebit will be able to implement their program proposals from their studios, the manifest superiority demonstrated by WJR in its over-all technical plant is related to its programming proposal and cannot be totally ignored. In extending a preference to WJR in this regard, we are not—as the Examiner feared—placing a premium on unnecessary and superfluous expenditures. The Examiner, though concluding that WJR's elaborate facilities were both desirable and useable, found them to be to some extent superfluous. In reaching this result, he apparently ignored the emphasis placed on remote broadcasts and on local live programs by WJR. Of the three applicants, only WJR proposes remote programs at the outset, and will utilize a mobile unit for such telecasts as well as its

Detroit studio. Although both Trebit and Butterfield envisage the televising of remote programs in the future, WJR is entitled to a preference in this regard. WJR also proposes substantially more local live programs than the other applicants. The elaborate facilities proposed by WJR, when considered in relation to these factors, entitle WJR to a preference.

11. Upon our independent review of the record, moreover, we find no basis for the Examiner's conclusion that the availability of studios and equipment in Detroit might result in the production of certain programs geared to the more immediate interest of the Detroit community rather than to Flint and its environs. Similarly, we find no support in the record for the Examiner's conclusion that such preference as WJR might merit for its Detroit studios is counter-balanced by latent risks in the employment of this studio. The Examiner did recognize that the Detroit studios were undoubtedly an advantage for the production of programs which might normally be unavailable from Flint locations. We conclude, in light of the foregoing, that WJR is entitled to a preference over both Trebit and Butterfield in this area of comparison.

12. Each of the applicants proposes a staff which appears adequate for operating the proposed station and implementing its proposal. Since the Trebit staff will be integrated with its present AM operation, it has been identified in greater detail than that of Butterfield or of WJR, which contemplates only a very limited integration with its present AM operation in Detroit. WJR, like Trebit, however, has specifically designated various individuals who will fill key positions in the new enterprise. Butterfield does not list any specific persons to fill staff positions, but represents that it will employ qualified personnel. That portion of the proposed Trebit television staff which is presently employed in its AM operation in Flint manifestly would be more close-

ly associated with the Flint community and more cognizant of local problems. While some preference might be afforded to both Trebit and WJR on their staffs since those employees already identified appear to be qualified to fill their intended positions, and in light of the associaton with Flint on the part of Trebit's staff already identified, we recognize that Butterfield will be able to employ competent personnel. We conclude that such distinctions as do exist among the proposed staffs are not sufficient to be determinative, and form no basis for a preference.

13. The Board of Regents of the University of Michigan owns 26% of the voting stock of Butterfield, entitling them to elect two directors. Through the testimony of the two members of the Board of Regents acting as Butterfield directors, the Regents have expressed a broad interest in the development of television and the use of such facilities by the University of Michigan. While a grant to Butterfield might result in a closer liaison between the University and the television licensee in Flint, the record reveals that such association would not occur on the operational level; and, furthermore, that the Regents have expressed a willingness to cooperate with any grantee in Flint. On the basis of the record, we are unable to conclude that the interest in Butterfield held by the Regents would significantly affect either the operation of the station itself or the utilization of the station and its facilities by the University.[7] We are of the view that substantially the same situation will prevail no

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[7] After the closing of the record in this proceeding, the Board of Regents of the University of Michigan was granted a permit to construct a non-commercial educational television station (WUOM-TV) on Channel 26 in Ann Arbor. While this factor has not been considered by us in reaching our decision in this case, it should be pointed out that, in our view, before we could make a grant to Butterfield, the record would require reopening to consider the changed circumstances arising from this fact.

matter which applicant proves successful, and such preference as Butterfield may merit in this regard is not of sufficient significance to be determinative of our ultimate decision.

14. Each of the applicants proposes to employ a community advisory group to assist its station in programming for Flint. These groups, which would be substantially similar in composition and functions for each of the stations, would be comprised of representatives of the major organizations of the Flint community. The record discloses that while such advisory groups have been formed by the Bitner interests in Flint and Evansville, where applications are involved in comparative hearings, the Bitner interests have not employed such groups in connection with their existing television or AM operations. WJR recently established a program advisory group for its AM operation in Detroit. Butterfield, not engaged in broadcasting, has not, of course, been in a position to utilize such a group heretofore. We are not unmindful of our experience that in some cases the establishment or proposal for program advisory groups has been a device of promise for hearing purposes only. But the record in this proceeding does reveal a history of informal cooperation by each of the applicants with local civic and service organizations, and that the proposed advisory groups would merely lend formality to an existing relationship and would enable even closer cooperation between the television station and the community. We see no basis, however, for preferring any of the applicants over the others in this connection.

15. The relative merits of the applicants' program proposals represent an important factor of comparison in competitive proceedings such as this. See *Plains Radio Broadcasting Co.* v. *F.C.C.,* 175 F. (2d) 359, 362. All of the appli-

cants in the instant proceeding have advanced well-rounded, balanced program proposals which, we believe, will substantially meet the needs of Flint and the areas proposed to be served. In addition, despite minor variations in wording or differences in emphasis, the broad program policies of all of the applicants are substantially similar in nature. Certain features of the various program proposals, however, do merit discussion in greater detail, with some forming the basis for preference.

16. Trebit presently transmits commercial religious programs over WFDF, its AM station in Flint, and proposes to carry such programs on its television station. Trebit will devote 3.8% of its hours of operation to religious programming, with 1.26% of such time to be devoted to commercially sponsored programs. The record indicates, however, that the commercial religious radio programs now being broadcast by Trebit are not objectionable in the sense that other faiths are attacked, or that excessive fund raising is engaged in; and Trebit's television programs of this category will follow the same pattern. In our opinion, commercially sponsored religious programs are not inherently objectionable or against the public interest; and Trebit is not to be penalized merely because it contemplates such programs. While the fact that some of Trebit's 3.8% of religious programs will be commercial means that Trebit would be making available less broadcast time on a sustaining basis for religious programs than either WJR or Butterfield, the difference is not so significant as to form a basis for preference.

17. Each applicant has demonstrated an equivalent recognition of the basic needs and desires of the Flint community, and the record contains no basis for concluding that any one applicant has been significantly more responsive to such factors. It would appear, however, that Trebit, through its day-by-day broadcast operations in Flint, has

been in a position to be more closely attuned to the needs of Flint than either WJR or Butterfield, and that its active participation in Flint community life is more impressive than that of the other applicants. While Trebit merits some preference on ths score, nevertheless, the record of WJR in Detroit, and of Butterfield's theatre operations in Flint and other communities, is satisfactory in this regard.

18. The Examiner found a distinction among the applicants on the emphasis to be placed on local news programs and on the provisions for the gathering of local news. He concluded that Trebit's proposal in this regard appears to meet the needs for local news in Flint to a greater extent than do the proposals of WJR and Butterfield, and Trebit was afforded a preference in this connection. Upon our review of the record, however, we find no basis for concluding that the difference among the applicants in this category is sufficiently substantial to form the basis for a preference

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19. The Examiner concluded that since Trebit's "Public Service Programs" were carefully developed over a period of time and after extensive consultation with the various civic and service organizations of the Flint community, Trebit's programming was more closely geared to the needs of Flint and merited a preference over WJR and Butterfield. The Examiner reasoned that developing plans and programs after extensive studies of the community to which service is proposed in order to ascertain the needs of the community, to tailor the program structure to fit such needs, and to insure the cooperation of, and explore the actual programming potentials of, the various agencies of the community, is decisionally more significant than merely proposing what appears to be a well-balanced program service prepared substantially in the abstract, despite the fact that it may in all probability meet the major needs of

an average community. The Examiner concluded that, in this particular, Trebit makes the best showing, pointing out that, through its AM operation, it had the advantage of having its personnel on the scene and of having previous extensive contacts and experience with the various interested groups. The Examiner while conceding that WJR did make some effort to ascertain Flint needs and to gear its proposal with specific requirements, concluded that WJR's efforts did not meet the standard set by Trebit in that it was much more limited in scope, time and development. The Examiner noted, also, that Butterfield, perhaps due to the lack of practical broadcast experience of its corporate officers and personnel, made on substantial on-the-spot survey until after an initial program proposal had already been advanced. Thereafter, through the services of a television consultant, Butterfield made certain changes which it believed would more closely approximate the needs of the community, but such changes were based on studies which were severely limited in scope. We are of the opinion, based on our careful examination of the record and our consideration of the contentions advanced by the parties, that the Examiner erroneously awarded Trebit a preference over WJR in this connection. The record, in our view, reveals that Trebit and WJR have both been equally diligent in preparing for television and in ascertaining the program needs and desires of Flint. The record indicates " that after determining to apply for a television station in Flint, WJR composed a check list of the community interests and activities which was made available to various WJR personnel who visited Flint and discussed program plans with local residents. The results of this work were, to a large degree, incorporated into WJR's program plans. After its program plans were thus formulated, WJR's Public Service Director visited Flint upon several occasions to discuss specific public service programs with some 27 Flint civic leaders and to invite their participation and cooperation." Subsequently, some 25 civic leaders in Flint met with WJR's President at a luncheon meeting to discuss programming plans. Moreover, all of the civic witnesses who testified at the hearing at Trebit's request indicated they would cooperate with any successful applicant in public service programming. In light of the above, and in light of the balanced, well-rounded program proposal advanced by WJR, we see no basis for here distinguishing between WJR and Trebit. However, in light of Butterfield's very limited activity in this connection, the record does support the conclusion that WJR and Trebit merit a

preference over Butterfield with respect to television preparations and the steps taken to ascertain and provide for the specific program needs and desires of Flint.

20. The Examiner also concluded that because of Trebit's program of practical closed circuit experimentation, Trebit's proposed "service" programs can be presumed to be subject to full and immediate implementation through cooperation by the local agencies involved and the experience of the proposed staff and the staffs of the local agencies. While this may be true, the record also indicates that the "service" programs of the other applicants can be implemented and will receive the cooperation of the local agencies. We do not believe, therefore, that Trebit is entitled to a preference merely because it conducted closed circuit activities.

21. WJR proposes to devote 33.5% of its broadcast time to local live programming. This compares with 17.4% for Trebit, and 21.98% for Butterfield. As noted heretofore, WJR is the only applicant proposing to conduct remote programs in the initial stages of operation. In light of these facts, we are of the opinion that WJR warrants a clear preference over both Trebit and Butterfield. In awarding

such a preference, we are mindful of the more elaborate facilities contemplated by WJR for implementing its program proposals. While it is correct that a preference should not be awarded an applicant merely because more elaborate studio facilities and equipment are proposed, when, as in this case, the more elaborate facilities will be employed to implement a program proposal contemplating a substantial amount of local live programming and remote programs, then such elaborate facilities become significant and form the basis for a preference.

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22. While the factor of previous experience is not a decisive one, it should be considered in the final determination. Both WJR and Trebit have had substantial experience in the broadcast field. Trebit, in addition, has had prior experience in television operations. Butterfield, on the contrary, has had no prior experience in the broadcast field whatsoever. In light of the foregoing, we are of the view that Trebit and WJR are entitled to a preference over Butterfield. As between WJR and Trebit, we do not believe the difference in experience is so significant as to warrant more than a slight preference in favor of Trebit.

23. In the standard broadcast field, the Commission relies upon a system of "protected contours" to determine the protection from interference to be accorded the various stations. This concept, however, is foreign to the television service; instead, the nature and extent of protection from interference for television stations has been established by a system of (1) minimum separations between stations and (2) maximum powers and antenna heights. *Section 3.612 of the Rules.* Such a system has been employed since, in our view, it "will more easily and more likely bring about a truly efficient and equitable distribution of television service than would a system based upon 'protected contours'."

See *Sixth Report and Order* (Docket No. 8736 *et al.*) par. 103. All of the applicants in this proceeding meet the minimum spacing requirements specified by Section 3.610 of the Rules. Similarly, all of the applicants comply with the minimum and maxium power and antenna height requirements of Section 3.614 of the Rules. All of the applicants propose operation with the maximum power and antenna height prescribed by the Rules.

24. The Commission's Rules permit wide latitude in the location of television transmitter sites and do not require that sites be situated within any specified distance from the principal community to be served. See *Music Broadcasting Company,* 9 RR 353, 355. The Rules (Section 3.610), however, do require, first, that transmitters be spaced a minimum distance from co-channel and adjacent channel assignments and stations;[8] and, as noted above, the applicants all meet this requirement. Second, the Rules (Section 3.685 (a) provide that transmitters be so located that, on the basis of the effective radiated power and antenna height above average terrain proposed, a specified minimum field intensity will be provided over the entire principal community to be served. All of the applicants also meet this requirement. In addition to the foregoing, Section 3.685(b) states, in pertinent part, that:

> "Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the intensity of the station's signals. In general, the transmitting antenna of a station should be located at the most central point at the highest
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> elevation available. To provide the best degree of service to an area, it is usually preferable to use a

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[8] In the UHF band, certain additional separation "taboos" must be observed.

high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path. The antenna must be constructed so that it is clear as possible of surrounding buildings or objects that would cause shadow problems . . . .''

25. WJR and Butterfield have specified transmitter sites on the only high ground in the general Flint area, 16.8 miles and 15 miles, respectively, southeast of Flint; and Trebit has chosen a site on lower ground, 4.4 miles northwest of Flint. In order to determine whether these sites meet the requirements of Section 3.685(b) and, in addition, whether they form the basis for a preference in this regard, we must first direct our attention to the nature of this provision. Section 3.685(b) does not prescribe a specific and definite requirement that can be determined absolutely or mathematically. Rather, it provides merely a guide, or standard, which applicants should follow in selecting sites. The ideal situation for the applicant is presented where high ground, or a tall structure, is situated in the center of the principal community to be served; in such cases the selection of a site becomes relatively simple. In actual fact, however, applicants are seldom faced with such ideal conditions and must make use of the terrain features and other conditions as they find them. For example, in Flint, the only high ground in the general area is to be found on a plateau southeast of the city. Thus, the applicants have the choice of locating their sites on high ground at a substantial distance from Flint or remaining close to Flint but on lower ground. WJR and Butterfield propose to locate some 15 miles from Flint to take advantage of the plateau to be found there. Trebit, on the other hand, would remain within 5 miles of Flint but, of course, on lower ground than the other appli-

cants. However, despite this variation, all of the sites meet the requirements of Section 3.685(b); and from each site, the applicant would place the required minimum signal over the principal city to be served. The Examiner concluded that a reasonable interpretation of Section 3.685(b) is that the "central point" referred to in the Rule should be associated with the immediate area of the community to be served; and that while this language would not require the location of a transmitted on top of the highest point within a stone's throw of the main post office, it would also not require the location of the transmitter at a site so far from the community as to result in low signal intensity over the community, solely because greater height would be obtainable at that point. While the Examiner's interpretation of the rule is substantially correct, his characterization of the field intensity of the signal placed over Flint by WJR and Butterfield as a "low signal intensity," and his awarding of a preference to Trebit on this basis, is in error. In our judgment, each of the applicants complies fully with the provsions of the rule, one no more than another. The applicants in this proceeding have had to compromise in selecting their sites. We cannot state, on the basis of the record, that Trebit, by remaining close to Flint, complies more fully with the rules than do WJR and Butterfield, who

have moved some 15 miles to the nearest high ground; and vice versa. We do not believe the record supports the basis for awarding a preference to any particular applicant in this regard.

26. The Examiner awarded a substantial preference to Trebit on the basis of its selection of a transmitter site and what he termed the results flowing therefrom. Such preference to Trebit was based on six factors, which will be discussed in turn.

27. The first factor considered by the Examiner with relation to the choice of sites is termed the difference in signal strengths over the principal community to be served and its "trading areas." Coupled with this is a discussion of the second factor, viz., that the WJR and Butterfield sites (southern location) will in all probability make available a signal receivable by a substantially greater number of people than may be expected from Trebit's site (northern location). The Examiner finds that the southern site would make available another VHF service to substantially all of Detroit. He concludes that while service may be available to a greater number of persons from the southern site, the needs of the different areas proposed to be served must also be considered from the standpoint of other services available. The Examiner considers the number of channels assigned to Detroit and contiguous communities and, on the basis of this data, concludes that substantially more services are now available to the residents south of Flint and in the Detroit area than to those residing to the north of Flint, and that this situation will continue. The Examiner also finds that the strength of the signal laid over Flint and Genesee County, and over a substantially greater portion of what is termed the Flint "composite trade area," is substantially stronger from the Trebit location. From the foregoing, the Examiner draws the conclusion that we cannot hold that the fact that more persons might be served through the southern location of the transmitter site outweighs the fact that the persons who would be served to the north of Flint from the Trebit site would be persons receiving less service than those to the south.

28. In our view, the Examiner's consideration of the foregong two factors in this proceeding is erroneous. As already noted, each of the applicants would meet the minimum signal intensity required to be placed over the entire principal city to be served. Once this has been established,

a comparison of the applicants on the basis of how much each applicant surpasses this minimum has no significance. Where all applicants meet the minimum, the fact that one applicant's signal intensity over the principal city to be served is greater than the others is not a proper basis for preference in a comparative proceeding. For, in the present state of the art, we are unable to generalize that an applicant with a higher signal intensity will, in fact, provide a better service to more residents in Flint than will other applicants who meet the minimum requirement. Moreover, we do not believe the record establishes a valid basis for awarding a preference in light of such signal intensity placed over the Flint "composite trade area." First, it should be kept in mind that the Commission's Rules assign channels to cities, and not to trade areas; and the rules prescribe only the minimum signal to be placed over the community. Furthermore, we do not believe that the Flint trade area has been

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identified with sufficient accuracy for this purpose.

29. We are also of the opinion that the Examiner erroneously awarded a preference to Trebit on the basis of a comparison of the other services available to the areas proposed to be served by the several applicants. We reach this result since, in our view, a determination that one proposal would provide service to an area with fewer signals than would another proposal cannot, on the basis of the record and in the present state of the art, be resolved with sufficient accuracy to form a reasonable basis for comparison. Preferring Trebit merely on the basis of the fact that more channels are assigned south of Flint than north of Flint is unwarranted. In considering the prediction of service areas and interference in the Sixth Report, we noted the following:

> "The Ad Hoc Committee Report established that the received field intensities of television signals vary so greatly from location to location, and with time, that any prediction of service from these average curves for a specific station is expected to deviate appreciably from the actual service. In addition, it is clear that a very large number of measurements from both desired and interfering stations, many of which will not be in existence for several years, would be necessary to make an accurate prediction of service for any specific station. However, the Ad Hoc Report indicates that the over-all estimate of service for a large number of stations will be fairly good. In view of the foregoing, it is apparent that the assignment table must be made on a large area basis for which the over-all estimated service is reasonably accurate. The assignment Rules and standards, however, cannot be construed as guarantees of service but rather as yardsticks based upon the best available data. As the quantity of available data increases, the assignment Rules and standards may be revised at a later date in the light of the scientific findings."
> (Sixth Report and Order, par. 88).

We recognized in the Sixth Report that, while the use of propagation curves was indispensable in the inauguration of a nationwide television service, and while we were confident that the curves employed were of sufficient accuracy to achieve the purpose of our assignment plan, ". . . the service and interference computed by the use of such charts are not expected to prevail for any specific station but rather describe the service and interference which would prevail if the stations involved were all typical ones producing the average field intensities described by the charts." We emphasized that the "methods for describing service areas and interference are only assignment tools which are expected to give fairly good service description on a large area basis but not necessarily on an individual station basis.'' (*Sixth Report and Order, par. 91*). In light of the foregoing, our Rules establish no basis or method whereby specific areas and populations receiving service may be delineated with any reasonable degree of accuracy. Section 3.683 specifies service in terms of two field intensity contours, designated Grade A and Grade B, which merely ''indicate the approximate extent of coverage over average terrain in the absence

of interference from other television stations.'' The Rules expressly advise that ''under actual conditions, the true coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based.'' The extent of interference, for example, with its consequent effect on the existing proposed service areas, cannot, in the present state of the art, be accurately predicted. In the absence of such interference data, however, the prediction of coverage becomes even more inconclusive and unreliable. The Commission noted, also, that with the passage of time, new stations would commence operation, with each station causing additional interference to existing stations. Similarly, existing stations may increase powers and antenna heights within prescribed maxima wthout regard to the effect on other stations. The extent to which the service areas would be contracted by the additional interference caused thereby cannot be predicted. It is meaningless, in view of the foregoing, to attempt as Trebit does, to compare the applicants on the basis of serving particular areas with allegedly fewer services.

30. As we noted in the *Westinghouse* case (8 RR 381), evidence relating to comparative coverage raises many ''grave problems.'' We explained in that proceeding that,

in light of the technical information available under the present state of the art, the tools employed by both the Commission and applicants may not be sufficiently sharp and reliable to permit an accurate prediction of areas and populations; and we emphasized that the admissibility of such evidence, and the weight to be accorded such evidence as may be admissable, would be left to our own consideration. Similarly, in the *Wasmer* case (9 RR 713), we noted our recognition in the Sixth Report and Order that predictions as to the precise location of field intensity contours, in the present state of the art, are subject to manifest error and are highly unreliable at best. We concluded that for almost all situations, we were unaware of "any techniques or measuring devices which can be applied so as to establish persuasively that the areas and populations to be served will differ significantly among applications for the same facilities"; and we held that ". . . an applicant should be permitted to offer evidence of coverage, for comparative purposes, only if he can establish that such evidence will have more than tenuous validity." We have examined the evidence adduced by Trebit, relating to other services available to the areas proposed to be served, and with respect to interference that would be caused to the operations proposed by the applicants. This evidence is based on the curves employed by the Commission and makes no use of any new techniques and supplies no additional data which would permit a significantly reliable definition of the service areas of the stations proposed in this proceeding. We conclude, in view of all the foregoing, that such evidence is of tenuous validity and might properly have been excluded from the hearing record. In our opinion, the record affords no basis for comparing the applicants on the ground of service to areas with fewer signals.

31. The Examiner states that a third factor flowing from the location of the transmitter sites relates to the possibility

of network affiliation by a station on Channel 12 in Flint, and to the reception of network programs in Flint and Genesee County. The three VHF stations in Detroit presently have basic affiliations with the NBC, CBS and ABC networks; no Detroit station is

affiliated with DuMont. The Grade A field intensity contours of WJR and Butterfield, and the Grade B contour of Trebit, encompass Detroit. Flint, however, would not fall within the Grade A contours of the Detroit VHF stations. The Examiner recognizes that the fact that a Detroit station is affiliated with a particular network does not necessarily preclude a Flint station from also affiliating with that network.[9] He concludes, however, that since the rules do not prohibit any agreement "between a station and a network organization pursuant to which the station is granted the first call in its area upon the programs of the network,"[10] and in light of the substantial Grade A overlap that would result between the Detroit stations and WJR and Butterfield, WJR and Butterfield might not be able to affiliate with networks already affiliated with VHF stations in Detroit. The Examiner further surmises that such might not be the case with respect to Trebit since no part of Detroit would fall within its Grade A contour and none of the Detroit stations covers Flint with a Grade A signal. The Examiner also presumes that since the returns to a network would be substantially higher from affiliation with a Detroit station as compared with Flint, under "normal operation of economic laws" the affiliation would go to a Detroit station rather than to Flint. The Examiner concludes that it is doubtful that Butterfield will be able to obtain an affiliation with NBC as proposed. He concludes, further, that WJR and Butterfield would probably be unable to obtain any network affiliation duplicating a Detroit affiliation, and that such a situation could preclude Flint and the surrounding area from receiving locally originated VHF signals carrying programs of networks affiliated in Detroit. On the basis of the foregoing, Trebit is awarded a preference. From our view of the record, we are of the view that the matter of possible network affiliation is too speculative to form a proper ground for comparative consideration. The Examiner, in our belief, has made a number of unwarranted assumptions. The record does not support the conclusion that WJR and Butterfield would be unable to affiliate with a network already affiliated in Detroit; or, on the other hand, that Trebit would definitely be able to obtain such an affiliation. The record does not establish a proper basis for awarding a preference to any of the applicants on this point. However, if any preference is to be awarded, it should go to WJR rather than Trebit. WJR is the only applicant proposing affiliation with a network not represented in Detroit. Thus, on the basis of the Examiner's own reasoning, it is more likely that WJR would be able to implement its network proposal than would be the case with both Trebit or Butterfield, who propose NBC affiliations.

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[9] Section 3.658(b) of the rules prohibits territorial exclusivity clauses in network agreements which would prevent another station serving a substantially different area from broadcasting the programs of the network organization.

[10] Section 3.658(b).

32. A fourth undesirable result which the Examiner finds would flow from the selection of the WJR and Butterfield transmitter sites would be an effort to program in such a way as to provide "a different and desirable" program service to the Detroit area. The Examiner notes that WJR will endeavor to secure such business as it can from advertisers desiring to serve the Detroit area and will provide the type of service that would result in substantial viewer appeal to this area. The Examiner concludes that, while

such operation in many instances may not be incompatible with "the best service to the local Flint community," it would create "an unnecessary and undesirable situation" in which Detroit, to the detriment of Flint, would become the dominant factor in the station's operation. The Examiner reasons that in attempting to provide programs of general interest, some programs of purely local interest to the Flint area might be reduced or eliminated. While Butterfield does not presently propose programs aimed at wide-area acceptance, the Examiner cites the possibility that such programming may be found desirable by management at some later date. Trebit, on the basis of the foregoing, is accorded a preference. We believe the Examiner's conclusions in this regard and his preference of Trebit in this connection are erroneous. The record indicates that WJR does not propose a service to Detroit but rather to the entire area within its service area, with emphasis on the Flint community. The record demonstrates clearly that both WJR and Butterfield have geared their program proposals to serve Flint. The record fails to support the conclusion that programs of purely local interest to Flint will be reduced or eliminated by either WJR or Butterfied. We find no basis for awarding a preference to Trebit on this score.

33. The fifth deleterious effect attributed by the Examiner to the choice of the southern sites is termed the impact of the Detroit area population on the rate base of the proposed stations. The Examiner reasons that, to the extent that the Detroit area circulation might increase the advertising costs of local Flint advertisers, it would be detrimental to the local Flint advertisers. The Examiner also advances the possibility that the factor of a higher return from national rates might reduce the opportunity for the local Flint advertisers to make use of the facilities. The Examiner's conclusions in this regard are too speculative

to form a proper basis for comparison. We believe the Examiner's comparative evaluation of the applicants on the basis of rates, and his awarding of a preference to Trebit thereon, is in error.

34. The sixth unfavorable factor flowing from the choice of the southern sites, and on the basis of which Trebit is preferred by the Examiner, is the possibility that a station employing the WJR and Butterfield sites might, in the future, function as a Detroit rather than a Flint station. While recognizing that WJR and Butterfield sincerely advance their proposals for service to Flint, the Examiner expresses the fear that they may succumb "to the obvious pressures which may be exercised in the future by economic and other factors which may later develop." In reaching this result, the Examiner refers to the history of aural broadcasting where stations so located as to provide service to large metropolitan areas make every effort to be identified with, to gravitate to, and to locate in, such metropolitan areas. The Examiner speculates as to what might occur upon a transfer of control. We believe that in preferring Trebit in this connection, the Examiner is engaged in unfounded speculation. We

see no basis in the record for the Examiner's unwarranted qualms with respect to WJR and Butterfield. First, it should be emphasized that, unlike the AM field, Channel 12 has been assigned to Flint pursuant to the Table of Assignments set out in our rules. The station authorized to utilize this frequency must operate as a Flint station. Its main studio must be located within the boundaries of Flint, a minimum signal strength must be placed over the entire community, and the station must provide a program service for the Flint community. Only through appropriate rule making proceedings in which all interested parties would be accorded full opportunity to present their views, may

Channel 12 be removed from Flint and shifted to another community. In any event, we believe the Examiner's fears that WJR or Butterfield would eventually operate their station as a Detroit station are not warranted by the record. Rather, the record makes clear that each of the applicants proposes a "Flint station" as that phrase is understood in the regulatory framework. The record does not provide a basis for awarding a preference to Trebit on this score.

35. We conclude, from the foregoing, that the public interest would best be served by a grant of the WJR application. Comparing WJR and Trebit, we find that WJR warrants a preference in light of its program proposal which would include a substantially greater amount of local live programming, as well as remote programs, and which will be implemented by means of its clearly superior studio facilities and equipment. WJR is also to be preferred on the basis of the more active day-to-day participation of its principals in the operation of the Flint station. Trebit, on the other hand, is entitled to some preference in view of its prior experience in the television field and in light of the fact that, through its AM operation in Flint, it has been in a position to be somewhat more closely attuned to the needs of Flint. WJR, however, has had substantial experience in the broadcast field and has satisfactorily geared its programs to serve the needs of the Flint community. In our opinion, the most significant difference between WJR and Trebit, and what, in our mind, is the determinative factor in the comparison of these two applicants, is the fact that a grant to WJR would better serve the Commission's well-established policy of diversification of the media of mass communications and, at the same time, would avoid the cncentration of control of such media within a relatively small area that would result from a grant of the Trebit application. We believe, therefore, that the record warrants the preference of WJR over Trebit.

36. Similarly, as between WJR and Butterfield, the record supports a preference for WJR. Here again, the WJR programming proposal is to be preferred in light of the substantially greater amount of local live programming and remote programs to be implemented by means of WJR's clearly superior studios and equipment. WJR is also to be preferred on the matter of prior broadcast experience and satisfactory record of operation, and on the basis of the active participation of a greater number of its principals in the day-to-day operation of the station. Butterfield merits a slight preference in light of the interest held by the Regents in its application. However, in our opinion, the determinative factor in the comparison of these two applicants relates to the preparation of their program proposals to serve the needs of the Flint community. In this connection WJR warrants a significant preference. In light of the above, we believe the record supports a clear preference for WJR over Butterfield.

37. In view of the foregoing and upon consideration of the entire record in this proceeding, it is determined that the public interest, convenience and necessity would be served by a grant of the application of WJR, The Goodwill Station, Inc. and the consequent denials of the applications of the Trebit Corporation and W. S. Butterfield Theatres, Inc.

38. IT IS ORDERED, That the Motion to Strike the Broadcast Bureau's exceptions filed by the Trebit Corporation IS DENIED.

39. In view of the foregoing, IT IS FURTHER ORDERED, This 12th day of May, 1954, that the application of WJR, The Goodwill Station, Inc., for a new commercial television station in Flint, Michigan on Channel 12 (316 kw, visual, and

158 kw aural) IS HEREBY GRANTED, subject to the condition that its antenna structure shall be painted and lighted in accordance with Part 17 of the Commission's Rules; and IT IS FURTHER ORDERED, That the applications of the Trebit Corporation and W. S. Butterfield Theatres, Inc. ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION*
MARY JANE MORRIS
Secretary

Released: May 14, 1954

4556

DISSENTING OPINION OF COMMISSIONER HENNOCK

The parties herein stipulated not to inquire into or urge as a disqualifying factor the past broadcast record of WJR and the alleged antitrust violations of Butterfield.

In my opinion this stipulation was improperly accepted by the Examiner. An inquiry into these matters was clearly required by the first hearing issue which was designed "to determine the legal, technical, financial *and other qualilcations* of the applicants to construct and operate the proposed station." (emphasis added).

The past record of the applicants, their competitive practices in the field of the media of mass communications and the maintenance of diversification of control of these media are the really critical issues that determine the qualifications of the applicants in this and any competitive proceeding for the valuable VHF channels which are so closely contested. The evidence in the record on these issues forms the basis for the truly significant and meaningful criteria in determining who should be preferred in the public interest. When any of these issues are eliminated by stipulation they cannot be resolved on the record and the hearing becomes meaningless.

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* See attached Dissenting Opinion of Commissioner Hennock.

Accordingly, I consider the record in this proceeding to be incomplete and vote that it be reopened for further hearing.

4557

APPENDIX

RULINGS OF THE COMMISSIONER ON THE EXCEPTIONS TO THE INITIAL DECISION

*Exceptions of WJR, The Goodwill Station, Inc.**

Exception No.	
1, 9, 14, 22, 27, 31, 33, 36, 37, 42, 50, 57, 65, 68, 69, 75, 78, 92, 93, 106	Denied. The decision as modified adequately reflects the record.
2, 16, 25, 40, 51, 55	Denied for the reason that the detailed exposition as requested is unnecessary to the decision reached herein and the decision as modified adequately reflects the record.
3, 6, 7, 10, 11, 12, 17, 20, 21, 39, 41, 44, 45, 47, 59, 64, 66, 71, 72, 74, 80, 87, 88, 89, 90, 91, 96, 100, 101, 102, 103, 104, 105, 107, 108, 112	Granted and the decision has been modified accordingly.
4	Granted in part to the extent that the decision has been modified to indicate the correct population of the city of Detroit.

Exception No.	
5	Denied for the reason that the objection goes to the weight of the evidence in question rather than its admissibility.
8, 53, 79, 81, 82, 98	Denied in light of the decision reached herein.
13, 35, 43	Denied as immaterial, irrelevant, or unnecessary to the decision.
15, 18, 19, 24, 29, 30, 38, 46, 62, 67, 70, 83, 84, 86, 94, 97, 99, 110, 111	Granted in part to the extent that the decision has been modified.
23, 85	Denied for the reason that the matter objected to has been deleted from the decision.
	4558
26, 52	Denied. The matter objected to has been deleted from the decision and the detailed exposition as requested is unnecessary to the decision reached herein.
28	Denied. The material objected to is relevant to this proceeding and the additional findings requested are unnecessary to the decision reached herein.
32	Denied. Evidence relating to the operation of WFDF in Flint prior to its purchase by Trebit is relevant to this

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* WJR has not designated any exceptions numbered 60 or 95.

	proceeding since it demonstrates the standing of the station in the Flint community. The decision as modified adequately reflects the record.
34	Denied. The material objected to is relevant to the proceeding.
48, 49, 109	Denied. The decision as modified adequately sets forth the Commission's function in a comparative proceeding and meets the requirements of the *Johnston Broadcasting Co.* case (4 RR 2138).
54	Denied. The decision as modified correctly sets out the burden of Trebit to establish that a grant of its application would meet and satisfy the criteria contained in Section 3.636 of the Rules, as amended.
56	Granted in part and denied in part. To the extent that the exception requests that we conclude that Trebit has not met the burden of Section 3.636, it is denied for the reasons set out in the decision. To the extent that it requests that WJR be preferred over Trebit on the basis of diversification and concentration of control of mass media of communicatins, it is granted for the reasons set out in the decision.
58, 63	Denied for the reasons set out in the decision.

Exception No.	
61	Granted in part and denied in part. To the extent that the exception requests that we prefer WJR over Trebit on the basis of diversification, it is granted for the reasons set out in the decision. To the extent that it requests that we prefer WJR over Butterfield on this basis, it is denied for the reasons set out in the decision.
73	Granted in part and denied in part. To the extent that the exception requests that we prefer WJR over Butterfield on the basis of prior broadcast experience, it is granted; and to the extent that it requests that we prefer WJR over Trebit on this basis, it is denied for the reasons set out in the decision.
77	Granted only to the extent that we have concluded that WJR is to be preferred in light of the greater active participation of its principals in the day-to-day operation of the proposed station.

Exceptions of W. S. Butterfield Theatres, Inc.

1, 32, 34, 39, 42, 50	Denied for the reason that the decision as modified adequately reflects the record, and the detailed exposition requested is unnecessary to the decision.
2, 4, 6, 7, 9, 10, 21, 22, 23, 24, 29, 31, 47,	Granted and the decision has been modified.

Exception No.	
60	
3	Granted to the extent that the decision has been modified to indicate the correct number of drive-in theatres in Flint. In all other respects the exception is denied as immaterial, irrelevant, or unnecessary to the decision.
5, 11, 12, 15, 17, 18, 19, 37, 54, 55, 57, 58, 66, 67, 72	Denied for the reason that the decision as modified adequately reflects the record.

4560

8	Granted to the extent that the decision has been modified to indicate Butterfield's preparations for remote programming in the future.
13	Denied for the reason that the material objected to has been deleted from the decision as modified.
14, 53, 64, 68	Denied for the reasons set out in the decision as modified.
16, 27, 28, 33, 35, 36, 38, 40, 41, 43, 45, 49, 61, 62, 63, 65, 69	Granted to the extent that the decision has been modified.
20, 46	Denied in light of our conclusions with respect to network affiliations as set out in the decision as modified.
25, 26, 30, 44, 51	Denied as immaterial, irrelevant or unnecessary to the decision.
48	Denied. The Commission considered the differences among the applicants

Exception No.	
	in these respects but did not find them of sufficient significance to form a basis for preference.
52	Granted in part and denied in part. To the extent that the exception requests more detailed findings with respect to proposed programs, it is granted and the decision has been modified. With respect to program policies, it is believed that decision adequately reflects the record and the detailed additional findings are unnecessary to the decision.
56	Granted in part and denied in part. To the extent that the exception requests that we prefer Butterfield to Trebit on the basis of diversification and concentration of control of mass media of communications, it is granted. To the extent that it requests that Butterfield be preferred over WJR on this basis, it is denied for the reasons set out in the decision.
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59	Denied. The decision as modified draws a proper conclusion concerning the participation by the Board of Regents in the operation of Butterfield and the proposed station as reflected by the record.
70, 71	Granted in part and denied in part. The conclusions as set out in the decision as modified are supported by the record.

Exceptions of the Broadcast Bureau

1, 2 Granted to the extent that the decision has been modified.

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4645

FEDERAL COMMUNICATIONS COMMISSION

DECEMBER 6, 1954

Memorandum Opinion and Order

By the Commission: Commissioners McConnaughey, Chairan and Lee abstaining from voting; Commissioner Webster dissenting and issuing a statement; Commissioner Hennock issuing separate views.

1. The Commission's Decision of May 14, 1954 granted the Flint, Michigan television application of WJR, The Goodwill Station, Inc., in preference to the competing applications of Trebit Corporation and W. S. Butterfield Theatres, Inc. The latter two have filed petitions for reconsideration, and the so-called "Citizens Committee for a VHF Television Station for Flint" has petitioned to intervene and for a rehearing and, alternatively, for permission to file a brief *amicus curiae*.[1] We shall consider first the petitions filed by the losing parties.

2. Both Trebit and Butterfield aim a series of generalized attacks at the Commission's Decision, charging, in substance, that the Commission ignored or failed to give sufficient consideration to the parties' proposed findings of fact, the Examiner's Initial Decision, the evidence of record and the testimony of expert witnesses. Aside from the fact that petitions for rehearing and reconsideration properly cannot be bottomed upon such vague and general allegations, the charges are mistaken, as a careful reading

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[1] The pleadings: Petition for rehearing and other relief filed by Trebit Corporation June 14, 1954; petition for rehearing filed by Butterfield Theatres June 11, 1954; Motion of the Citizens Committee filed June 14, 1954; opposition to the Trebit and Butterfield petitions filed by WJR on June 21, 1954; reply to the WJR opposition filed by Trebit on June 28, 1954; opposition to the Citizens Committee motion filed by WJR on June 21, 1954; reply to WJR opposition filed by Citizens Committee on June 28, 1954.

of the Decision will reveal. The proposed findings of the parties, the Examiner's Initial Decision, the evidence of record and the testimony of all the witnesses received our most careful consideration. Out of an abundance of caution, we have reviewed our findings and conclusions and, except in the minor respects hereinafter set forth, we have concluded that rehearing is unnecessary. It is to be noted that where

our Decision differs from the Examiner's, our reasons therefor have carefully been stated. We find no justification for Trebit's charge that the Commission decided the case *de novo* after it had been decided by the Examiner; thus there is no merit in the assertion that the parties should have an opportunity to address themselves to those points with which they now do not agree. Trebit's theory of the case, as we understand it, would, in this respect, preclude final determination of any case on grounds other than those found by the Examiner. We do not so construe the law.

3. The decisional process not only involves but requires the exercise of an independent judgment on the part of the Commission. Trebit's interpretation of this process would restrict the Commission to the limited consideration of these points upon which the Examiner chose to base his decision and which the parties elected to urge in their respective pleadings, regardless of the correctness of such choices and selections. We find nothing in the Communications Act or the Administrative Procedure Act which has the effect of so limiting the Commission's freedom of action. In any event, we have been unable to find, nor has Trebit specified, those respects in which our Decision so departs from the findings and conclusions urged and found in earlier phases of the proceeding as to justify the accusation that we considered "all or any essential part" of

the case "*de novo* after it had been referred to an Examiner."

Programming

4. Petitioners disagree with the findings and conclusions which the Commission made (paragraphs 10 and 21 of the conclusions) wherein the live programming proposals of WJR were an element of a preference awarded to that applicant. It is urged that we have erroneously based a preference on the greater quantity of local live programs offered by WJR than by the other applicants without making a qualitative analysis of these programs in comparison with the proposals of Trebit and Butterfield.

5. In paragraph 10 of the conclusions we awarded WJR a preference with respect to remote program proposals and then stated: "WJR also proposes substantially more local live programs than the other applicants. The elaborate facilities proposed by WJR, when considered in relation to these factors, entitle WJR to a preference." In paragraph 21 of the conclusions we stated: "While it is correct that a preference should not be awarded an applicant merely because more elaborate studio facilities and equipment are proposed, when, as in this case, the more elaborate facilities will be employed to implement a program proposal contemplating a substantial amount of local live programming and remote programs, then such elaborate facilities become significant and form the basis for a preference." It was not our intention to nor did we prefer WJR solely because of the quantity of local live programming proposed.

6. However, on re-examination we are of the view that to some extent we have placed emphasis on a quantitative advantage in the amount of local live programs and that to this extent the decision should be altered. While we attach great weight to local live programming because an

applicant, through its local live programming, demonstrates its capacity to meet community needs and

desires and serves as an outlet for local expression quantity alone is not sufficient; for it is the content and the promise for implementation of the proposals and the assurance of the effectuation which must be considered.[2]

7. A finding that WJR's live programs will be superior in quality to those of the other two applicants is not a prerequisite of the point of preference which we awarded to WJR. Rather, all that is required is that it be demonstrated, if this be possible from the evidence, that the live programs proposed for local origination are of a quality which makes their presentation, in terms of greater quantity and of superior facilities for presenting them, significant as an element of public interest in which WJR excels. Our Decision already contains such comparison of the quality of the programs of the respective applicants as it is possible to make on the basis of the record.

8. The findings of our Decision (paragraph 88) contain a description of the non-network programs, other than the usual news and entertainment programs, proposed by WJR. The major portion of these[3] will be local live programs, and with the exception of "In Our Opinion," they will originate all or most of the time in Flint rather than Detroit. These programs are designed to meet the varied local interests and needs for television programs, presenting a well-balanced format of religious, educational, public service and other types of programs of particular local interest well intended for local live origination. In addition, WJR will originate as live presentations numerous news and entertainment programs to fill out the local live pro-

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[2] *The Tribune Company,* 9 Pike & Fischer RR 719.

[3] All except those designated g, h, m, r, u and y.

gram schedule proposed. Thus, the local live program proposal shows an awareness of the needs and interests of the community and area to be served and is meritorious.

9. The preference we gave to WJR was a preference of a composite nature in which WJR was preferred because its more elaborate studio facilities and equipment will be employed to implement a program proposal contemplating a substantial amount of local live programming and remote programs. The Commission stated that under these circumstances "such elaborate facilities become significant and form the basis for a preference." Of course, petitioners are correct in contending that the Commission's conclusion is erroneous to the extent that the significance of superior facilities is based in part upon the quantity alone of local live programs, and to correct this error we have made above the additional findings necessary to show that these local live programs are of meritorious nature. As thus corrected, the preference granted to WJR is appropriate, for through the superior presentation of its local live programming an applicant better serves as an outlet for local expression.

Trebit Petition

10. Trebit disagrees with the Commission's ruling permitting the Broadcast Bureau to file exceptions to the Initial Decision. The arguments have been considered previously and rejected by the Commission; there is no need to give further consideration to this point.

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11. In the remainder of its exceptions, Trebit attacks the Commission's findings and conclusions concerning remote programming proposals, transmitter sites, existing television services, studios and equipment, participation of principals in day-to-day operation of the proposed stations, preparation for television, and staff proposals. Also it is

contended that the Commission erred in not agreeing with the Examiner that there was a danger that WJR would function as a Detroit rather than a Flint television station. All these points have been thoroughly considered by the Commission, discussed in detail in the Decision, and ruled upon after evaluation of all of the evidence of record, the Initial Decision, and the exceptions filed by the parties. On the basis of this record, the Commission was of the view that these points could not be decided in the manner urged by Trebit. The Commission continues to be of that view after evaluating what is, in major substance, a reiteration of the arguments and contentions previously made by this petitioner. In other words, we find no basis for rehearing on the merits of the matters raised by Trebit. We do feel, however, that there is one factor which deserves some comment.

12. At several points in its petition for reconsideration Trebit suggests that the Commission erred in overruling the Examiner who had the opportunity to observe the demeanor of WJR witnesses and to consider this in the preparation of his Initial Decision. Although mindful of the conditions imposed upon its authority to reverse an Examiner's finding predicated upon the demeanor of witnesses,[4] the Commission notes that at no point in his Initial Decision did the Examiner state or indicate that his findings or conclusions were based upon his observation of the witnesses. No testimony was rejected because of evasiveness or lack of candor on the part of any witness, and, indeed, the Examiner made it clear on several occasions where he made findings adverse to one applicant, that he did not question the good faith or sincerity of that applicant or its witnesses. Thus, the Commission believes that Trebit's suggestion of error on the question of candor and demeanor is unjustified.

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[4] *Allentown Broadcasting Corp.* v. *FCC*, F. 2d, (August 19, 1954).

Butterfield Petition

13. Butterfield argues that since issuance of the Decision new facts have appeared which make it clear that Butterfield should be preferred to WJR on the basisof diversification and control of the media of mass communications. The new facts are the acquisition of interests in television station WINT, Waterloo, Indiana, by several of the WJR principals. It is contended that this matter should be reconsidered by the Commission, that the record should be reopened, and that a further hearing should be ordered to learn the facts.

14. At the outset it is to be observed that the question of reopening the record for the purpose of ascertaining facts which have occurred since the closing of the record is not required, it being a matter of discretion with the Commission whether such reopening will be ordered. Section 405 of the Communications Act of 1934, as amended. That we are not required to reopen the record to bring it up to date is well settled. *I. C. C.* v. *Jersey City,* 322 U. S. 503.

In two places in our Decision we referred by footnote to facts occurring since the hearing record was closed; in both instances we declined to consider these altered facts in making our decision. Were we now to reopen the record as requested by Butterfield, it would be necesary to consider those facts as well as any others, including those referred to by petitioner. It would be necessary, for example, to ascertain the facts relative to the granting of a non-commercial educational television station construction permit at Ann Arbor, Michigan to the Board of Regents of the University of Michigan, which holds a substantial stack interest in Butterfield and to ascertain whether both the University and the Butterfield station would provide

Grade A service to Ann Arbor. We are of the opinion that under the circumstances it is neither necessary nor desirable further to delay the final administrative disposition of this case.

15. In its petition, Butterfield charges that the Commission's allowance of the WJR amendment of transmitter site was improper. This matter has been thoroughly considered heretofore; further consideration is unnecessary. Butterfield also attacks findings relative to integration and staff proposals and insists that the Commission's findings and conclusions on diversification and concentration of control, experience and past performance, and the influence of the University of Michigan on the Butterfield operations are improper. We reject these contentions for the same reasons we rejected those of Trebit in paragraph 11, *supra.*

Citizens Committee

16. We turn now to disposition of the motion to intervene filed by the "Citizens Committee for a VHF Television Station for Flint." The committee, a voluntary organization representing various Flint civic groups, was formed on May 20, 1954, subsequent to the release of our Decision awarding Channel 12 to WJR. It is argued that the Commission erred in its grant to WJR, that WJR will be subjected "to enormous pressures resulting from the fact that it will be serving equally a metropolitan area of two million persons and the Flint area of approximately two hundred thousand persons," and that the citizens of Flint are "aroused" by the Decision indicating that "the Commission incorrectly gauged the true beliefs of the public interest." The Committee asks for a rehearing in which it should be permitted to intervene to show that the citizens of Flint believe that their best interests require a Flint station which would be unable to serve Detroit with a signal of equal intensity. Alternatively the Committee requests that it be permitted to file a brief *amicus curiae.*

17. WJR opposes the petition of the Citizens Committee, contending that under Section 1.388 of the Rules the Committee has no standing to intervene, has failed to allege facts to support its intervention at this time, and has filed untimely without showing good cause. As to rehearing, it is urged by WJR that the Committee has no standing under Section 405 of the Act because it will neither suffer electrical interference nor economic injury within accepted meanings attributed to those criteria. WJR maintains that the Committee has failed to present any substantive facts or arguments requiring reconsideration

or showing the respect in which the Commission's Decision is claimed to be erroneous. Concerning the alternative request for permission to file an *amicus curiae* brief, WJR points out that the Commission's Rules do not provide for such briefs and states that even if they did the time for filing would be prior to oral argument before the Commission. In its reply to the opposition, the Committee urges that in light of the special circumstances the Commission should exercise its discretion to grant a rehearing. As to delay in seeking to intervene, it is asserted that the Flint "public" did not feel itself aggrieved until the Commission's Decision reversing the Examiner was issued.

18. The Citizens Committee motion must be adjudged first on the request for rehearing, for unless rehearing is granted there is no proceeding in which to intervene. The request for rehearing is deficient. While Section 405 of the Act allows petitions for rehearing to be filed by "any party thereto, or any other person aggrieved or whose interests are adversely affected thereby," the Citizens Committee does not qualify under either of these categories. Certainly it is not a "party" to the proceeding nor does the Committee qualify as a "person aggrieved or whose interests are adversely affected" by the grant to WJR. We have declined to recognize the right of an individual with

no other interest than as a member of the public to file a petition for reconsideration or a protest;[5] similarly the petition to reconsider filed by an association of radio and television broadcasters was refused for lack of standing.[6] An unincorporated association of radio station licensees in a community has also been held to possess no standing to petition for reconsideration of a grant of an application for a new station in the community.[7] In these cases it was noted that the petitioners had not made any showing of injury which would permit them to come before the Commission as persons aggrieved or whose interests are adversely affected. The Citizens Committee has failed to specify how it, or its members, are aggrieved or adversely affected by the Commission's action in granting the WJR application. Furthermore, the Committee has stated in only the most general terms the way in which the Decision is in error, *i.e.,* that WJR will be a Detroit rather than a Flint station, and has offered no arguments or facts not previously and thoroughly considered by the Commission. For the foregoing reasons the petitions must be denied.

19. Regardless of the foregoing it is clear that the request to intervene should be denied. It was filed too late, and we do not find good cause for the delay in the excuse offered by the Committee that it was not formed until after the Decision because there was no need to participate before then. A person's or group's obligation to protect its interests commences before the proceeding has been completed; failure to meet this obligation does not constitute good cause for filing a petition to intervene more than a year after the proceeding commenced, particularly when it has been apparent from the beginning that WJR, being one of three applicants, might receive the contested grant. Additionally,

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[5] *Paul A. Brandt,* 8 Pike & Fischer RR 409.

[6] *Kansas State College,* 8 Pike & Fischer RR 261.

[7] E. D. Rivers, Jr., 6 Pike & Fischer RR 552.

the Citizens Committee is not a party in interest entitled to intervene under the provisions of Section 309(b) of the Act. At the minimum, it has failed to specify those respects in which its members would be injured so as to entitle it to intervene as a party in interest.[8]

20. Our Rules make no provision for the filing of *amicus curiae* briefs. Moreover, it is clear that petitioner's alternative request to file such a brief is for the purpose of placing before us the same arguments it would urge were we to grant the petition for reconsideration and intervention. Petitioner has not demonstrated any good reason why special treatment should be afforded to it. The request will be denied.

In view of the foregoing, IT IS ORDERED, this 2nd day of December, 1954 that except to the extent indicated herein the petitions filed by Trebit Corporation and by W. S. Butterfield Theatres, Inc. for reconsideration of the Commission's Decision and for rehearing ARE DENIED; and that the petition filed by the "Citizens Committee for a VHF Television Station for Flint" requesting leave to intervene and for a rehearing and alternatively for permission to file a brief *amicus curiae* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION *
MARY JANE MORRIS,
Secretary.

[SEAL]

Released: December 6, 1954.

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[8] In this connection, see Senate Report No. 44 on S. 658, 82nd Cong., 1st Sess., (p. 8) where, in discussing the possibility that use of the term "parties in interest" used in Section 309 might make possible interventions by those who have no legitimate interest, the Senate Committee stated: "The committee does not so construe the term 'party in inerest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U.S. 470)."

* See attached dissenting statement of Commissioner Webster.

See attached separate views of Commissioner Hennock.

DISSENT OF COMMISSIONER E. M. WEBSTER

If this case involved the unopposed application of WJR, Inc., I would have less trouble with it, since that applicant is well qualified to operate a television station and its proposal does not violate the Commission's rules. But the record with which we are concerned here involves a competitive situation wherein Trebit proposes to locate its antenna so as to serve only the city to which the channel was allocated, while WJR contemplates locating its antenna so as to serve Detroit in addition to Flint, with a studio not only in Flint but also in Detroit at the site of its AM studio. While there is nothing inherently wrong in serving two cities, unquestionably, in the circumstances, it complicates the resolution of the question as to which of several qualified applicants will operate the proposed station so as to conform to the spirit as well as the letter of the allocation table.

Although WJR has expressed its intention to render programs designed to meet the economic and social needs of Flint, it appears inevitable to me that such good intentions will eventually succumb to the play of the market place, leaving Flint without the primary VHF facility to which it is entitled under the Commission's allocation plan. Without reflection upon the integrity of those who would direct the activities of the station proposed by WJR, Inc., to believe that any licensee under similar circumstances would not avail itself of the economic opportunities provided by the larger market is to assume that human nature has undergone a drastic metamorphosis.

I cannot rid myself of the belief that a grant to WJR in the circumstances invites the conversion of Flint's channel 12 into a Detroit channel, making vulnerable the Commission's allocation table and paving the way for its demise.

Accordingly, I believe the Commission should reconsider this matter.

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SEPARATE VIEWS OF COMMISSIONER HENNOCK

I would deny the petitions for reconsideration because they are not directed to the matters about which I had previous reservations and which formed the basis for my dissent to the adoption of the final decision in this matter.

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FEDERAL COMMUNICATIONS COMMISSION

RECEIVED DECEMBER 28, 1954

* * * * * * * * * *

Joint Petition for Stay of Effective Date, Reopening of the Record, Rehearing and Further Relief

Come now W. S. Butterfield Theatres, Inc. and Trebit Corporation, hereinafter referred to as Petitioners, by their attorneys, and, pursuant to Section 405 of the Communications Act of 1934, as amended by the Communications Act Amendments, 1952, file this Joint Petition requesting the relief set forth in the Prayer for Relief.

1. This proceeding, involving the above-entitled mutually exclusive applications each requesting a construction permit to construct and operate a commercial television station on Channel 12 at Flint, Michigan resulted in a decision by the Commission on May 14, 1954, awarding the aforesaid authorization to WJR, The Goodwill Station, Inc. (hereinafter referred to as WJR). Separate petitions for rehearing pursuant to Section 405 of the Communications Act of 1934, as amended, were filed by Petitioners on June 11, and June 14, 1954, which pleadings, by this reference are made a part hereof. Responsive to these petitions,[1] the Commission, on December 6, 1954 released

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[1] And the petition of the "Citizens Commitee for a VHF Television Station for Flint."

and published its Memorandum Opinion and Order changing and modifying its aforesaid Decision of May 14, 1954 and reaffirming the WJR grant.

2. During the interval between the release of the Commission's aforesaid Memorandum Opinion and Order of December 6, 1954 and the present time, WJR issued a press statement on December 16, 1954, (Exhibit A); tendered for filing with the Commission and application for modification of construction permit on December 16, 1954, (by this reference made a part hereof and referred to as Exhibit B); and published an advertisement on December 17, 1954 (Exhibit C); each of which constitutes newly discovered matter having so material an impact on the proceedings in this case that the hearing already conducted and the decision reached thereunder are pure nullity.

3. The salient disclosures of newly discovered matter contained in Exhibits A and C are:

A. WJR has abandoned the transmitter site proposed in its application and hearing and will locate instead at a point near Chesaning;[2]

B. WJR has abandoned its studio proposal provided for in its application and hearing, and as a substitute therefor *has already acquired* a second-hand studio structure which it will lease;[3]

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[2] Twenty-two paragraphs and some nine pages of the Commission's Decision were devoted to comparative considerations flowing from the WJR site in relation to the others.

[3] After contrasting WJR's ¾ million dollar studio proposal with Trebit's plan to remodel a three-story AM structure at a cost of $63,000 and Butterfield's proposal to remodel and enlarge a theatre building at a cost of $260,000, the Commission concluded that WJR had demonstrated "manifest superiorty" over Petitioners. (Conclusion No. 10.)

C. WJR will not affiliate with the DuMont Network as specified in its application and hearing but will affiliate with CBS;[4] and

D. All of these "new plans" were effected months prior to December 17, 1954, but WJR deliberately kept them from the Commission until after the Commission's final Decision on the so-called "merits" of the case which they had submitted.[5]

4. The salient disclosures of newly discovered matter contained in Exhibit B include:

A. The matters specified in sub-paragraphs A, B and C above;

B. Changes in the stock ownership of principals in this proceeding from that disclosed in the hearing;

C. Cost estimates at substantial variance from those submitted in the application and tested during the course of the hearing which, ironically are still based upon WJR's stipulation with Petitioners;

D. Changes in the analysis of time to be devoted to the various types of programs from that submitted in the application and during the course of the hearing;

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[4] See WJR's proposed conclusion (No. 14)—"* * * the only definite conclusion that can be reached is that WJR's network plans will be carried out and that it is highly improbable that the Trebit or Butterfield proposals can be accomplished." * * * and the Commission's Conclusion (No. 31): "Thus * * * it is more likely that WJR would be able to implement its network proposal than would be the case with both Trebit and Butterfield * * *."

[5] See 12th paragraph, Ex. C. See also application for extension of completion date filed by WJR December 1, 1954 and dealt with in Par. 9 *infra*, wherein it is disclosed that during the very time the Commission was being urged to reconsider its preference for WJR because of the alleged studio superiority, WJR, in violation of its construction permit, had already acquired and was equipping these other and totally different facilities.

E. A new and materially different program schedule than that submitted with the appllication and presented during the course of the hearing;

F. A new and materially different analysis of the source of programs to be broadcast than that submitted with the application and presented during the course of the hearing;

G. New and different information showing newly acquired television interests of WJR principals in this proceeding different from that submitted in the application and presented during the course of the hearing;

H. New and different lists of equipment to be utilized from that submitted in the application and presented during the course of the hearing; and

I. New and different information concerning the staffing of the proposed television station differing from that in the application and presented during the course of the hearing.

J. New and different plans of financing than that submitted in the application and presented during the course of the hearing. (See Ex. F-2 and 3 attached to Exhibit B as compared with Stipulation of the Parties.)

5. As stated by the Commission in its Decision in this proceeding of May 14, 1954, these applications were designated for consolidated hearing on the following five issues:

(1) To determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations;

(2) To determine the type and character of the program services proposed to be rendered and whether they

would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours;

(3) To determine whether the construction and operation of the proposed stations would be in compliance with the Commission's Rules and Regulations governing television broadcast stations;

(4) To determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation; and

(5) To determine on a comparative basis which, if any, of the above-entitled applications should be granted.

The newly discovered material set forth in Exhibits A, B and C hereinabove referred to alter the position of WJR in this proceeding to such an extent that each of the aforesaid issues is substantially affected, rendering conclusions thereon meaningless and hollow. Considered only in outline form:

A. WJR's showing at the hearing with respect to financial qualifications is now moot. Among other things (1) it will not spend $766,821 to build studios; (2) its estimated budget must now contain a rental item not dealt with in the hearing; (3) its estimates

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of operating costs and revenues having been based upon 9.95% of its broadcast hours as network commercial and the use of filmed material for 28.42% of its operating hours, can hardly have any provable connection with the operation provided for in Exhibit B calling for 39.34% network commercial and 25.78% of filmed material; (4) revenues calculated on the basis of a 65.94% commercial operation as shown in the hearing (and found by the Commission) cannot be supported by the current proposal of 73.31% commercial as set forth in Exhibit B. Additionally, as pointed out in Par. 4 J *supra,* the financial plan generally has been altered. Technical qualifications as well have undergone change, for, as shown herein, WJR now proposes an entirely new and different technical operation from that proposed in its original application and in the competitive hearing herein. Thus, Issue No. 1 has been settled on facts which no longer obtain.

B. The WJR showing at the hearing on the type and character of the program service to be rendered in relationship to the requirements and needs of those residing within its Grade A and Grade B field intensity contours and, consequently, the Commission's findings on Issue No. 2 are clearly moot inasmuch as the aforesaid contours have little, if any, relationship to those now specified by WJR. (See Par. 12, *infra.*)

C. All of the testimony submitted by WJR concerning the compliance of its antenna proposal with the Commission's Rules and Regulations is now moot in view of the fact that its proposal bears no relationship to the one presented by it during the aforesaid hearing. There is consequently no evidence in this record pertaining to WJR on Issue No. 3. (See Par. 12, *Infra.*)

D. There has been no evidence on the suitability of the proposed WJR site from the standpoint of air navigation and hazards thereto and, consequently, conclusions by the Commission on Issue No. 4, as they pertain to WJR, are clearly moot. That this is no trivial matter was made clear by the difficulties experienced by WJR during the course of this proceeding in its first effort to alter its site after the hearing in this proceeding had commenced. (Memorandum Opinion and Order, March 9, 1953.)

E. As will be shown hereinafter, virtually every subject dealt with in the hearing and relied upon by the Commission having to do with comparisons between applicants is affected by the material set forth in Exhibits A, B and C to such an extent that there no longer exists a comparison on the real facts between WJR and Petitioners.

6. Section 309(b) of the Communications Act of 1954, as amended, the requirements of Due Process and the essence of fair play in administrative proceedings required the holding of this hearing upon clear-cut issues known to all parties. A hearing, presumably on such standards, has been held and an award ordered. Each of Petitioners has proceeded in good faith, expending its time, effort and financial resources to compete on these issues only to discover from the unmistakable evidence contained in Exhibits A, B and C that the alleged comparative proceeding was a mere academic exercise and that the WJR proposal with which it joined issue were mere straws.

7. The Commission in its Decision of May 14, 1954 and its subsequent Memorandum Opinion and Order of December 6, 1954, saw fit to prefer WJR over Petitioners based upon what it characterized as "a comparative evaluation of all relevant and material differences among the applicants, as reflected by the record * * *," and stated further that "The ultimate judgment cannot be accomplished by means of any precise, mathematical formula; for, in the final determination, any particular distinction among applicants may, in light of the factors in any specific case, merit a greater or lesser significance." (Commission's Decision of May 14, 1954, p. 36, Par. 4.)

8. In thus evaluating the record, the Commission placed major support for preferring WJR on that applicant's superior studio facilities and the capacity of those facilities to carry out the substantial number of local live programs proposed to be carried. This studio structure that so impressed the Commission to a point of its being of major decisional value, no longer exists except in the memory of a hearing record. Rather than expending $766,821 "in the construction of a new, two-story main studio building at a site to be determined in Fint" * * *[6] housing two studios 50 x 50 and 34 x 52, two stories high and a third studio 16 x 20 with elaborate facilities, handsomely exhibited by WJR in exhibit form (WJR Ex. 11-Exhibit D for the purposes of this Petition), it is now revealed that WJR not only intends to use other and different facilities but has already contracted to do so, such other facilities being a second-hand one-story structure evaluated at $125,000, which, on information and belief, contained one fairly large studio and two others both smaller than the smallest proposed during the hearing. Exhibits E-1, 2, 3 and 4 attached hereto are actual photographs taken during the week of December 19, 1954 of the structure acquired by WJR as set forth in Axhibit B.

9. And it is interesting to discover when this transformation took place. The Commission Decision announcing this decisive preference for WJR's elaborate studios was released May 14, 1954. Petitioners attacked this conclusion in Petitions for Rehearing on June 11 and 14, 1954. WJR responded on June 21, 1954, defending the Commission's conclusion without making the slightest admission

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[6] Decision of May 14, 1954, p. 7.

that the entire issue had disappeared into thin air and no longer, in fact, existed. And yet, what are the facts? In an application for extension of completion date filed by WJR December 1, 1954 and granted December 21, 1954, all without public notice or announcement until after the fact, or notice of any kind to Petitioners,[7] WJR admitted that the substituted studio

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building had been acquired and furnished, that installation of equipment was in varying stages of completion, that "*installation commenced June, 1954.*" (Application on form No. 701 Sec. 5), and that it had been "expending at the rate of $8,700 per month *since July 1 for maintaining a nucleus staff at the Flint Studio.*" (Application on form No. 701, Sec. 3.) Moreover, that these plans were known and finally formulated by WJR months ago is clearly admitted by that applicant in its advertisement published on December 17, 1954. (See Ex. C.)

10. Thus, while Petitioners and WJR were contesting the very issue before the Commission, WJR was busily engaged in outfitting and preparing to occupy totally different facilities. While its representatives before this Commission were arguing to sustain this conclusion of studio superiority, its agents in the field were attending to the details involved in the acquiring and furnishing of the second-hand building now described in Exhibit B. Viewed in this perspective, WJR's public statement to the people of Flint that it withheld the filing of this information so as to avoid influencing the Commission's Decision on the Petitions for Rehearing, takes on added and startling meaning. (See Exhibit C, par. 12.)

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[7] The application was submitted to the Commission December 1, 1954. In Mimeo No. 14440, released December 21, 1954 the Commission publicly announced the filing of the application. On the same day, December 21, 1954, the Commission granted the application, but no public announcement thereof has *yet* been made.

11. In this connection, and particularly with reference to the off-hand explanation in WJR's modification application, that the change was made "to expedite commencement," the Commission's attention is invited to the fact that seven months have elapsed since the grant of the WJR application and no stay order has been in effect during any part of that time. Such a stay was requested by one of the Petitioners and vigorously opposed by WJR. (WJR Opposition to Petitions for Rehearing, p. 8.) Moreover, the present WJR proposal is in all respects permanent.

12. WJR's MP application proposes a third site and coverage so essentially different from that provided in its application for CP that it could not have been proposed subsequent to October 28, 1952 by amendment of its application on which the comparative hearing was

held without a substantial showing of good cause which it has not made and cannot make. (See Memorandum Opinion and Order, March 9, 1953.) (See Exhibits F and G attached re this paragraph 12.)

A. WJR's new site is some 44 miles north and west of the site specified in its CP. The site proposed in its MP application is 3.4 miles further from the Flint Post Office and its antenna is 450 feet lower than those specified in its CP. The adverse shadow effect is multiplied by a factor of 2 in the MP proposal over the CP. The Commission's Conclusion No. 25 in its May 14, 1954 Decision that no preference can be awarded to any of the applicants on the basis of site selection under Section 3.685(b) of the Commission's Rules obviously could not have been made if WJR's MP proposal had been before the Commission. Only by comparison of the abandoned WJR proposal with the Butterfield and Trebit proposals was the Commission able to equate the three.

B. From an area standpoint, WJR's MP proposal in all significant contours is substantially a new proposal.

(1) 69% of the area in the city service (77 dbu) contour in its CP will not receive such service under its MP proposal.

(2) 68% of the area in the city service contour (77 dbu) proposed in its MP proposal would not receive such service under its CP.

(3) 59% of the area in the Grade A contour in its CP will not receive such service under its MP proposal.

(4) 57% of the area in the Grade A contour proposed in its MP proposal would not receive such service under its CP.

(5) 37% of the area in the Grade B contour in its CP will not receive such service under its MP proposal.

(6) 39% of the area in the Grade B contour proposed in its Mp proposal would not receive such service under its CP.

C. From a population standpoint WJR's MP proposal in all significant contours is substantially a new proposal.

(1) 90.4% of the population in the city service (77 dbu) contour proposed in its CP will not receive such service under its MP proposal.

(2) 52% of the population in the city service (77 dbu) proposed in its MP would not receive such service under its CP.

(3) 89% of the population in the Grade A contour proposed in its CP will not receive such service under its MP proposal.

(4) 54% of the population in the Grade A contour proposed in its MP would not receive such service under its CP.

(5) 75% of the population in the Grade B contour proposed in its CP will not receive such service under its MP proposal.

(6) 20% of the population in the Grade B contour proposed in its MP would not receive such service under its CP.

It is clear from the above that overwhelming majorities in the City Service, the Grade A and Grade B contours of the CP will no longer be included within comparable contours under the MP proposal and that controlling majorities within the MP proposed city service and Grade A contours will be persons not residing within such contours under the CP. In view of WJR's representations that the programming would be responsive to the desires of the majority of its audience (see TR. 407, 439) these population differences are basic.

13. In its Decision of May 14, 1954, the Commission made an analysis of the statistical program information submitted by each applicant. That information as it pertains to WJR has only academic interest now for it develops from an examination of Exhibit B that the figures supplied by WJR and the ones against which Petitioners competed in the comparative hearing are not those which will actually obtain. To the extent that Petitioners presented comparative evidence and examined and cross-examined witnesses thereon, they were performing idle and meaningless tasks. From the hearing record the Commission found that WJR was to affiliate with the DuMont Television network and devote but 27 plus per cent of its time to network, thus leaving

a substantial amount of time available for other types of programming. We now are informed that this can be ignored for, in fact, WJR now proposes to affiliate with the Columbia Broadcasting System Television network and devote approximately 41% of its time to network programs. The only explanation offered by WJR for the abandonment of its hearing proposal to affiliate with DuMont is that *after it received its grant* from the Commission, another station secured the affiliation. The complete absence of any showing as to why its negotiations, if any, failed, leaves substantial questions as to the sincerity of its original proposal as presented during the hearing. Petitioners went to trial with WJR on the basis of its devoting 39% of its time to filmed material only to find now that this will be 26% of the station's time. Of even greater significance, Petitioners competed against an applicant who proposed devoting but 65.94% of its time commercially only to find that it will in fact devote 73.31% of its time to commercial broadcasts—some 6% and 8% higher than the comparable proposals of Petitioners.[8]

14. The Commission devoted a full paragraph of its Decision[9] to a list of nine outstanding network programs to be broadcast by WJR in the event of a grant, all but one being sustaining features of the DuMont Network. An examination of the schedule now supplied by WJR in Exhibit B shows that but three of these programs remain on WJR's schedule. Let it be said that this is brought about solely by a change in network affiliation proposed, it is pointed out that the three that *are* retained are sustaining

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[8] It is interesting to note in this connection that although WJR now proposes to increase its overall commercial content by more than 7%, its application for modification of construction permit leaves the estimate for station revenue unchanged. Petitioners, of course, have had no opportunity to deal with this anomaly.

[9] Decision of May 14, 1954, Par. 89.

features of the DuMont Network and not one single sustaining program of the Columbia Broadcasting System has been proposed. Petitioners competed with WJR on issues such as this, and lost on the basis of findings thereon.

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15. The program schedules now supplied by WJR reflecting that which it really intends to broadcast, differ so from that which formed the basis for the comparative hearing with Petitioners, that it is difficult to make an accurate analysis of these differences. However, a cursory examination reveals that programs consuming at least 45 hours out of the 110 hours of proposed programs per week submitted by WJR as a part of this comparative proceeding no longer are contemplated. Some 10 hours of this consists in commercial network programming; over 17 hours in sustaining network features including such programs as "This Week in Religion," "Youth on the March," "Pentagon Washington" and "Life is Worth Living";[10] some 12½ hours of recorded programs and almost three hours of live programming, considered and dealt with as a part of this proceeding in contrast to the proposals of Petitioners, no longer appear in the WJR schedule and comparative findings dealing therewith are of fictional interest only.

16. In addition to this, changes and alterations have been made in the program schedules, against which Petitioners competed, in many ways. To cite illustrations.

In Our Opinion —Was live commercial—now live sustaining.

Children's Theatre —Was 1½ hours—now one hour.

Symphony At Work —Was recorded—now live.

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[10] Present substitute: *Inter City Quiz.*

Women Today	—Had been classified for hearing purposes as "new"—now "talks."
Your Government—Local	—Had been classified for hearing purposes as "talks"—now "discussion."
Your Government—State	—Had been classified for hearing purposes as "talks"—now "discussion."[11]
Cartoons	—Was commercial—now sustaining.
Man in the House	—Was 15 minutes recorded commercial—now 10 minutes live sustaining.
Dinner Date with Music	—Was 10 minutes live sustaining—now 15 minutes live commercial.
Know Your America	—Was 15 minutes—now 10 minutes.
Swingshift Cimena (Monday, Tuesday & Wednesday)	—Was recorded commercial—now recorded sustaining.[12]

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Understanding Our World	—Was live sustaining—now recorded sustaining.
Wings Over Michigan	—Was live commercial—now recorded sustaining.

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[11] It is curious to note that "Your Government-Federal" a sister program remains classified as "talks" just as it was represented in the hearing.

[12] Interestingly enough, for the balance of the week, the record treatment of the program was not changed.

Sports Arena —Was 30 minutes recorded commercial—"entertainment"—now 15 minutes live commercial and classified as "talks."

Music Has a Story —Was recorded sustaining—now live sustaining.

Western Theatre —Was recorded commercial—now recorded sustaining.

Barn Dance —Was one hour—now ½ hour.

17. The matters set forth in Paragraph 16 herein are not submitted for the purpose of showing that one arrangement might be better than another. Rather, they are submitted to demonstrate the obvious juggling that has been done in a contrived attempt to recreate a program schedule to fit WJR's presently declared intentions while at the same time retaining the appearance of some of the attributes for which it was preferred. Petitioners have had no opportunity in this proceeding to examine, meet or compete against the showing so reflected. Rather, they have been denied a facility because the WJR showing (now altered) was said to be better.

18. And what of the non-network programs proposed by WJR and spelled out by the Commission in such detail in its Decision of May 14, 1954,[13] and applauded "qualitatively" by the Commission in its Memorandum Opinion and Order of December 6, 1954. Even here, the re-creation could not be entirely successful for of the 30 such programs listed, schedule changes with respect to more than half of them have now been effected together with other changes as well. (See *In Our Opinion, Symphony at Work, Your*

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[13] Pp. 26-28.

Govrnment, Know Your America, Understanding Our World and *Wings Over Michigan.*[14] For example, WJR presumably incurred credit with the Commission for its program "Understanding Our World" which, according to the hearing and the Commission's

Decision thereon, was to be produced live and "probably originate at the University of Michigan at Ann Arbor." (Decision, p. 27.) Indeed, this may have been one of the proposals that led the Commission to favor WJR for its remote features. Yet, an examination of Exhibit B shows that this will now be a filmed program. Understanding the present posture of "Symphony At Work" presents a unique challenge. On the record before the Commission this was to be a program on Sunday showing films of "Wednesday night symphony rehearsals." The interesting thing is that this program will still be carried on Sunday but will be live. How that program proposal can be effectuated under these set of facts is unanswered. Other programs have been reduced in duration from that specified in the record and Commission Decision. Some have undergone commercial-sustaining as well as live-recorded transformations, and others have been reclassified as to type without a word of explanation to support the change.

19. Contention as to the appropriateness or inappropriateness of these various changes, the weight to be ascribed to them and the net result that the altered facts might have had upon the Commission's ultimate decision are of little significance in connection with Petitioners' aggrievement asserted here. The true significance of these matters lies in the fact that that which appeared to be a

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[14] Compare WJR's program schedule, Docket 10268, Ex. 53 with the program schedule affixed to the application for modification of construction permit, Exhibit B herein.

comparative hearing between three parties is now revealed as farcical and absurd. Each of the matters referred to are in turn interdependent upon other matters all of which have varying impacts upon the ultimate decision in a proceeding of this character.

20. WJR submitted evidence during the course of the hearing concerning the selection of key personnel to operate its television station and while the Commission did not find WJR's superiority over one of the Petitioners as determinative in this regard, it nevertheless made conclusions concerning the qualifications of those persons selected by WJR for this purpose. An examination of the record (WJR Ex. 26) reveals that such conclusions were supported by representations concerning seven individuals named to special positions in the proposed television station. Exhibit P-4 of the modification of construction

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permit application (Exhibit B), however, discloses that but three of those seven are now scheduled for operating assignments. Mr. Leydorf, upon whom great reliance was placed in this record because of his engineering experience and skill, no longer is a part of the WJR showing. Mr. Hornung, Public Service Director, Mr. Large, Associate Music Director and Mr. Wells, Farm Editor, no longer appear in the applicant's staffing exhibit. WJR was also preferred over Petitioners because of integration. This principally, because Leydorf was to devote 80% of his time and Patt and Kramer 25% each. Exhibit B now removes the major portion of this proof for Leydorf is no longer shown in this capacity. Thus, of the 130% of integrated management only 50% remains. A record was made and differences were analyzed, however, on WJR Ex. 26 which, now that the hearing is over, no longer appears of decisional consequence to WJR.

21. In addition to the above, the present filing of WJR (Exhibit B) alters other aspects of the comparative equation in numerous ways. For example: (a) The Commission found with seeming approval that "in order to encourage management incentive and to foster integration of ownership and management" 40,000 shares of additional stock were being made available to WJR's directors. (Decision, p. 9.) *The facts:* rather than acquiring *more* stock, Exhibit B discloses that one director (Leydorf) now has *no* stock, two have *less* stock and *none* has *more* stock. (b) The Commission thoroughly canvassed other broadcast interests of each of the parties to this proceeding and arrived at conclusions which, as far as WJR was concerned, related only to its WGAR and WJR affiliations. Exhibit B now lists WJR principals Patt, Kramer and Moore as stockholders of Tri-State Television, Inc., a television permit holder at Waterloo, Indiana. (c) WJR equipment proposals made no reference to the utilization of second hand equipment, yet Exhibit B (F-1) now discloses the purchase of an indeterminate amount of used equipment from a defunct UHF station.

22. Petitioners respectfully submit that the material herewith submitted reveals, beyond dispute that they have been deprived of the fair and full hearing to which they are entitled. This petition presents no question of "stale" record, but of newly discovered material of the greatest importance dealing with substantially every facet of this comparative proceeding. Nor are questions presented concerning the granting or denying of the application for modification of construction permit, for the material contained in that application is submitted as evidence not only of fact, but of intention, some of which has already been effectuated.

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In proceedings of this kind, prior existing facts constitute but a small part of the showing required; the major portion of such cases must, of necessity, deal with an applicant's intentions. Not only is the submitted material in sharp contrast with the comparative facts of record but the WJR intentions with which Petitioners dealt, no longer exist, except in residue.[15]

23. Because of the conditions herein stated and presumably brought to the attention of the Commission for the first time with the filing of this petition and the documents referred to therein, a situation exists where the Commission, were it dealing with a final authorization, would have a definite responsibility under Section 312 (a). and (c) of the Act to issue an order directed to WJR requiring it to show cause why said construction permit

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[15] The Court of Appeals for the District of Columbia Circuit in *Plains Radio Broadcasting Co.* v. *FCC* (175 F. 2d 359, 362-363) in dealing with the fact that the successful applicant in a competitive hearing would *not* have the network affiliation it proposed at the time of the hearing said:

> "* * *
>
> "That summation of the Commission's position on program proposals leaves us uninformed as to the facts upon which this portion of the conclusion rested. According to the Commission's finding, the proposal made by Lubbock was 'based upon' a Mutual network contract. The final decision of the Commission recites the improbability of such contract and rests upon 'the type of programming' proposed and the probability that the applicant will present 'a well rounded and balanced program service.' We are not told by any findings what type of program Lubbock proposes, absent the Mutual network affiliation. Moreover, this is a comparative consideration, and the question is not whether the applicant will present a well-rounded program but whether its proposals will better serve the public interest than will those of another applicant. How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known? Perhaps a mere finding that an applicant will present a well-rounded program would suffice, if the decision related merely to the bare qualification of the applicant for a license. But that is not the inquiry here. The Commission is making a comparison and it says, correctly, that the comparison of the program proposals is an important criterion in that determination. Then, we think, it must make findings upon what the program proposals are. And it must receive evidence upon which to base those findings."

should not be revoked. Such show cause order would be based not only on the fact that the proposal now made by WJR is at complete and total variance with that upon which the comparative hearing with your Petitioners was conducted, but also on the fact that WJR has intentionally and purposefully concealed such changes long after they were decided upon and substantially implemented. The facts now known to the Commission not only would have warranted the Commission in refusing to grant said construction permit to WJR upon original application therefor, but disqualify said party from acquiring the status of a permittee or licensee of the Commission because of its active concealment of said facts.

Prayer for Relief

Wherefore, the premises considered, it is respectfully prayed:

1. That the Commission reconsider the Petitions for Rehearing filed by Petitioners on June 11 and June 14, 1954, herein in light of the matters set forth in this Joint Petition;

2. That the Commission vacate and set aside its Decision and Order of May 14, 1954 and its Memorandum Opinion and Order of December 6, 1954, herein, reopen the record and order a further hearing in order that among other pertinent matters, all relevant and material facts concerning the abandonment by WJR, The Goodwill Station, Inc. of its proposal upon which it was preferred in this competitive proceeding and the good faith and conduct of WJR and its principals in view of the matters set forth in this Joint Petition may be made a part of the record and considered by the Commission;

3. That in view of the fact that January 5, 1955, is the last date upon which an appeal can be taken under Section

402(b) of the Communications Act of 1934, as amended, from the Commission's said Decision and Order of May 14, 1954, as modified and affirmed by its said Memorandum Opinion and Order of December 6, 1954, the Commission forthwith stay the effectiveness of said Orders pending its determination of this Joint Petition; and

4. That the Commission grant such other and further relief as the circumstances warrant.

EXHIBIT A

EXHIBIT A

Thursday,
December 16, 1954

The Flint Journal

Section Four
Pages 39 to 52

WJRT Plans to Put Tower Near Chesaning

Seeks to Switch Site From Clarkston Area

Plans to Proceed With Work and Begin Transmitting Early in 1955

The transmitter tower of WJRT, Flint's VHF Television Channel 12, will be built northwest of Flint, near Chesaning, if the Federal Communications Commission approves an application to make a switch in the proposed transmitter site.

The application to change the tower site from the FCC-approved location southeast of Flint, near Clarkston, was to be filed by WJRT today, it was disclosed here by John F. Patt, president of WJR, Inc.

Patt met with members of the steering committee of the Flint Citizens Commitee for a VHF Television Station for Flint at Hotel Durant Wednesday noon to clarify the firm's position regarding the controversial Channel 12 grant and to reaffirm its avowed intentions. With him were Worth Kramer, WJR general manager, and Reed T. Rollo, Washington counsel.

In a formal statement, Patt said WJRT's decision to ask FCC's consent to move the transmitter site was based on these two considerations:

"A wish to conform our coverage and operations as far as possible to the expressed desire of a Flint Citizens' group" . . . and on "a reappraisal of the numerous changes in allocations and network affiliations since the Summer of 1952, when our original application was filed."

A construction permit for Channel 12 was granted to WJRT by the FCC last May. On Dec. 6, the FCC denied petitions for a rehearing which were filed by Trebit Corp., operators of Radio Station WFDF, and W. S. Butterfield Theaters, Inc., which also have sought to operate Channel 12.

Contending that the FCC erred in awarding the grant to WJRT, Trebit and Butterfield have asked anew for a reargument of the issue. If argument is not granted, the two say they will appeal to the U. S. Court of Appeals.

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"This they are entitled to do, of course. But . . . if and as soon as the Commission may approve our application for the new site . . . WJR is prepared to build and commence operation of the new Flint TV station at an early date in 1955, confident that the Commission's decision was grounded on sound law and legal precedent, and that the courts will sustain the Commission."

Elaborating on the proposed transmitter site northwest of Flint, Patt declared the decision was made after careful consideration during the last few months of the changed picture of television in this area from that which existed when WJR filed its original application and began hearings more than two years ago.

New stations have been built, existing ones have increased power, and a new channel assignment has been made in the Jackson area, he notes.

"These and other factors," he says, "have made necessary an adjustment of television service areas with a consequent realignment of network programming plans."

He says the new site, selected by WJR engineers, is believed to be the optimum location, not only for primary service to Flint, but to send Flint programs to the viewers of the Saginaw-Bay City-Midland-Lansing area as well.

"Since outlets in these districts are presently inadequate to serve all four of the national networks," he says further, "the re-location of WJRT transmitter site will make possible a wider selection of national programs to the entire area."

As another point in favor of the new site, Patt said it "will avoid duplication of the Metropolitan Detroit area which caused concern to several Flint organizations. The DuMont Network with which we originally proposed to affiliate has already obtained representation in this area."

Patt's statement includes a reaction of the Flint Citizens' Committee, which has been confirmed by several of its members, including Harding Mott, committee chairman.

The committee expressed "delight" with the proposed new site for the WJRT transmitter and gave assurance it would "welcome WJR, or any other successful applicant with a transmitter site northerly from Flint," Patt said.

Mott stressed that the committee "has not taken sides at any stage in the proceedings," confining its interest in assuring that Channel 12 would be strictly a Flint station.

Facilities for WJRT are housed in leased quarters at 2302 Lapeer St., former location of Radio Station WTAC and its defunct UHF TV Channel 16.

Patt said WJRT's will be "one of the finest and most complete television studios and transmitting facilities in the nation.

The station will transmit 316,000 watts of visual power, maximum permitted by the FCC, from one of the tallest broadcasting towers in Michigan.

In addition to other equipment on hand, he said, will be an RCA Television mobile unit, complete with its own field cameras and microwave relay equipment. This will enable the station to telecast local sporting events, functions from IMA Auditorium, Atwood Stadium or any other locale where an event of community interest may take place, he added.

The Lapeer St. building will house three studios, each equipped with the most up-to-date facilities for live program production, Patt said. Included will be 5 cameras with a complement of 19 lenses ranging from 50 millimeter to 15-inch telephoto and a zoomar for bringing objects into rapid close-up.

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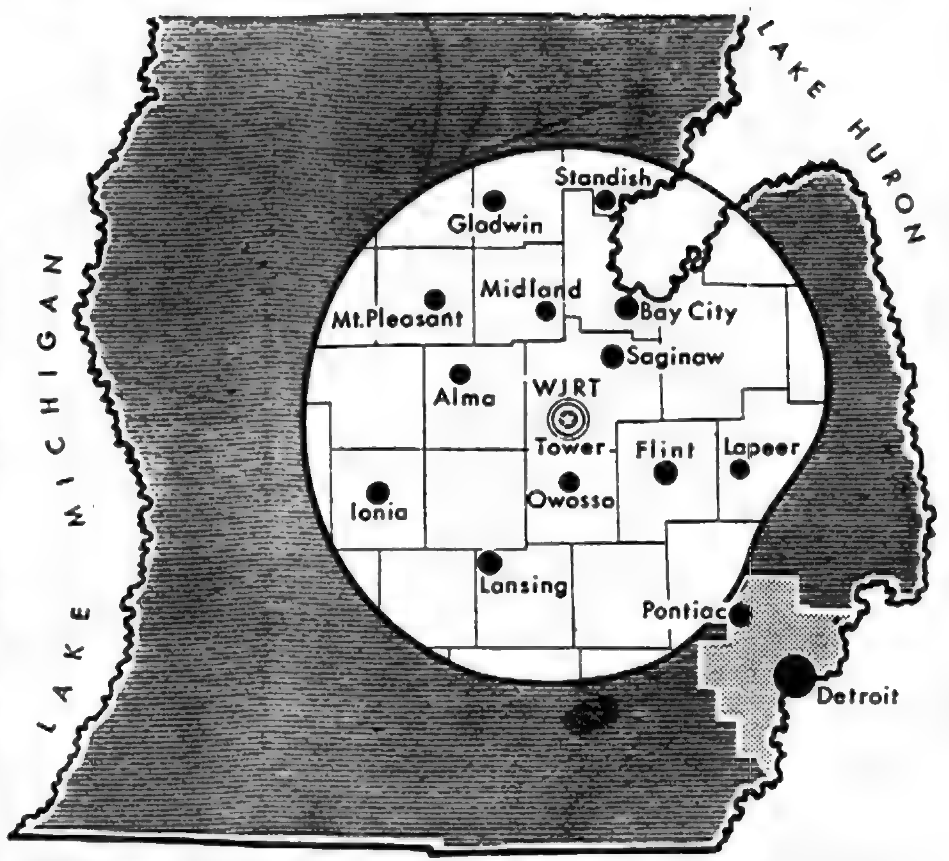
Members of the WJRT staff already located here are A. Donovan Faust, operations manager, and Franklin Mitchell program director.



PROPOSED TV TOWER SITE—This map shows the new site (star) proposed by WJRT for Flint television channel 12 and the TV primary range (black circle). WJRT was to file application today with the Federal Communications Commission for the change of transmitter tower site from a point southeast of Flint to the northwest site, near Chesaning. The shaded area in the lower right corner of the map outlines the Detroit metropolitan area.

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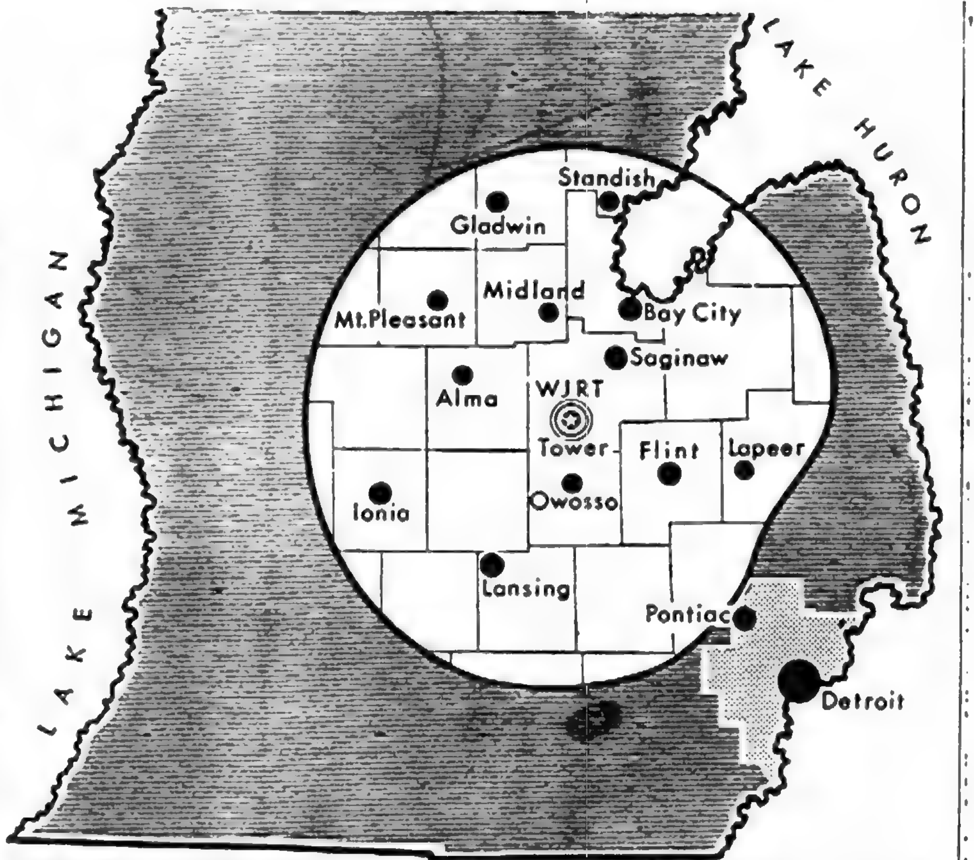

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Members of the WJRT staff already located here are A. Donovan Faust, operations manager, and Franklin Mitchell program director.

EXHIBIT C

A STATEMENT BY WJRT TELEVISION TO ALL CITIZENS OF FLINT

Inasmuch as some unwarranted speculation and completely false information have circulated concerning the plans our company has for its newly authorized TV station in Flint, we are taking this opportunity to state these plans clearly.

Before going into the background of the issues and F.C.C. findings in this case, we wish to announce our plans to move our authorized transmitter site to a new location northwest of Flint, near Chesaning. Our decision to ask the Commission's consent to this move has been based on two considerations: First, a wish to conform our coverage and operations as far as possible to the expressed desire of a Flint Citizens' group which met with us last May and to whom we made known our revised plans several months ago; second, a re-appraisal of the numerous changes in allocations and network affiliations since the Summer of 1952, when our original application was filed.

The Commission heard the evidence by all three applicants for Channel 12 in the Fall of 1952 and January-February, 1953. In April, 1953, Examiner Benito Gaugine issued an "initial" decision favoring the Trebit Company, owners of WFDF. The Butterfield Theatres, Inc., the third applicant in this contested case, and our group filed exceptions to the Examiner's opinion, and asked for oral argument before the full seven-man F.C.C. This argument was heard by the Commission en banc on August 31, 1953. On May 12, 1954, the Commission, having considered the entire record of evidence and the opposing arguments, issued the "final" decision, favoring the WJR proposal. The other two parties filed briefs asking for reconsideration of the issues. Last week, after another six months of study into all the issues and arguments, the F.C.C. reaffirmed its grant to WJR and by a clear majority vote of 4 to 1 rejected our opponents' requests. Now the two other parties have asked for "re-argument" and have announced they will take the case to the courts. This they are entitled to do, of course. But we wish to point out that if and as soon as the Commission may approve our application for the new site, northwest of Flint, WJR is prepared to build and commence operation of the new Flint TV station at an early date in 1955, confident that the Commission's decision was grounded on sound law and legal precedent, and that the courts will sustain the

So much has been made by our opponents and by a few uninformed persons of our transmitter site and our philosophy of having our Flint station have the maximum possible coverage (even if it happened to include Detroit, as well as Bay City and Saginaw and other communities) that we now plan to eliminate the Detroit area from our coverage entirely, as revealed above. Even Trebit proposed to cover Detroit with a Grade B signal (56 decibels or better).

WJR this week is proposing to the F.C.C. a new television transmitter site northwest of Flint, near Chesaning. This decision was made after careful consideration during the past few months of the changed picture of television in this area from that which existed when we filed our original application and began hearings more than two years ago. New stations have been built, existing ones have increased power, and a new channel assignment has been made in the Jackson area. These and other factors have made necessary an adjustment of television service areas with a consequent realignment of network programming plans. The new site selected by our engineers is believed to be the optimum location, not only for primary service to Flint, but to send Flint programs to the viewers of the Saginaw - Bay City - Midland - Lansing area as well. Since outlets in these districts are presently inadequate to serve all four of the national networks, the re-location of the WJRT transmitter site will make possible a wider selection of national programs to the entire area.

As previously stated, the new site will avoid duplication of the Metropolitan Detroit area which caused concern to several Flint organizations. The DuMont Network with which we originally proposed to affiliate has already obtained representation in this area.

We have had these new plans for several months and discussed them informally in September with members of the Flint Citizens' Committee. They were delighted with our new plans, and assured us they would welcome WJR, or any other successful applicant with a transmitter site northerly from Flint. We advised them we would revise our transmitter site just as soon as the F.C.C. decided the reconsideration petitions on their merits, without attempting to influence the Commission's decision by applying for the move earlier.

Commission.

Now, what are some of the issues and F.C.C. findings in this case?

None of the three applicants is Flint-owned. Trebit, which operates WFDF, is controlled by New Jersey, Pennsylvania and Indiana interests. The Bitner family of Princeton, New Jersey, and Indianapolis, bought control of WFDF less than a year before the hearings began in 1952. Butterfield Theatres, Inc., is controlled by the W. S. Butterfield estate, whose beneficial owners and trustees are not Flint residents. WJR has nearly 1,300 stockholders, with more than half of them residing in Michigan. Fifty per cent of its shares are publicly owned, and more than fifty of its employees own stock. Since it is planned to make stock available to eligible members of our Flint TV staff, and since WJR shares are available on the over-the-counter market to anyone interested, we hope to have a number of Flint stockholders in the future. Our TV staff of more than 50 will all be residents of Flint.

Second, it should be understood clearly that one of the main points of preference for WJR was that Station WFBM of Indianapolis, the parent company of Trebit, already has two VHF television properties, one in Indianapolis and one in Grand Rapids. That WJR should have its first station before WFBM-WFDF interests have their third should not surprise anyone.

Another point of preference for WJR was its superior program proposals. We have proposed the most and best local live talent programs. WJR also was the only applicant to propose remote control facilities, and a mobile unit exclusively to serve the Flint community.

Then there is the misunderstood matter of transmitter site. In this case the Commission in its decision said that no one of the three applicants was to be preferred on the basis of the transmitter site it proposed; all met equally well the Commission's standards as to required signal strength over the Flint metropolitan area. Our opponents have wrongly accused us of having only Detroit and not Flint in mind in operating Channel 12. My associates and I testified at great length that our chief consideration was giving Flint a superior local TV service. Our plans were clearly stated: We would have main studios in Flint, a Flint manager, a Flint staff and only Flint local programs (not any Detroit local programs). These local programs would supplement those of more general interest, such as national network programs or regional sports. Our advertising rates, we also said, would be low enough to attract all Flint merchants who wished to engage our facilities and would be entirely competitive with other local advertising media.

As announced last week, our studios will be all ready for production at an early date, following improvements we are busy making to our newly-acquired studio-office building at 2302 Lapeer Street, and upon installation of nearly three-quarters of a million dollars worth of cameras and other latest television equipment, which is on hand. We also have a fully equipped RCA Television mobile unit delivered and ready for commencement of operations. This fully paid for equipment, plus our announced plans to expand large additional sums for tower and transmitter facilities should be proof to everyone of our earnestness in operating our newly authorized station.

More than 800 boxes of technical equipment have already been received by our company and are in the process of installation. When completed, this will give Flint one of the finest and most complete television studios and transmitting facilities in the Nation. The station will transmit 316,000 watts of visual power, maximum permitted by the F.C.C., from one of the tallest broadcasting towers in Michigan. To assure uninterrupted service, a 200 kilowatt General Motors Diesel generator will provide emergency power, making this station one of the few television operations in the country so equipped.

The special mobile unit, complete with its own field cameras and microwave relay equipment, will enable us to telecast local sporting events, functions from IMA Auditorium, Atwood Stadium or any other locale where an event of community interest may take place.

Our building will house three studios, each equipped with the most up-to-date facilities for live program production. Included will be 5 cameras with a complement of 19 lenses ranging from 50 millimeter to 15 inch telephoto and an expensive zoomar for bringing objects into rapid close-up. Correct time of an absolute nature will be maintained by an IBM Clock system for continuously corrected time which is radio controlled directly from the National Bureau of Standards in Washington, D. C.

Finally, we already have the nucleus of a new staff selected and residing in Flint which has been on the job since last Summer, building these facilities and planning programs for all of Flint and the new area we will reach, to enjoy. We look forward to joining all of the constructive forces which are working to build a Greater Flint, and we plan to make ourselves an integral part of this thriving community.

We hope all of you will look forward with us to the early inauguration of service, and we pledge you our best efforts to build an institution of which all Flint may be proud.

STATION WJRT

CHANNEL 12, FLINT

John F. Patt, President

EXHIBIT D

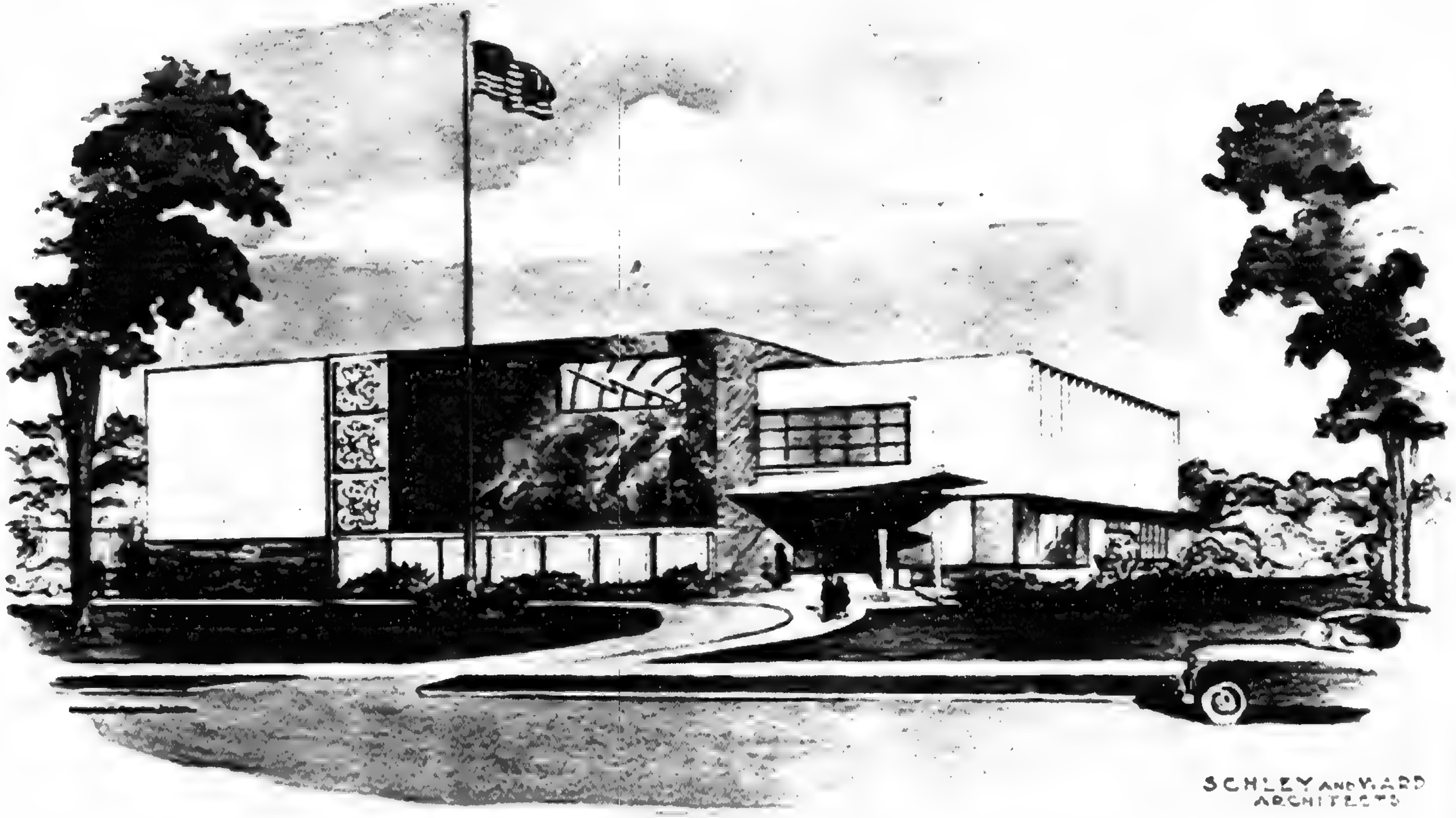

SCHLEY AND WARD
ARCHITECTS

EXHIBIT E-1

← FIFE ELECTRIC CO. WAREHOUSE
← WOAT STUDIO

EXHIBIT E-

4577

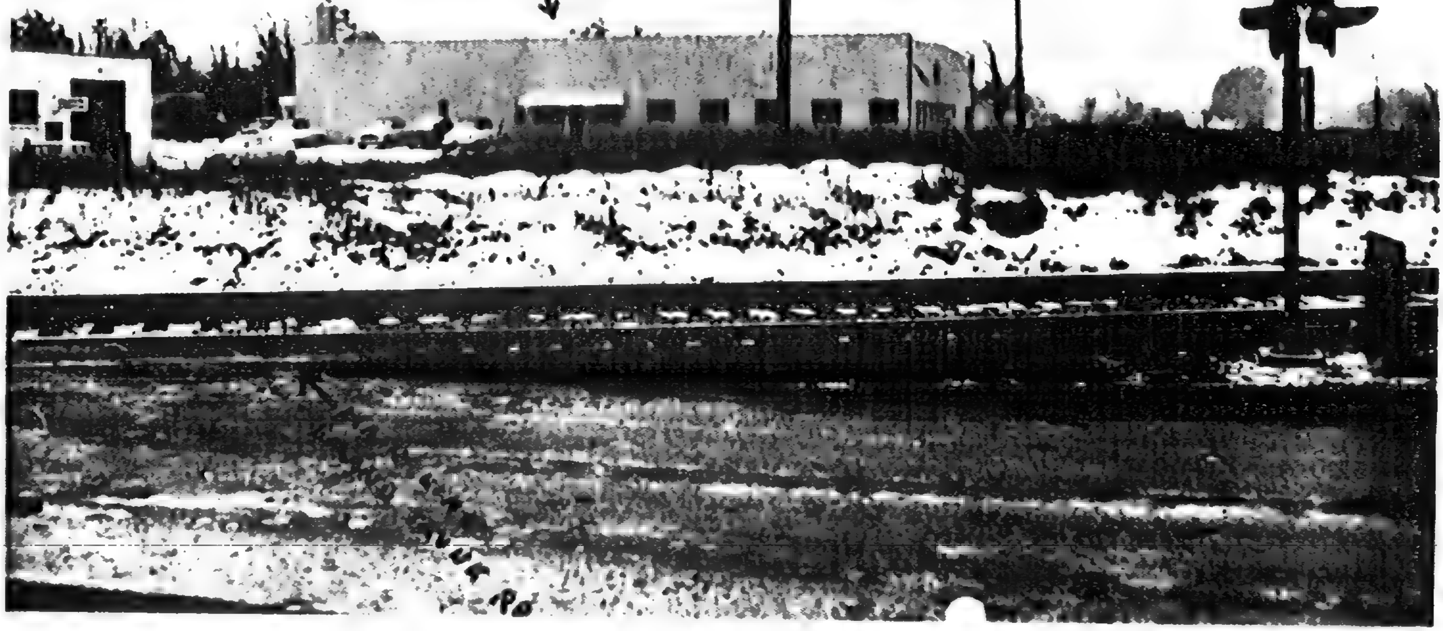
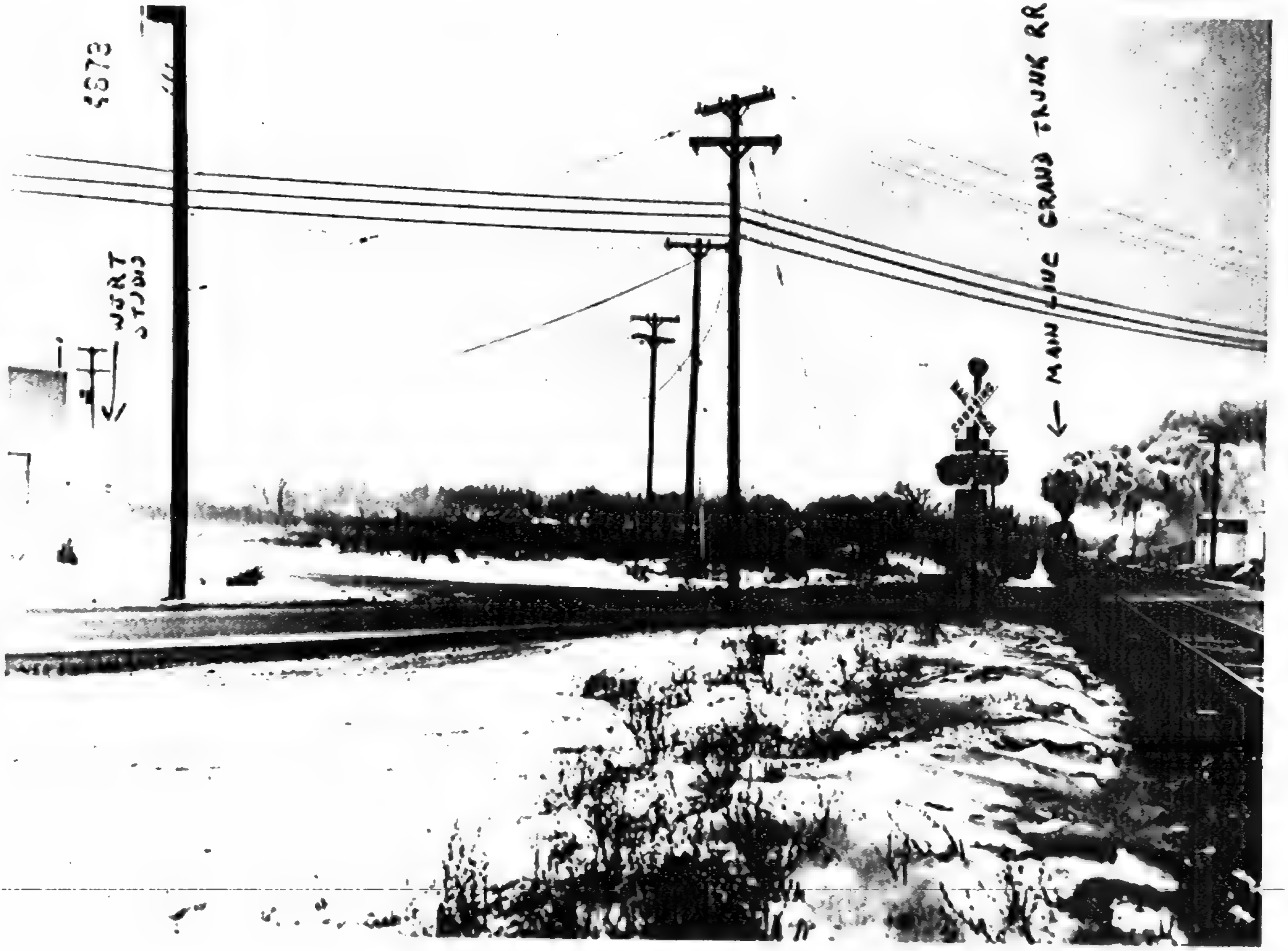

← S.F.C. ELECTRIC CO. WAREHOUSE
← WSRT STUDIO
RD

EXHIBIT E-3

MAIN LINE GRAND TRUNK RR
4678

EXHIBIT P-4


MAIN LINE GRAND TRUNK R.R.

4680

Exhibit F

AFFIDAVIT

CITY OF WASHINGTON,)
DISTRICT OF COLUMBIA,) ss.:

Willis C. Beecher, having been duly sworn, deposes and says:

1. That he is a qualified engineer engaged in consulting engineering in the city of Washington, District of Columbia; that he has been granted registration to practice as a Professional Engineer in the District of Columbia; that he is a member of the firm of Kear and Kennedy, and that his qualifications are a matter of record with the Federal Communications Commission.

2. That the firm of Kear and Kennedy has been retained by Trebit Corporation, Flint, Michigan, an applicant for a construction permit for a television station (FCC File No. BPCT-968) to be operated on Channel 12 at Flint, Michigan to compare the authorized facilities of WJR, The Goodwill Station, Inc., to operate on Channel 12 at Flint, Michigan, with the facilities proposed in its application for modification of construction permit.

3. That the WJR construction permit authorizes a supporting structure and antenna system at a site 20.3 miles from the Flint Post Office and having an elevation which results in the center of radiation of the antenna being 1245 feet above the center of Flint. That the WJR application for modification of construction permit specifies a site 23.7 miles from the Flint Post Office and an antenna system and supporting structure resulting in the center of radiation being only 795 feet above the center of Flint. That the computation of the foregoing figures includes the effect of the earth's curvature.

4. That the population and area within the 77 dbu, Grade A and Grade B contours and the area and population common to both the authorized WJR facilities and those proposed in its application for modification of construction permit are as follows:

	AREA (SQ. MI)		POPULATION	
Contour	Authorized	Application for MP	Authorized	Application for MP
77 dbu	4,480	4,230	3,296,265	668,817
Grade A	6,320	5,985	3,620,660	865,387
Grade B	10,800	11,180	4,302,550	1,325,545

Contour	Common Area (Sq. Mi.)	Population Common
77 dbu	1,372	318,497
Grade A	2,603	398,629
Grade B	6,790	1,070,644

5. That the foregoing statements and the afore-mentioned elevations, distances, populations and areas which were computed by him or under his immediate supervision are true and correct of his own knowledge except the areas and populations shown for the Grade A and Grade B contours of the authorized WJR facilities which were taken from the Commission's decision granting the WJR application, and except such statements as are on information and belief, and as to such statements, he believes them to be true.

WILLIS C. BEECHER.

Subscribed and sworn to before me this 27th day of December 1954.

HESTON H. WALKER,
Notary Public, D. C.
My Commission Expires Nov. 15, 1959

[SEAL]

4682

Exhibit G

For convenience the data contained in Paragraph 5 of Exhibit F is here retabulated on a percentage as well as an absolute basis.

MP v. CP

	Area Retained		Area Lost		Area Retained		New and Different Area	
	Sq. Mi.	Percentage	Sq. Mi.	Percentage	Sq. Mi.	Percentage	Sq. Mi.	Percentage
City Service (77 dbu) contour	1,372	31	3,108	69	1,372	32	2,858	68
Grade A contour	2,603	41	3,717	59	2,603	43	3,382	57
Grade B contour	6,790	63	4,010	37	6,790	61	4,210	39

	Population Retained		Population Lost		Population Retained		New and Different Population	
	Total	Percentage	Total	Percentage	Total	Percentage	Total	Percentage
City Service (77 dbu) contour	318,497	9.6	2,977,768	90.4	318,497	48	350,320	52
Grade A contour	398,629	11	3,222,031	89	398,629	46	466,758	54
Grade B contour	1,070,644	25	3,221,906	75	1,070,644	80	254,901	20

4686

FEDERAL COMMUNICATIONS COMMISSION

JANUARY 7, 1955

Motion to Dismiss and Opposition to Joint Petition Filed Herein on December 28, 1954

* * * * * * * * * *

4693

Transmitter Site

17. With respect to the Joint Petition's charges concerning WJR's pending application which seeks authority to move the transmitter site, the Commission was advised in a Form 701 filed December 1, 1954, that WJR contemplated changes in its proposed transmitter location. Exhibit P-3 of the modification application filed December 16, 1954, fully sets forth the circumstances that have occurred since the closing of the record herein which brought about the change in WJR's plans. In view of the fact that one of the major questions presented by the petitions for rehearing filed herein in June, 1954, related to the fact that WJR's hearing site was located between Detroit and Flint, WJR did not deem it proper to file an application seeking authority to change that site in a manner that would beneficially affect the pending issue. However, the Commission's decision of December 6, 1954, reaffirmed its decision of May 14, 1954, that there was no significant difference respecting the

4694

transmitter site selected by the three applicants. In view of this it is impossible to see how the proposed move of the WJR transmitter site has any bearing whatsoever in this proceeding. As clearly appears from the modification application, the site would be moved away from Detroit to a location on the opposite side of Flint. The question pending before the Commission is whether it would be in the public interest to grant the WJR modification application, but this is an entirely separate question from the question of whether WJR was properly preferred for Channel 12 in Flint. The Joint Petition fails to allege any respect in which the proposed WJR transmitter site fails to comply with the Commission's Rules and Regulations.

* * * * * * * * * *

4696

Item	Hearing	Present
Transmitter	$260,385.00	$260,385.00
Antenna	201,000.00	201,000.00
Monitors	3,010.00	3,010.00
Studio Equipment	324,686.53	392,402.85
Land	29,420.00	30,000.00
Studio Building	766,821.00	To be leased
Transmitter Building	179,974.00	179,974.00
Contingency Fund	15,000.00	None
Other Items	72,500.00	72,500.00

* * * * * * * * * *

4699

25. WJR's Form 701 filed December 1, 1954, reported to the Commission that the studio building of former UHF station WTAC-TV had been leased by WJR, in an effort to expedite commencement of operation of its proposed television station. WTAC-TV had commenced operations and left the air *after* the record in this proceeding was closed. WJR expressly stated in its modification application that it would "expand the studios as needed to provide the locally originated program service proposed." Although the lease arrangement represents a change in

WJR's plans to construct its own studio building, it does not reflect any substantial change inasmuch as the new studios will be fully adequate to effectuate the WJR program proposal. In the event the present studio building, with planned expansions, should by any chance become inadequate to produce the programs originally proposed, WJR will not hesitate to build a larger building in line with its original plans. The new studio building, without additions, houses three studios, 58′ x 48′, 21′ x 30′ and 13′ x 24′ as well as a live camera announce booth 7′ x 9′. There are attached hereto as Exhibits 1 and 2 a floor plan of the studio building and an architect's site plan. The building also includes a master control room, projection room, dark room, film editing and storage space, film viewing room, conference room, engineers' workshop, dressing rooms, rest rooms, mailing room, general offices and lobby. Although the Joint Petition deceptively refers to the studios which WJR has leased as "second hand", the fact is that the studio building is new and modern—being little more than a year old—having been constructed in late 1953. The Joint

4700

Petition has also distorted the appearance of the new WJR studio building by the photographs marked Exhibits E-1 through E-4 inclusive. These photographs have been taken at angles which fail to reflect the true appearance of the building and which emphasize the fact that the land surrounding the building has not yet been landscaped. Attached hereto marked Exhibit No. 3 is an actual photograph of the building on which an artist has added landscaping and building decorations. This photograph much more accurately reflects the appearance of the building as it will exist when the station commences operation, than do the photographs submitted with the Joint Petition. Further proof of the distortions inherent in the photographs attached to the joint petition (Exhibits E-1 through E-4) is contained in the attached interior photographs as follows:

Exhibit No. 4—A view of Studio showing the two power generators, some lighting fixtures and other equipment. The other equipment is still in crates but is in the process of being installed.

Exhibit No. 5—Another view of Studio A.

Exhibit No. 6—A view of the master control room, with film projection room in background.

Exhibit No. 7—A view of the space to be used as Studio C.

Exhibit No. 8—A view of the space to be used as Studio B. The two walls shown are to be removed, thus making Studio B 21′ x 30′.

Exhibit No. 9—A view of the lobby and hallway to the general office.

Exhibit No. 10—A view of the offices to be used by the President and Vice-President of WJR.

Exhibit No. 11—A view of the office of the Operations Manager.

Exhibit No. 12—A view of the office of the Program Manager.

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Exhibit No. 13—Exterior view of the building taken at an angle to omit the weeds that have not yet been replaced by landscaping. This photograph also shows the mobile unit and station wagon, which have already been acquired for use by the television station.

Petitioners completely unfounded slur at the proposed studio building of WJR comes with particular ill-grace from applicants who themselves proposed to use as studios older buildings originally built for other purposes. Inasmuch as WJR presently proposes to broadcast each and every one of the 30 local-live programs which formed the basis for the Commission's preference (see Finding 88 of the Final Decision), and inasmuch as the present studios will be expanded or a larger building built, if needed in order to present adequately these programs, the change in studio plans is of no significance. WJR proposes no change at all with respect to its transmitter building or remote equipment, and proposes actually more studio and technical equipment.

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FEDERAL COMMUNICATIONS COMMISSION

APRIL 1, 1955

Memorandum Opinion and Order

By the Commission: Commissioners Hennock and Webster not participating.

1. On May 14, 1954, the Commission released its Decision in this proceeding granting the application of WJR, and by Memorandum Opinion and Order released December 6, 1954 the petitions filed by Trebit and Butterfield for reconsideration of the Decision were disposed of. Separate petitions for reargument have been filed by Trebit[1] and Butterfield[2] who subsequently[3] filed a joint petition for stay of effective date, reopening of the record, rehearing and further relief. It is these petitions, and the oppositions to them filed by WJR, that are under consideration here.

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[1] On December 8, 1954.

[2] On December 10, 1954.

[3] On December 28, 1954.

32. WJR, as shown by its past broadcast record, subscribes to and practices the belief that representations made to the Commission in applications or hearings should be adhered to. Only it, of all three applicants, proved this at the hearing. However, it is recognized that no man or corporation can predict the future with exactitude. There have been logical reasons for each and every change that has occurred in WJR's plans since the record in this proceeding closed a year and ten months ago. That WJR religiously adheres to representations made to the Commission with respect to proposed programming is amply demonstrated by WJR hearing Exhibit 49. Thus, there is no possible room for any doubt as to the sincerity of WJR's hearing proposal.

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Exhibit No. 3

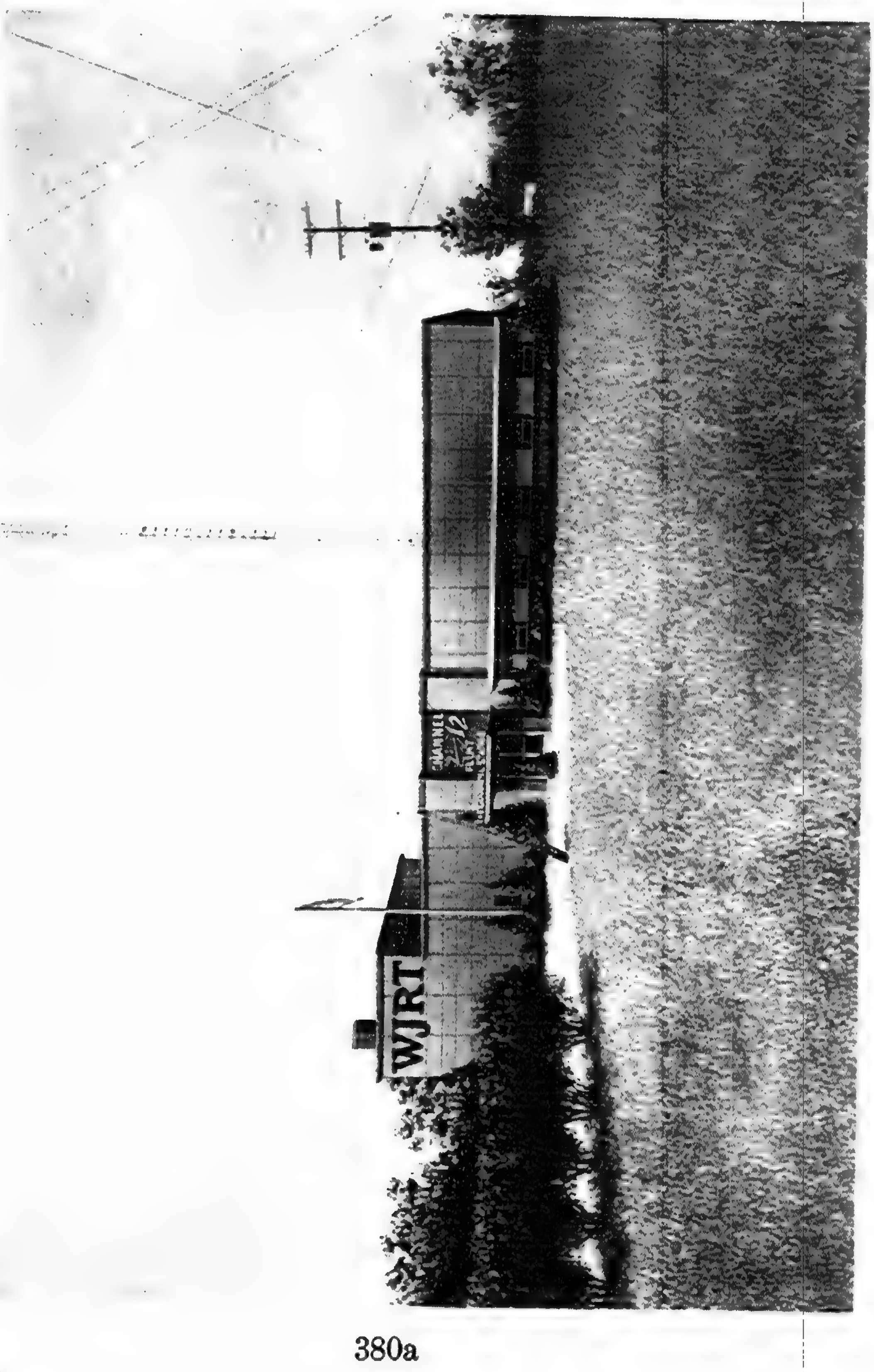
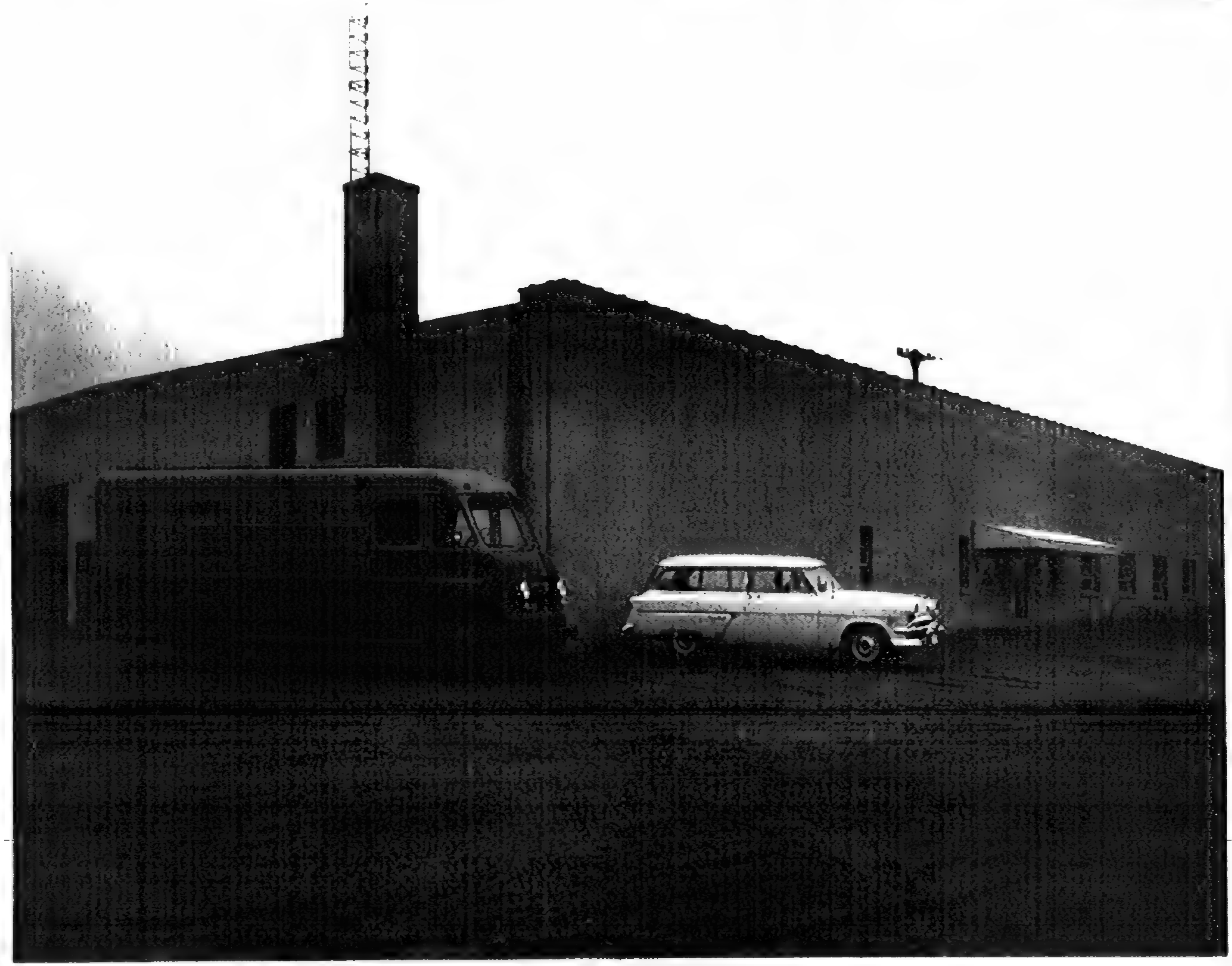

WJRT
CHANNEL 12

Exhibit No. 13



2. The basis of the request for reargument appears to be that consistency requires that we order reargument here as we did in the *Tampa Times* (Docket No. 10253 etc.) and the *Beaumont* (Docket No. 10286 etc.) cases and that further argument should be held to obtain a vote by the full Commission. It must be observed, at the outset, that in the *Tampa Times* and *Beaumont* cases the Commission ordered oral argument on the petitions for reconsideration, and did not order oral arguments or grant rehearings with respect to the proceedings upon the merits. Certainly it is clear that to grant or deny such additional relief is discretionary with the Commission, the action in each case being determined on the basis of the particular factual situation presented. In refusing to hold another argument in the Flint proceeding the Commission concluded that unlike the other two cases, the petitions for reconsideration raised no questions requiring further oral discussion by the parties before the Commission.[4]

3. Likewise, the fact that the full Commission did not participate in either making the Final Decision or disposing of the petitions for rehearing and reconsideration fails to establish the necessity for granting reargument. A quorum of the Commission participated in each of these stages and a majority of such quorum voted for the action taken. That nothing further is required is well established. See *Western Union Telegraph Co.*, 6 Pike & Fischer RR 1184g (1953) and *WHEC, Inc.*, 10 Pike & iFscher RR 521 (1954).

4. The joint petition filed by Trebit and Butterfield requests reconsideration of our December 6, 1954, Memoran-

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[4] It may be noted, in this context, that those cases in which the Commission allows additional argument are the exception rather than the rule.

dum Opinion and Order, that the December 6 Opinion and the May 14, 1954 Decision be reconsidered and the record reopened for further hearing, and that the Commission stay the effectiveness of its decision.[5] The nub of petitioners' arguments is that newly discovered material alters the position of WJR in this proceeding to such an extent that each of the hearing issues is substantially affected, rendering the Commission's previous conclusions thereon meaningless and hollow. The tenor of WJR's reply is that the changes in its proposal, as reflected in the so-called newly discovered material, for the most part have no bearing on the areas of significant difference relied on by the Commission and that in those respects where the changes impinge upon aspects of WJR's proposal upon which significant differences were found, the changes are so negligible as to be *de minimis.*

5. The changes to which petitioners object are set out in an application for modification of construction permit filed by WJR subsequent to the December 6, 1954 Memorandum Opinion. This application has not yet been considered by the Commission, a fact we want to emphasize, for the modification application is not before us here for disposition.

6. For the purposes of disposing of the joint petition, however, we shall consider whether the changes proposed, if subsequently effectuated upon authorization given by the Commission, would so alter the WJR hearing proposal as to indicate that our findings and conclusions relative to points of significant differences between the applicants

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[5] The request for stay was made "in view of the fact that January 5, 1955, is the last date upon which an appeal can be taken under Section 402(b)." Since that date has passed and Trebit and Butterfield have filed this Notice of Appeal, the stay request has been rendered moot and requires no further consideration.

have been neutralized as petitioners allege. We think analysis shows that they have not.

7. Of the changes proposed by WJR and referred to by petitioners, a number relate to phases of the proposed WJR operation as to which, on a comparative basis with Trebit and Butterfield, either no or slight basis for preference between the applicants was found. This applies to the proposed change in WJR's transmitter site, about which the Commission, after a lengthy discussion of the parties' contentions relative to differences in transmitter locations and antenna heights, concluded that no preference to any of the applicants was warranted. Petitioners do not allege, nor does it appear, that the proposed change will result in WJR's failure to provide the coverage required by the rules, nor do they allege that on a comparative basis WJR will be in any worse position than it was under its original proposal.[6]

8. A similar evaluation applies to the proposal of WJR to substitute CBS network affiliation for that of DuMont, the Commission having held in its May 14 Decision that "the matter of possible network affiliation is too speculative to form a proper ground for comparative consideration." (Paragraph 31 of Conclusions.) The Commission was aware, as indicated in its Decision, that WJR would make a change in its affiliation to improve its competitive position were that possibilty to occur. Except in certain respects relative to programming, to be later discussed, petitioners do not assert that the network change contemplated by WJR has the effect of degrading WJR's position in comparison with Trebit and Butterfield thus entitling petitioners to a preference over WJR.

9. The anticipated changes in staff proposals and integration are likewise insufficient to affect adversely the ulti-

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[6] Indeed, the move places WJR in a geographic position similar to the one posed by Trebit who has argued vigorously that this location entitled it to a substantial preference.

mate preference awarded to WJR after hearing. It is true that a material change in integration within WJR will take place as the result of the elimination of the vice president who was to devote 80% of his time to the station. While the consequence of this might be that the "some preference" heretofore awarded to WJR on this point would be diminishesd or eliminated entirely, the overall effect upon the rationale of the Decision remains basically unaffected thereby.

10. In our Decision (and in the December 6 Opinion) we awarded a preference to WJR on the basis of its superior technical facilities which would enable it better to produce local live programs and remote programs.

Reference was made to WJR's anticipated expenditure of $776,000 for a new, two-story main studio building in Flint. WJR's modification application proposes the use of studios belonging to WTAC-TV, a UHF station whose construction permit has been surrendered. These studios were constructed in 1953 and are to be leased by WJR who also holds an option to purchase them for $125,000. This building will contain three studios somewhat, but not substantially, smaller than those originally proposed.[7] WJR has made no change in its plans for a studio at the transmitter, for studios in Detroit, or for remote equipment. Moreover, WJR states that the studios will be expanded if needed to adequately present its programs. In view of the foregoing we are of the view that the studio proposals of WJR have not so changed as to materially affect the conclusions we made with respect to the superiority of these facilities when compared with those of Trebit and Butterfield. Indeed, petitioners do not contend that WJR's proposed studios will be inferior to theirs.

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[7] The largest of the three has greater floor space than the largest studio proposed in the original application.

11. Because of the importance which we attached to the local live and remote programs proposed at the hearing by WJR, we have examined with care the program changes proposed in WJR's application for modification of construction permit to ascertain whether, if put into effect, they would result in either the elimination or a serious diminution of those elements we found to be of unusual significance in WJR's original proposal. Ignoring for the moment the local live programs, we believe that the other program changes alluded to by the petitioners do not in any way affect the overall suitability of WJR's programs. The increase in total commercial programs from 65.94% to 73.13% does not result in an excessive emphasis on the commercial aspects and the change is not significant relative to differences between the applicants when it is observed that our preference for WJR was not based upon percentage of commercial content. While the proposed commercial content of WJR's programs would exceed that of either Trebit or Butterfield, the change, plus the others referred to by petitioners, is not such as to warrant any change in our preference for WJR.

12. The Commission attached special importance to the local live programs proposed by WJR. In the December 6 Memorandum Opinion the Commission considered these programs from the point of view of quality and decided that the conclusions relative to WJR's local live programs were justified. Petitioners contend the previous conclusions have been neutralized by schedule changes and other modifications. WJR concedes that all but eleven of the programs have been rescheduled due to the change in proposed network affiliation, that three of them have been changed in length, and that the classification of six of them has been altered, but WJR insists that all of the programs will be produced and are listed in the modification application. After summarizing the changes as having 1.05% more live sustaining, 1.05% less live commercial,

.03% increase in educational and discussion programs, .08% increase in talks, and .14% decrease in entertainment, WJR asserts that the changes are of no consequence.

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13. We have carefully compared the WJR program proposals specified at the hearing[8] with the schedule incorporated in the modification application. Of the local live programs originally proposed, two are now classified as recorded instead of live; however, two programs heretofore shown as recorded are to be broadcast alive instead. Three live programs have been reduced in length. Many of the programs have been rescheduled, but with the exception of three as to which the day of broadcast has been altered, the changes are small. Reasonably comparable broadcast hours have been given to those for which the day of presentation has been altered. There are a few instances of the commercial-sustaining classifications being altered. It is apparent from the foregoing, we think, that the changes which WJR proposes in those programs to which we attached so much importance, those of local live origination, are too minor to suggest that they would have, had they been in effect during the hearing, required any different finding or conclusion concerning the point of preference awarded to WJR.

14. WJR, as a separate defense, has maintained that the Commission lacks jurisdiction to entertain the joint petition. Relying on language in the last sentence of Section 405 of the Communications Act,[9] WJR argues that the

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[8] See pages 26 through 28 of May 14 Decision and paragraph 8 of December 6 Memorandum Opinion.

[9] Section 405 reads in pertinent part:

> "... The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order."

joint petition amounts to a second petition for reconsideration which the Commission may not grant because the Commission, although making additional findings and correcting a conclusion in its December 6 Opinion disposing of the first petitions for reconsideration, did not in this opinion reverse, change or modify its order in the May 14, 1954, Decision which granted the WJR application. Thus, the argument continues, the statutory 30-day period for filing a Section 405 petition for rehearing was not reinstated by the December 6 Opinion but expired June 14, 1954.

15. Whether or not the petitions before us are second applications for rehearing, as contemplated by Section 405, we do not consider to be a question we must decide. It seems sufficient to us that the petitions were filed within the *time* provided for (1) second applications for rehearing in Section 405, and (2) appeals in Section 402(b). We think, in the absence

of statutory language prohibiting us from doing so, the Commission, within the 30-day specification referred to, has the authority by implication to reconsider its order, on its own motion or upon a motion or petition seasonably filed. *Sprague* v. *Woll,* 122 F. 2d 128. Further, within the period provided for an appeal, as stated in *Albertson* v. *Federal Communications Commission* (182 F. 2d 397), "jurisdiction of the contested order remains with the Commission."

16. In view of the foregoing, IT IS ORDERED, This 31st day of March, 1955, that the petitions for reargument filed by Trebit Corporation and Butterfield Theatres ARE DENIED, that the WJR motion to dismiss the Joint Petition

filed by Trebit and Butterfield Is DENIED, and the Joint Petition itself Is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
MARY JANE MORRIS,
Secretary.

[SEAL]

Released: April 1, 1955.

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4862

FEDERAL COMMUNICATIONS COMMISSION

SEPTEMBER 12, 1952

Amendment to Motion to Enlarge Issues

Comes now TREBIT CORPORATION, Flint, Michigan, (hereinafter referred to as "Petitioner") and, pursuant to Rule 1.766, by its attorneys, hereby amends the pleading which it filed in the above-entitled proceeding on August 11, 1952, requesting the Commission to enlarge the issues specified for the hearing in this proceeding.

1. The petition filed on August 11, 1952, requested the Commission to enlarge the issues for the hearing in this proceeding by striking the issues presently numbered 1 through 4 and leaving as the only issue the one now numbered 5, in order that the parties may have a full and complete opportunity of presenting evidence at the hearing on all relevant points of difference between their respective proposals.

2. Since the date on which said petition was filed, Booth Radio and Television Stations, Inc., has requested dismissal of its application and said request is now pending Commission action. Thus, it now appears that the com-

parative hearing in this proceeding will involve only 2 applications—petitioner's, and the application of WJR, The Goodwill Station, Inc. (File Number BPCT-967).

3. One of the points of substantial difference between the petitioner's application and the application of WJR, The Goodwill Station, Inc. for a television station on Channel 12 in Flint is the technical service proposed to be rendered by these two applicants. Since the respective

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transmitter sites proposed by the applicants are separated by approximatley 30 miles, the substantial difference in coverage resulting from the selection of transmitter sites by these applicants, is an essential element in making a comparison of the two proposals. Such a showing would appear to be required by Commission Rule 3.683(b)(1).

4. In the petition filed on August 11, 1952 petitioner pointed out that one of the reasons that the issues presently specified for hearing are "too restrictive to permit Petitioner the opportunity to make a showing on all the relevant differences between Petitioner's application and the applications of other parties to this proceeding" is that "the issues would not permit petitioner the opportunity to show the superiority of its proposed use of this channel over the proposal of other applicants with respect to the areas and populations which will receive service from the different proposals". Petitioner also pointed out that the issues now specified would not afford petitioner "the opportunity of showing what other television services are presently available or are proposed in pending applications to the areas and populations that would be served by applicant's proposal and by the proposal of the other competing applicants".

5. Since the filing of the August 11th petition, the petitioner's consulting radio engineer has made a study of

the technical proposal of WJR, The Goodwill Station, Inc., and has made a comparison of that proposal wtih petitioner's technical proposal. This study shows that there will be substantial differences between (1) the areas, communities and populations within the Grade A and Grade B contours of petitioner's proposed station and the station proposed by WJR, The Goodwill Station, Inc.; (2) the type of technical service which will be rendered within the proposed Grade A and Grade B field intensity contours of these two applicants; (3) the extent to which these two applicants will make the fullest and most efficient use authorized by the Commission for Channel 12 in the Flint, Michigan, area under its rules and regulations governing television broadcast stations; and (4) the areas, communities and populations that will receive service from

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petitioner's proposal but not from the proposal of WJR, The Goodwill Station, Inc. and which do not receive television service at the present time, and can not be adequately served except on television channels allocated by the Commission's rules to Flint, Michigan. This study also indicates that because of differences in the transmitter sites selected, there exists a real question as to which applicant will accomplish the best use of the facilities applied for, and other related questions concerning possible interference to and from other stations allocated on or assigned to the same or adjacent channels.

6. Attached hereto and made a part hereof is an affidavit of Paul Bergquist, petitioner's consulting radio engineer, in support of the foregoing allegations.

7. The petition filed on August 11, 1952 is hereby amended to the extent necessary to include the foregoing allegations in support of the prayer for relief contained in said petition in order that petitioner will have the right

and opportunity to present evidence relating to the following specific bases of comparison between petitioner's application and application of WJR, The Goodwill Station, Inc. for Channel 12 in Flint:

(a) The areas, communities and populations within the proposed Grade A and Grade B field intensity contours of Trebit Corporation and WJR, The Goodwill Station, Inc.

(b) The extent to which Trebit Corporation and WJR, the Goodwill Station, Inc. will provide the fullest and most efficient technical use authorized by the Commission for Channel 12 in Flint, under its rules and regulations governing television broadcast stations.

(c) The type of technical service which will be rendered within the proposed Grade A and Grade B field intensity contours of Trebit Corporation and WJR, The Goodwill Station, Inc.

(d) Other television services that are presently available or are proposed in any pending application or could be proposed under the Commission's present Table of Allocations of television channels to the areas, communities and populations within the Grade A and Grade B contours of Trebit Corporation and WJR, The Goodwill Station, Inc.

(e) The extent to which the proposed sites specified by Trebit Corporation and WJR, The Goodwill Station, Inc. will accomplish the best use of the facilities applied for, in view of the need for, and the fair and equitable distribution of, service and the mitigation or elimination of the possibility of interference to and from stations allocated on or assigned to the same or adjacent channels.

8. The filing of this amendment to petitioner's original motion of August 11, 1952, is not intended to waive any of petitioner's rights to present evidence on any relevant point of difference between its application and that of WJR, The Goodwill Station, Inc. in addition to those specifically mentioned above.

Request for Oral Argument

9. Oral argument before the Commission is hereby requested.

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4914

FEDERAL COMMUNICATIONS COMMISSION

MARCH 30, 1953

Trebit Proposed Findings of Fact and Conclusions of Law

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4921

Mass Media of Communication and Entertainment

FLINT

26. In addition to Trebit's station WFDF, there are four other AM stations in Flint. There is also one FM station owned by the University of Michigan and a non-commercial FM station licensed to the Flint Board of Education. There is no evidence in this record concerning the University of Michigan station or its operations.

27. In addition to the foregoing, the Commission has granted two television construction permits for Flint. Trendle-Campbell Broadcasting Company, the licensee of AM station WTAC, is the permittee of one of the Flint UHF channels. The other permittee has no broadcasting interests in Flint.

28. Flint has one daily and Sunday newspaper, the Flint Journal, which is owned by the Booth Newspapers, Inc., some of whose stockholders are common to Booth Radio and Television, Inc. because of AM station WBBC in Flint. The Flint News-Advertiser is a publication published twice weekly and there are several other weekly publications in the community. According to the testimony of witnesses at the hearing, the Flint newspapers have a large circulation throughout the Flint trade area. Some Detroit papers are sold in Flint but according to the Executive Secretary of the Flint Chamber of Commerce, the

Detroit papers are not relied upon to any great extent by the population of Flint.

29. Seven of the Flint motion picture theatres, owned by Butterfield, have a seating capacity of 8,615 seats. Except for one theatre which shows all pictures from first to last run, Butterfield owns the only first-run theatres in the community. Butterfield owns one of the two houses which are regularly second-run theatres. (Tr. 1873-1875, 1882, 1883, 1001, 1002—See also Stipulation)

DETROIT

30. Detroit has fourteen aural broadcast stations or permits for same. Six are AM stations and six are FM stations jointly operated by Detroit AM licensees. Two are independent FM stations. Royal Oak, a suburb of Detroit has a joint AM-FM operation. Pontiac has one AM-FM station.

31. As noted above, Detroit has three VHF television stations on the air. That city also has an allocation of three UHF stations, one of which is reserved for educational television. Windsor, Ontario, Canada, which also serves the Detroit area, has been allocated one VHF (9) and two UHF channels. The Windsor station CKLW, which also has an FM installation, is the Mutual Network outlet for the Detroit area. Pontiac has one UHF assignment. Butterfield operates five theatres in Pontiac with a total seating capacity of 5,752. Two of these are first-run houses and another is a second-run theatre. (See Sixth Report, Stipulation and Commission Files)

Flint Trade Area and Sphere of Influence

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58. WJR elected to go forward with its engineering presentation based on the Waterford Hill site despite the

fact it had knowledge that there was serious difficulty with Airspace because of opposition by the city of Pontiac. After the engineering testimony had been completed, WJR petitioned for leave to amend and to specify a new site in the vicinity of Butterfield's site. The Examiner heard oral argument on the petition for leave to amend and granted same on a finding that good cause had been shown. Trebit and Butterfield appealed to the Commission and requested reversal of the Examiner's decision. The Commission on January 29 denied the Trebit and Butterfield petitions for review and reversal of the Examiner's ruling and on March 9, 1953, issued its Memorandum Opinion and Order setting forth reasons therefor.[6]

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Proposals for Television—Trebit

STUDIO FACILITIES

130. WFDF's proposed television studies will be located in the building which presently houses its AM studios. This building consists of three floors, the second floor of which is now occupied by WFDF-AM. There is a basement and an addition to the building which will be used as storage space. The TV studios and master control, as well as auxiliary control facilities, will be installed on the first floor. Studio A is 38′ x 44′ and an exit will be cut through to the street from this studio to permit the entrance of automobiles and other heavy equipment. Studio B is 30′ x 54′ in dimensions. The third floor will consist of business offices and rooms for the various personnel of the television station. The basement has space for film

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[6] Trebit believes the decision permitting WJR to amend its site constitutes prejudicial error seriously affecting its right to a fair hearing and hereby reserves all of its rights on appeal. Accordingly, the various petitions filed by Trebit opposing WJR's amendment, the transcript of oral argument and the Examiner's and the Commission's Memorandum Opinions and Orders are incorporated herein by reference and are madea part hereof.

projection and screening, film editing and costume storage, ladies' and men's dressing rooms and will be further occupied by the basic machinery of the building, including air conditioning. Annexed to the main studio building is the studio storage space which consists of two identical floors of 1,900 square feet each. The main building and the storage space will be served by elevators. The storage space will also house the scenery construction and carpentry shop. The second floor of the building has been remodeled recently to permit the operation of WFDF-AM. The first floor space, characterized above as studio B, is not refinished for television. There are some flats, drops, temporary lights and other equipment installed for the purposes of closed circuit demonstrations but the partitions remain as they were and the columns have not been de-furred.

131. The WFDF proposed television studios are located in downtown Flint. They are about four and one-half blocks from the business center of the city and one-half block off the main thoroughfare of Flint. Part of the property on which the studio building is located is a parking area which is now in use for the staff of WFDF. Directly across the street are two parking lots. There is on-street parking in the vicinity of the studio building except for Garland Street. The principal bus lines of the city, the only public transportation in Flint, are one-half block away from the building. WFDF-AM moved into this building in December of 1952. Prior to that time the AM studios were located on the top floor of the Mott Foundation Building, and at one time were considered for television. However, the available space in the Mott Building was not ample even for AM and since the company had for a long time considered mov-

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ing, it did so in the latter part of 1952 when it moved to the building in question.

132. The building which houses WFDF-AM and is proposed for television has been leased by Landsmore Corporation from its owners. The lease also includes an option to purchase. As noted in the stipulation, Landsmore is a corporation wholly owned by WFBM, Inc. and has been established for the purpose of holding real property for its television and radio interests. Landsmore leases the building for $1,200.00 per month and rents to Trebit. Landsmore would spend up to approximately $75,000.00 for leasehold approvements to provide Trebit with studios in the event it receives a construction permit. It has not expended any funds in the improvement of this building, the AM improvements having been made by Trebit. The funds which will be expended by Landsmore for improvements for television are to be repaid in rent and provision for same is included in Trebit's operating costs. It has been estimated by a Flint contractor who did the work on Trebit's AM studios that an expenditure of $63,000.00 will be required in order to prepare this building for television operation. The Landsmore lease is for a period of five years and the option to purchase, if exercised, would cost Landsmore $150,000.00. It is estimated that the replacement cost of this building is between $400,000.00 and $500,000.00.

133. The proposed studios for Trebit will be equipped with RCA studio facilities and the company will have four cameras of the portable type. Although

there is no proposal for remote broadcasts, it is expected that eventually there will be such broadcasts and WFBM-TV mobile equipment is available if necessary. The Executive Chief Engineer and the Program Director of

WFBM-TV, both of whom have inspected these studios and facilities, testified that in their opinion they were adequate to carry out the program schedule proposed by Trebit. (Tr. 1412, 1413, 1444-1454, 840, 851, 937-943, 1462-1470, WFDF Ex. 7A and 7C)

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Preliminary Planning for Television

CONTRACTS WITH FLINT GROUPS

158. In planning its programs for Flint and preparing the schedule of programs presented in this proceeding, WJR used the following methods: The first step was to make up a check list of the various human-interest and community-interest activities which the officials of WJR believed would be

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applicable from their past experience in operating a radio station. This check list took into consideration various civic, religious, educational, fraternal, etc. activities. The check list was then given to a "task force" of people in the WJR executive program public service field with instructions to go to Flint and "to find out what organizations were active there and to meet them, and tell them of our plans for a television station, and to invite their participation." (Tr. 372) The task force headed by WJR's public service director then visited Flint and contacted the Flint Chamber of Commerce to obtain a list of civic agencies and other public service institutions. From that list a number of calls were made and people were interviewed to try to ascertain their interests in the community and their cooperation was sought in the event WJR is successful in this application. This initial wave of WJR's task force made its first contact with the Flint public service organizations in late October or November of 1952. This project was obviously for the purpose of preparing for the hearing since WJR's application was filed in July and its final amendment as to program was filed in October, 1952.

159. In its work the task force contacted 27 people in Flint and asked them to send letters confirming the contact. Several of these letters were identified by witnesses at the hearing. All of the letters identified by witnesses, as others, in this connection are dated November, 1952. (Tr. 648, 649, 650, WJR Ex. 43 and 44, see also WJR deposition)

160. According to the testimony of witnesses at the hearing and in the WJR deposition session, WJR had never contacted any of them prior to October, 1952, and has made no offer for AM time in the future. (WJR depositions, Tr. 1181-1211, 1245-1275, 1329-1348, 1349-1364)

161. In early December, 1952, during the course of the hearing, WJR gave notice of its intention to take depositions in Flint. Trebit filed a motion to quash the taking of depositions for the reasons as more fully set out in its motion to quash and in the transcript of argument on same. The motion to quash was denied and said depositions on behalf of WJR were taken in Flint, Michigan on December 17 and 18, 1952. The WJR notice indicated that

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the depositions of eleven persons would be taken. On December 17, the date for taking depositions, WJR had a luncheon at the Dupont Hotel in Flint and was host to 25 or more citizens of Flint, some of whom were listed as deponents. Depositions were started at the close of the luncheon and three witnesses testified on that day and one on the next day, December 18. It is quite apparent from the testimony that some of these witnesses did not know they were to give a deposition on behalf of WJR until the luncheon. Nonetheless, each of the witnesses testified that the organizations on whose behalf he appeared would cooperate with any one of the applicants who might obtain a grant of television facilities. Only four of the eleven witnesses appeared. The others were absent for various reasons. (WJR depositions, Tr. 373-375)

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Proposal for TV

FACILITIES—STUDIO

163. WJR will utilize a portion of its Detroit AM studios in the Fisher Building for television and will also have studios in Flint at a site to be determined. When it originally filed its application for Flint, a studio in Flint at a street address was specified but no Detroit studio was shown. In its November 17 amendment, WJR omitted the specific address of the studio in Flint and showed it as "site to be determined" and specified another studio in Detroit. Mr. Kramer, WJR's general manager, testified that WJR had always intended to have studios in Detroit.

164. The exhibits concerning WJR's studio and equipment proposal deposited with Commission Counsel prior to the hearing (in accordance with the Examiner's established procedure) and as originally introduced in the hearing, provided for identical equipment in the way of cameras, lighting, controls, consoles, etc., for studios in Detroit and Flint. During the hearing a "debate" took place among the executives of WJR which resulted in a change of these plans and the substitution of a new equipment list and cost figures. The change related in the main to the equipment which WJR proposes to use in its Detroit studio and instead of a studio camera being specified

the plans were changed to indicate a field camera and related remote equipment. Changes were also made in the lighting specifications at the Detroit studio. In its final plan, WJR proposes two cameras in its Flint studio and one at its transmitter. It will have two portable cameras at its Detroit studios and two portable cameras located in a proposed mobile unit to be garaged in Flint. WJR will also have film projectors at its Detroit and Flint studios and its transmitter site. The Detroit studios, of which there will be two, are 20 x 30 feet in dimensions and according to the WJR chief engineer are equipped to produce the programs proposed by WJR in this proceeding. (Tr. 450-479, 487-488, 671-672, WJR Ex. 21 and 21A)

STAFF

165. WJR proposes a staff of 52 persons for its television operation, 21 of these will be in the engineering department, 24 in the program department, 5 in sales and 2 in accounting. The staff of the WJR-AM station will be used for Detroit programs "as required". Ten or twelve of the 21 engineers will be on duty in the Flint studios. The remainder will be at either the transmitter or Detroit.

(Tr. 465, 466)

166. According to Mr. Kramer, WJR's general manager, the technical and program departments furnished him with the number of personnel that would be needed to put on the programs proposed in this application. He said he did not know how many persons it would take to perform the functions of the station in detail and that he took his figures on personnel requirement for the program department from WJR's programming people. In questions asked of

Mr. Mitchell, the program director of WJR who would also be the program director for the television, he did not know how many people would be necessary to handle any specific program. He said he was informed of the number of people he would have in round numbers and that was the personnel he would have to work with. He testified that he did not furnish Mr. Kramer with the number of personnel he would need which is shown as 24, and moreover, that Mr. Kramer did not request the information from him. No staff was figured for rehearsals or for remote operation. The answer given by WJR witnesses was that if more personnel was required it would be obtained. None of WJR's executives or its key personnel for the proposed television operation have had any experience in operating a television station. (Tr. 465, 466, 561-564, 729-739, 802-806, WJR Ex. 26)

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220. Even asuming *arguendo* that Butterfield could obtain an NBC affiliation, it is patent on this record that its proposed programs are the product of someone's imagination and have no relationship to the wishes of the local Flint public. All of Butterfield's programs were conceived in advance of contact with any one in Flint and there is no evidence in this record that they would serve the needs and desires of Flint and its environs.

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Moreover, the entire Butterfield proposal is rife with error as to costs, revenues, rates, staff requirements, etc. We think that Butterfield's efforts are directed to obtaining a television station solely as a measure to protect its theatre interests and the ill-conceived proposals advanced in this proceeding have little or no probative value in determining the actual qualifications of Butterfield to operate a television station. These proposal are the handiwork of a professional consultant who has been to Flint only twice in his life and on the basis of planning, preparation and presentation of its case, Butterfield's program plans and the other particulars contained in its proposal are inferior to those of Trebit. Accordingly, we believe that the Butterfield application must be denied.

221. The community of Flint has one daily and Sunday newspaper in which there is some community of interest on the part of a local Flint AM station. Flint also has several other weekly and semi-weekly publications. There are five AM stations in Flint including WFDF. WJR, one of the applicants herein, serves the community and has a better audience rating during certain periods than does any other Flint station. Flint also has two FM stations and construction permits have been granted by this Commission to two applicants, one of whom is the operator of a Flint AM station. Of the motion picture theatres in Flint, seven are owned by Butterfield, one of the parties to this proceeding. In this situation where we have two AM stations which serve the market and a theatre group which owns numerous stations in Flint and throughout its proposed service area we see no reason to consider the question of concentration of media of mass communications.

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 14, 1954

Petition for Rehearing and Other Relief

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Statement

The above-entitled applications request authorization to utilize Channel 12 which the Commission, in its Sixth Report and Order governing the allocation of television stations, has assigned to Flint, Michigan. Since each of the applications seek the same frequency, they are mutually exclusive and were the subject of a hearing before a duly appointed Examiner of this Commission. The hearings commenced on November 17, 1952 and continued intermittently to February 27, 1953. Proposed Findings of Fact and Conclusions of Law were submitted by the three applicants, reply findings were similarly submitted and on April 29, 1953[1] the Examiner rendered his Initial Decision granting Petitioner's application and denying the applications of WJR, The Goodwill Station, Inc. (hereinafter sometimes referred to as "WJR") and the application of W. S. Butterfield Theatres, Inc. (hereinafter sometimes referred to as "Butterfield"). Exceptions to the Initial Decision were filed by WJR, Butterfield and the Commission's Broadcast Bureau. Trebit filed a reply to the WJR and Butterfield exceptions[1] preserving all its record exceptions (none of which are waived here) and notifying all concerned of its intention to appear and participate in the oral

argument requested. Trebit also filed a motion to strike the exceptions of the Broadcast Bureau for the Bureau's failure to file any comment, answer or reply to the findings submitted by the applicants on the ground that such failure was a violation of Section 1.849(c) of the Commission's Rules.[1] Oral argument was held before the Commission *en banc* on August 31, 1953, at which time all of the parties, including the Broadcast Bureau, were permitted to participate. As heretofore noted, the Commission in its final decision, released May 14, 1954, reversed the Examiner's Initial Decision and granted the application of WJR.

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[1] Trebit's Proposed Findings, its Reply Findings, its Reply to the WJR and Butterfield Proposed Findings, its Reply to their Exceptions and its Motion to Strike the Broadcast Bureau's Exceptions are hereby made a part hereof.

[1] See footnote 1, *supra*.

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II

The Commission Erred in Refusing to Give Weight to or Make Appropriate Findings on the Basis of Trebit's Proposed Findings and Conclusions

The Commission in its final decision in this case totally ignored basic facts of record and failed to consider and evaluate the proposed findings of fact and conclusions of law and the replies to WJR and Butterfield submitted on behalf of Trebit and incorporated herein by reference and made a part hereof. In rejecting Trebit's proposed findings of fact, the Commission has failed to take into account many pertinent facts of record which were advanced by Trebit on the basis of the evidence adduced at the hearing. We will not recite them *in extenso* again here—it is evident that the Commission ignored them all—in doing so it acted arbitrarily and capriciously. A few of the more important findings which were completely disregarded by the Commission in its final decision are contained in Trebit's findings at paragraph 6-25. These findings contain data of probative value dealing with the population characteristics and the business, industrial, cultural and welfare activities of the City of Flint, the City of Detroit and the area involved. This evidence is essential as a premise to the Commission's consideration as to whether Trebit or WJR or Butterfield will make proper use of Channel 12 in serving the community of Flint. The Commission in its findings agrees with Trebit's findings as to the Flint Trade Area but seeks to minimize them in its conclusions

—a wholly inconsistent position. Trebit's findings, at paragraph 32-41, consist in the main of testimony given at the hearing by witnesses representing Flint commercial, welfare, educational, civic, agricultural, social, economic and cultural organizations concerning these aspects of Flint life and its lack of any community of interest with Detroit and the area to the south of the City of Flint—the area which is proposed to be served by WJR, the applicant favored

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by the Commission. The Commission also ignored completely the aspects of this testimony which corroborated the findings in paragraph 42 relating to the Flint trade area as computed by professional trade area and market studies. The Commission unceremoniously ignored and brushed aside Trebit's findings at paragraph 67, 69-91 which are supported by the record and which consist of substantial evidence favoring a grant of Trebit's application. The Commission arbitrarily and capriciously ignored and disregarded Trebit's findings at paragraphs 115-129 which consist of substantial evidence in proof of the fact that the scope of Trebit's preliminary preparation and implication of its proposed programs was substantially better than and resulted in a proposed program service superior to that of WJR. The Commission furthermore ignored and disregarded Trebit's findings concerning the feasibility of its programming as shown at paragraphs 154-155 of its findings which consist of the uncontradicted testimony of local Flint witnesses and experts in the field of television broadcasting which conclusively demonstrates that Trebit's programs are feasible and would satisfy the needs of the community of Flint and its service organizations.[4] The Commission utterly distorted and otherwise ignored Trebit's findings concerning the evidence adduced on behalf of

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[4] It should be noted that WJR produced no proof along these lines.

WJR at paragraphs 163-165 which, based on the facts of record, demonstrate that WJR in fact proposes a Detroit, first,—Flint, second, television operation on Channel 12. Finally, the Commission arbitrarily and capriciously rejected Trebit's conclusions at paragraphs 205-224 which requires from the substantial evidence in the record that Trebit's application be granted and WJR's application denied.

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III

B. The Commission Erred in Its Application of Section 3.685(b)

In paragraph 24 and 25 of its Conclusions, the Commission finds that there is no basis for awarding a preference to Trebit over WJR because of the location of its antenna site. This conclusion is based on a purported application of Section 3.685(b) of the Rules. It quotes as the pertinent portion of that Section the following:

> "Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the intensity of the stations' signals. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available. To provide the best degree of service to an area, it is usually preferable to use a high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path. The antenna must be constructed so that it is as clear as possible for surrounding buildings or projects that would cause shadow problems. . . ."

After observing, in paragraph 25, that the above Section does not prescribe:

> "... a specific and definite requirement that can be determined absolutely or mathematically. Rather, it provides merely a guide, or standard, which applicants should follow in selecting sites."

the Commission then states:

> "The ideal situation for the application is presented where high ground, or a tall structure, is situated in the center of the principal city to be served; in such cases the selection of a site becomes relatively simple."

The above-quoted statement makes it clear that the "most central point" referred to in Section 3.685(b) is the center of the principal community to be served—an obviously correct conclusion. The Commission proceeds:

> "* * * In actual fact, however, applicants are seldom faced with such ideal conditions and must make use of the terrain features and other conditions as they find them. For example, in Flint, the only
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> high ground in the general area is to be found on a plateau southeast of the city. Thus, the applicants have the choice of locating their sites on high ground at a substantial distance from Flint or remaining close to Flint but on lower ground * * *"

There is a clear recognition by the Commission that there is an "ideal situation"; there is an equally clear implication that there is a difference between two applicants based upon which more closely approaches the "ideal". It cannot be gainsaid that if one is significantly closer to this "ideal" than the other, he should be preferred. Two questions are posed:

(1) Does Trebit come closer than WJR to the "ideal"?

(2) Is the difference significant?

Both questions must be answered in the affirmative.

It is evident that the Commission in the above-qouted language has substituted "high ground" for "highest elevation available" as used in Section 3.685(b). "Elevation" everywhere in the Commission's Rules and Regulations, and in the Sixth Report and Order, when it has reference to the elevation of an antenna, has one meaning and one meaning only—elevation above average terrain. Two antennas each at the same elevation above average terrain are equal, without regard to whether one is located on the roof of a building or on a steel supporting tower and the other on a hill or mountain. The type of supporting structure and the ground level at the point have no bearing on the computation of antenna height. Trebit and WJR each have maximum elevation permitted under the Rules, each having its center of radiation 1,000 feet above average terrain.

If elevation in Section 3.685(b) is to be interpreted, not as elevation above average trrain, but as elevation with respect to conditions which produce shadows, then the distance of the antenna from the center of Flint as well as its height above it must both be considered since shadows vary depending upon the angle at which radiation strikes an obstructing object. It is clear beyond peradventure that the shadow condition sought to be minimized by Section 3.685(b) is the shadow condition in the principal community because the reference point prescribed in that Section for optimum antennna location is the center of that community. Assuming that Section 3.685(b) in recommending the highest elevation available at a central location concerns itself with problem of *illuminating* the area to minimize shadow, it is axiomatic that the height of the center of radiation must be proportionate to the distance from the center of the principal city to be served, if the same areas of shadowing are to be maintained. It is equally axiomatic that, if the strength of the illuminating source is kept constant, the intensity of illumination will decrease as the square of the distance from the source to the central point is increased. (Shadowing is greater when a weak signal is involved than it is when a strong signal is involved. The Trebit signal at the center of Flint is over 6.9 times as strong as the WJR signal.)

The center of radiation of the Trebit antenna is 993 feet above the center of Flint and the horizontal distance from the antenna to the center of Flint is 7.75 miles. The height of the center of radiation of the WJR antenna above the center of Flint is 1,245 feet and the horizontal distance of the antenna is 20.4 miles from the center of Flint.[5] The WJR antenna is 12.65 miles further from the center of Flint than the Trebit antenna and is 252 feet higher. The Trebit antenna is closer than the WJR antenna to the center of Flint by more tha 260%, it is lower by less than 21%. On the basis of the ratio of height to distance—which is obviously the most significant factor from the standpoint of shadow effect—the ratio for Trebit is 1:41 and for WJR is 1:85.

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There can be no dispute that if elevation as the term is used in Section 3.685(b) means what it means everywhere else in the Commission's Rules and Regulations with respect to antenna situation, i.e., elevation above average terrain, Trebit and WJR propose to locate their antennas at the same elevation and there is zero difference between them in that regard. From the standpoint of closeness to the central point of Flint, however, WJR is more than 2½ times as far as Trebit from the center of Flint and its signal only 1/7 as strong. If "elevation" as used in Section 3.685(b) is to be construed as elevation above the central point of Flint, because in the context the concern is only with shadowing in Flint, then the relation between the elevation of the antenna above and its distance to the central point of Flint must each be taken into account for shadowing effect are a function of both, not either alone. Comparing the ratios of height above the central point to distance from that point, Trebit has better than a 2:1 advantage over WJR. That this ratio advantage is substantial and significant is obvious from the fact that, for WJR at its proposed site to cut down shadowing in Flint so that it would have as little shadow effect as Trebit, it would be necessary for WJR to increase its antenna height to over 2,600 feet above the center of Flint (i.e., to add over 1,355 feet to its tower) and increase its radiation in the direction of Flint to over 15 million (15,000,000) watts (or to utilize some equivalent combination involving gargantuan power and height factors).[6] Quite apart from the obvious physical impossibility of achieving any combination which would produce this result, the Commission's Rules

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[5] The figures—993 for Trebit and 1,245 for WJR—are corrected for earth curvature on the basis of 9/10ths of a foot per miles. The uncorrected figure for the Trebit antenna is 1,000 feet and for the WJR antenna is 1,263 feet.

prohibit WJR from attempting to utilize any combination of power and height at its proposed site which would result in any decrease in its present shadow effect in Flint.[7]

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[6] The combination 2,600+ feet antenna elevation and 15+ megawatts power assumes only inverse distance attenuation, and is therefore the most conservative estimate possible.

[7] That Trebit has an advantage from the standpoint of shadowing in Flint is not surprising for nothing is more certain than that WJR did not select its site to minimize shadowing in Flint, but to maximize signal in Detroit. In fact, if WJR's most desired proposal, i.e., to construct at Waterford Hill, could have been achieved, it would have located its antenna six miles further from the center of Flint, the effect being to maximize shadowing in Flint and minimize it in Detroit.

On any basis of comparison, the question of whether the base of the antenna supporting structure is on low ground or on high ground, is utterly irrelevant. The Commission's failure to consider relevant, and its reliance upon completely irrelevant factors in reaching its conclusion that Trebit and WJR each comply with Section 3.685(b) "no one more than the other" is arbitrary and capricious.

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III

D. The Commission Erred in Vital Additional Respects

(1) Findings of fact as set forth in paragraphs 9-10 (all of the references in this section pertain to the Commission's Decision) do not accurately reflect the status of television operations in either Flint or Detroit. On November 27, 1953 Trans-American Television Corporation which had been granted a construction permit for one of the two commercial UHF channels at Flint surrendered to the Commission its construction permit. WTAC-TV, the permittee of the other commercial UHF channel assigned to Flint, notified the Commission in April that it would cease operations and did so on April 30, 1954. The Commission should have found that the City of Flint has no local television station. The Commission should also find in paragraph 10 that an additional television station has been added to the

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Detroit area by virtue of the grant of construction permit to UAW/CIO for UHF Channel 62 on November 19, 1953. Furthermore, the Commission errs when it blindly ignores in its "Final Decision" the service to Detroit which will be furnished by Station CKLW, Windsor, Ontario, Canada. That station which serves Detroit on AM with the programs of the Mutual Broadcasting System has been authorized by the Canadian government to operate on VHF Channel 9 from Windsor, which is for all intents and purposes a suburb of Detroit.

(2) The Commission's findings at paragraph 22 and its conclusions at paragraphs 10 and 35, holding that WJR will have superior studios, are not supported by substantial evidence. The record facts with respect to studios are that WJR proposes to build new studios somewhere within the city limits of Flint, Michigan (site to be determined) and will expend an estimated $776,000 for studio construction. Trebit's studios will occupy a building in downtown Flint easily accessible to the public from the standpoint of parking, public transportation, etc. The replacement cost for this building would be between $400,000 and $500,000 which, together with the improvements already undertaken and the additional $63,000 necessary to convert to television, would make its cost closely approximate that of WJR. Moreover, the record shows that WJR's studio plans are still on paper in the form of an architect's conception, whereas the housing for Trebit's television facilities are accurately described and depicted by pictures and exhibits in evidence which attest to the fact that Trebit's studios will be modern in every respect and adequate to produce Trebit's programs which the record shows are superior to WJR's programs.

(3) The Commission's conclusions at paragraph 9 are wholly without precedent in Commission decisions. The preference for WJR on the ground that its "principals" will more actively participate in

WJR's proposed television operation cannot be supported by the record and is arbitrary and capricious. The WJR "principals" in question are Messrs. Patt, Kramer, Leydorf, Moore, Cushing, Gray, Seibert and Dickenson. This group of so-called "principals" own between them a total of less than three percent of the stock of WJR. They are employees of Mrs. Frances S. Richards and the Richards estate in every sense. The titles given these employees are probably necessary to lend to them some prestige in directing the activities of Station WJR in the absence of Mrs. Frances S. Richards, the true owner who lives in Clafiornia and did not even appear at the hearing. There is no evidence of record that Mrs. Richards will take any active part in this operation. It is to be noted that in paragraph 25 of the Commission's findings the Commission takes notice of the fact that Mrs. Frances S. Richards, after the record closed, remarried and is now Mrs. Walton Parker. It is apparent that the Commission is diligent in its reading of the society pages. If it had exercised the same diligence in reading its own ownership record, it would know that on January 30, 1954 prior to the issuance of this decision, Mr. Lester W. Lindow, an officer and a director of Trebit, exercised his option, a matter of record in this case, and has purchased five percent of the stock of Trebit. Mr. Lindow, who will spend 100 percent of his time in directing Trebit's proposed television operations, is a many year resident of Flint, Michigan and is closely associated with local public service activities. It is submitted that, if this point is significant, Trebit is to be preferred. Mr. Lindow owns more stock and will spend more time in the operation of Trebit's proposed television station than will all of the WJR "principals" combined.

(4) The Commission's findings at paragraphs 62-63 and its conclusions at paragraphs 14, 19-20 which purported to reflect the past television activities and preparation for television by Trebit

are grossly inadequate and do not truly or accurately reflect the facts of record. The Commission errs when it fails to give full credit to the long and extensive preparations engaged in by Trebit in preparing for television. A complete recitation of the record facts in this connection are set out in our proposed findings of fact. It is incredible that the Commission should damn with faint praise the good faith efforts of Trebit with respect to its program advisory committee and its closed circuit training of personnel and production of programs which have been reflected in its programming proposal in this proceeding. It is arrant nonsense for the Commission to hold that an applicant should not receive a substantial preference when the local programming proposal it advances in the hearing (as is the case here for Trebit) was worked out in advance with local public service organizations and produced and run time and again in closed circuit under the close scrutiny of representatives of those agencies to achieve airworthiness and to otherwise meet the wishes and desires of the public service groups. The Examiner correctly found from the Trebit evidence and from the lack of evidence on the part of WJR that Trebit's program proposals were tailor-made for the community of Flint and that WJR's were conceived and would be produced without either prior planning or testing and that this was a significant factor favoring the grant of Trebit's application. The Commission in its decision has acted arbitrarily and capriciously in disregarding this important evidence.

(5) The Commission erred in its findings at paragraph 78 and its conclusions at paragraph 12 wherein it holds that WJR's staff is adequate. There is not only no evidence to support this view—all the record evidence repudiates it. Not a single WJR witness was able to say how many people would be necessary to put on its programs. (Tr. 564, 730-732, 798, 800) There is no record evidence

as to the staff which would be available or how many people were necessary to

accomplish its "remote" programs to which the Commission attaches so much significance. (Tr. 796-797) The entire record concerning WJR's proposed staff is riddled with inconsistencies, evasive testimony and lack of knowledge or concern with what was needed as to staff (compare Kramer's testimony at pages 558-562 and 564 with WJR Program Director Mitchell's at pages 802-803 and 806-807). To hold as does the Commission in its decision that WJR, on the basis of this record has adduced proof that its staff is adequate to implement its proposed programming is to make a mockery of the hearing process, and is clearly arbitrary, capricious and unjustified.

(6) The Commission erred in its findings at paragraph 85 and its conclusions at paragraph 18 that "there is no substantial distinction between the applicants in the amount of local news or the size of the staff to be engaged in local news-gathering and editing." The record facts show that Trebit, because it operates a radio station in the community of Flint, is keenly aware of its responsibility with respect to news-gathering and the local conditions which are peculiar to Flint in this regard. WJR, which operates a radio station in Detroit, has no knowledge of the local Flint situation and has not provided any staff for Flint news-gathering. The City of Flint, as found by the Commission in its final decision has one daily and one Sunday newspaper. WJR, on this record, had no awareness of this fact in its program planning. The record shows that the local Flint daily is published in the afternoon and that Trebit's Station WFDF conceives its responsibility to furnish news to the community via radio in the mornings and after the local Flint paper has been published. Accord-

ingly, as correctly found by the Commission at paragraph 79 of its findings, Trebit proposes a staff to be devoted to local news-gathering and local news programs. Other facts of record pertaining to Trebit's proposal for news-gathering and news programs are found in Trebit's proposed findings. WJR, not

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only has an inadequate staff to do other than announce news programs (and, perhaps, edit news material gathered by others), but has made no provisions whatsoever for news-gathering and news coverage in the City of Flint, Michigan. WJR proposes no news-gathering staff for Flint. We do not conceive this to be the way a Flint television station should discharge its responsibilities nor has the Commission ever so held in any other case. This is a typical example of the Commission's refusal to consider and evaluate undisputed facts of record in this proceeding. The Commission's decision holding that there is no distinction between the news personnel or the news programs of Trebit as contrasted to WJR fails to take into account the evidence and is arbitrary and capricious.

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IV

It is customary in a petition for rehearing to claim that the Commission has ignored a petitioner's evidence, it is also in accord with custom to charge violation or disregard of substantive law and procedural due process—there are, however, few cases in which a petitioner can claim that the Commission, like an indulgent parent, has ignored admissions (and even affirmative contentions) of its favored applicant to find that despite a stated purpose and intent to do otherwise that applicant will conform to the public interest. This case is novel, if not unique, in that the Commission in the face of WJR's repeated and convincing disclaimers by word and action to the contrary, finds that WJR should be preferred because it will serve Flint first last and always and ignore Detroit in the operation of its proposed station. Since the Commission rejects its favored applicant's confession on the point, it is not surprising that it refuses to accept proof on the question from Trebit, a rejected claimant for favor. The law, however, requires decisions to be made on record evidence—on that basis WJR must be denied and Trebit granted.

That it is, and always has been WJR's purpose to serve Detroit to the detriment of Flint—and that it has been Trebit's purpose to serve Flint and prefer it over Detroit is proved beyond any reasonable doubt on the record in this case. If criminal sanctions applied to an attempt to violate the Commission's determination that Channel 12 should be used to serve Flint, not Detroit, WJR could be convicted on this record under the most stringent application of the safeguards which protect one charged with a crime in the Federal Courts of the United States.

A brief review of some of the salient points is in order:

(1) WJR has for many years operated a standard broadcast station of great power in Detroit—that station lays

down a signal so strong in Flint (in fact as strong as the signal WJR's TV station would provide in Flint) that WJR can and has prevented any station in Flint from obtaining an affiliation with CBS—WJR's network. Despite this fact WJR in all the years of its operation has only originated *one* public service program of interest to Flint from that city—and did not do this until it filed its application for Channel 12, asigned to Flint.

(2) WJR filed its first applications for television for a Detroit station—and only applied for Channel 12, assigned

to Flint, after it was foreclosed in Detroit and after it determined that it could blanket Detroit using Channel 12.

(3) Before taking action to request Channel 12, WJR attempted to get a VHF channel assigned to Detroit, notwithstanding that its proposal involved denying a VHF channel to Flint.

(4) WJR's network proposal is based entirely upon its desire to cover Detroit—and is admittedly inferior from the standpoint of Flint.

(5) WJR's counsel stated in the course of this hearing that WJR was vitally interested in Detroit coverage.

(6) Mr. Patt, the most important official of WJR, who appeared at the hearing, testified that Flint and Detroit were "homogeneous" areas—and that programming problems would be resolved in the interest of the majority of the station's audience, i.e., be determined by the desires of Detroit residents.

(7) WJR made an elaborate (but abortive) attempt to prove that Detroit and Flint were parts of a "homogeneous" area in this case—its only purpose being to show that Detroit programming was indistinguishable from Flint programming.

(8) That the WJR proposal—before it was challenged in this hearing—called for identical studio equipment in Detroit and Flint.

(9) That there is no record evidence that any attempt to "gear" WJR's programming proposal to Flint was made until after this hearing started—and after WJR should have been precluded from changing the proposal. Prior to challenge in this hearing WJR obviously—if it considered Flint at all—operated, as it has in AM, on the

theory that what is good for Detroit is good for Flint. Any attempt to "gear" WJR's proposal to Flint was nonexistent until it belatedly realized in mid-hearing that Flint for the purposes of this case was more than a name on the map of Michigan. Its "gearing" at that point resulted only in wheel spinning, not in improvement of its proposal so far as Flint is concerned.

(10) All of WJR's officers, directors, stockholders and staff personnel who testified evidenced an abysmal ignorance concerning Flint—those who did not testify could not know less about Flint—these cannot be presumed to know more.

Much more can be added to the above summary—nothing can be found in the record in this case to refute the conclusion that WJR's purpose and intention by fair means or otherwise is and has been to become the licensee of a VHF television station in Detroit to complement its AM operation—its application for Channel 12, assigned to Flint is but a means to that end. The giving of a television service to Flint and its surrounding area plays no part in WJR's plan. The Commission's denial not only of the obvious but also the admitted facts is arbitrary, capricious and a gross dereliction of its duty to the people of Flint.

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 21, 1954

WJR Opposition to Petitions for Rehearing

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7. Butterfield's seventh assignment of error (VII, page 15) relates to the finding (78) and conclusion (12) that

WJR proposes an adequate staff.* The Initial Decision herein concluded that "all three applicants propose satisfactory staffs which will be able to implement the program proposals and operate the station in the event of a grant" (Paragraph 97). Butterfield failed to except to this conclusion (See Butterfield Exception 60) and to the Examiner's findings made respecting the WJR staff in Paragraph 72 of the Initial Decision (See Butterfield Exceptions 43 and 44). Therefore, Butterfield has waived the right to assert that the WJR staff is inadequate (See Rule 1.854). Finding 78 of the Final Decision amply supports Conclusion 12 that the WJR staff is adequate for operating the proposed station and implementing the WJR proposal.

* * * * * * * * * *

9. Butterfield's ninth assignment of error (IX, page 28) relates to the preparation for television and the ascertainment of the program needs and desires of Flint. Butterfield asserts that the Commission's conclusion that WJR was entitled to significant preference over Butterfield in the area is erroneous (Findings 47-50, 76-77 and Conclusions 19 and 36). The relevant matters advanced by

Butterfield in support of its assignment of error consist of previously asserted arguments, all of which were considered and passed upon by the Commission. In its discussion, Butterfield alludes to matters not relevant to the areas of comparison referred to in Conclusions 19 and 36. For example, Butterfield asserts the WJR staff is not adequate (See Paragraph 7 hereof), raises questions concerning WJR's estimated expenses and revenues of $530,000 and $800,000 (although Butterfield stipulated that WJR was financially qualified) and argues for the first time in this proceeding that "WJR cannot effectuate its proposal." The assignment of error is deficient as it is based on (a) matters previously asserted and passed upon (some of which are not relevant to the assignment of error) and (b) theories advanced for the first time (See *Western Union Telegram Co., infra* and *Camden Broadcasting Company,* 4 RR 491 at page 492 (1948)). The conclusions referred to by the assignment of error are supported by the record (See WJR Exception 66).

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* The same assertion is made in Butterfield point IV, 2a at page 29.

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 28, 1951

Trebit's Reply to Opposition to Petition for Rehearing

* * * * * * * * * *

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9. Finally, WJR notes that, in Trebit's petition for rehearing, there is no comment with respect to the question of diversity. In this connection we invite attention again to footnote 1 of Trebit's petition for rehearing which incorporates by reference its reply to WJR and Butterfield's proposed findings which demonstrates that Trebit is definitely to be preferred over WJR on this ground. Furthermore, it is clear that the Commission's "diversity" preference rests on its erroneous rejection of preference to Trebit on all other grounds.

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FEDERAL COMMUNICATIONS COMMISSION

MARCH 30, 1953

* * * * * * * * * *

Proposed Findings of Fact and Conclusions of W. S. Butterfield Theatres, Inc.

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7. At the hearing, Trebit offered and over the objections of WJR, Butterfield and the Broadcast Bureau, the Examiner accepted, with reservations, three exhibits in evidence. These exhibits relate to "Other Signals" (Trebit Ex. 3-S), "Interference" (Trebit Exs. 4 and 4-S) and "Comparison of Service" (Trebit Exs. 5-A and 5-S). The exhibits were discussed on the record and the rulings with respect to each were made at pages 202-26, 226-36 and 236-45, respectively. Upon reconsideration of the record and the substance of these exhibits, we believe that they are of no value to our determination here. It is clear from the record that Trebit offered these exhibits to support its contention that a grant of its proposal will result in a more fair, efficient and equitable distribution of television service than will a grant to WJR or Butterfield. The Commission in the Sixth Report established a nationwide allocation plan and thereby, among other things, met the requirements of Section 307 (b) of the Communications Act of 1934, as amended. Thus, we shall not, in competitive proceedings for a channel assigned to a community, reconsider this issue or encourage procedures which cannot be settled under our existing rules and standards. With respect to the "Other Signals" exhibit it is clear that the showing there is so speculative as to have no probative value. For example, since that exhibit was prepared on February 13, 1953 a new application has been filed for

Cadillac, Michigan (File No. BPCT-1634) and, of course, is not reflected on that exhibit. Nor do we have standards for determining "service" or know whether other assignments in the area not applied for will be assigned to applicants, or what ultimate tower heights or power assignments will be used by any of said applicants, licensees or permittees. As indicated above, each of the proposals here complies with the Commission's Rules and Standards, including the requirements for separation. There are no standards for computing interference, and in the absence of such standards we cannot speculate. Nor can we establish such standards in an adjudicatory proceeding such as this. Finally, the "Comparison of Service" exhibit is subject to the same deficiencies mentioned above with respect to the other exhibits. Accordingly, we conclude that the issues raised by these exhibits are not matters for our consideration of the applicants here, but even if they were they are either too specious or speculative upon which to base substantial findings of comparative matters between applicants. (See Sixth Report, particularly paragraphs 13-17, 85-96, 103 and 166-168; Sections 3.612, 3.683 and 3.684 of the Commission's Rules; *In the Matter of Manistee Radio Corporation, Manistee, Michigan, et al.*, 5RR 302, 306, 306,; *In re Applications of Atlantic Radio Corporation, Boston, Massachusetts, et al.*, 5RR 195, 199; *In re Application of Courier-Journal and Louisville Times Co., et al.*, 5RR 348, 375, footnote 3; *In re Application of The Corbin Times-Tribune (WCTT), Corbin, Kentucky,* 6RR 396, 412-413).

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 15, 1953

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Exceptions to the Examiner's Initial Decision and Request for Oral Argument

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6. To paragraphs 16, 17, 21 and 22 for the reason that they are based on material which is irrelevant, immaterial and of no probative value. The Examiner

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bases these findings on Trebit's "Comparison of Service", "Other Signals" and "Interference" exhibits (Trebit Exs. 5-A, 5-S, 3-S, 4 and 4-S). The acceptance of these exhibits over the objections of WJR, the Broadcast Bureau and Butterfield was error and his ruling should be reversed. (See Butterfield's Findings, paragraph 7).

* * * * * * * * * *

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WJR, The Goodwill Station, Inc.
Section III
Paragraph 1.a.

Exhibit F-1

From Amendment to Application of WJR

Cost Estimates

At the time of the hearing on the application for construction permit, the WJR estimates for construction costs were as shown in paragraph 1.a. of Section III, except for studio equipment, land and construction of buildings (see Stipulation in Docket No. 10268, p. 7). Since the grant of said application, applicant has obtained an option on the new transmitter site specified in this application for a purchase price of $30,000 and has negotiated a lease of the studios formerly used by station WTAC-TV at 2302 Lapeer Street, Flint, Michigan. Applicant has also purchased equipment as indicated below from WTCA-TV and from RCA. Thus, at the present time, the additional cost of studio equipment, as compared with the original estimate (corrected Exhibit 21) is as follows:

Extract from corrected Exhibit No. 21

(Docket No. 10268)

Studio, Technical Equipment, Microphones, Etc.

1.	Studio Equipment (at transmitter)	$ 15,366.00
2.	Film Equipment (at transmitter)	7,281.00
3.	Camera and network (at transmitter)	18,350.00
4.	Lighting Equipment (at transmitter)	615.69
5.	Technical Equipment (both locations)	5,189.00
6.	Studio Switching Equipment	13,649.00
7.	Studio Cameras	37,730.00
8.	Studio Film Camera	22,920.00
9.	Studio Film Projector	10,421.75
10.	Studio Audio Equipment	8,576.00
11.	Studio Audio Equipment	5,050.00
12.	Studio—General Equipment	83.75
13.	Studio—Lighting Equipment	3,674.30
14.	Remote Equipment	12,022.85
15.	Materials and Installation	30,000.00
16.	Furniture—etc.	2,500.00

17.	Shipping Charges and Contingencies	$ 7,000.00
18.	Two Field Camera Equipment (Remotes and Detroit Studios)	42,084.00
19.	Film Cameras (Detroit Studios)	22,920.00
20.	Switching Equipment (Detroit Studios)	13,649.00
21.	Lighting (Detroit Studios)	615.69
22.	Film Projectors (Detroit Studios)	10,421.75
23.	Audio Equipment (Detroit Studios)	5,050.00
24.	Synchronizing Generator (Detroit Studios)	4,516.75
25.	Installation and Contingencies—Detroit Equipment	25,000.00
	Total	$324,686.53

Present Cost Estimates for Studio Equipment

1.	Studio Equipment (At Transmitter) to be ordered a	$ 15,366.00
2.	Film Equipment (At Transmitter)	7,281.00*
3.	Camera & Network (At Transmitter)	17,559.25*
4.	Lighting Equipment (At Transmitter)	615.69*
5.	Technical Test Equipment (All Locations)	12,834.25*
6.	Studio Switching Equipment	12,949.05*
7.	Studio Cameras	38,103.25
8.	Studio Film Cameras	22,920.00
9.	Studio Film Projectors	11,418.75*
10 & 11.	Studio Audio Equipment	5,652.80*
12.	Color Broadcasting Equipment	22,459.00*
13.	Studio Lighting Equipment	3,040.09*
14.	Remote Equipment	91,576.00*
15.	Materials & Installation	30,000.00
16.	Furniture	2,500.00
17.	Shipping Charges & Contingencies	7,000.00
18.	Two Field Camera Equipment	33,121.85
	(To Be Ordered)	6,016.00
19.	Field Camera (Detroit Studios) to be ordered	22,920.00
20.	Switching Equipment (Detroit Studios) (Part of Item 18)	
21.	Lighting Equipment (Detroit Studios) to be ordered	615.69
22.	Film Projectors (Detroit Studios) to be ordered	10,421.75
23.	Audio Equipment (Detroit Studios) Will use WJR Equipment	
24.	Sync Generator (Detroit Studios) (Part of Item 18)	
25.	Installation, Taxes & Contingencies	15,000.00
26.	Spare Tube Kits	3,032.43*
	Total	$392,402.85

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* Equipment received and paid for.

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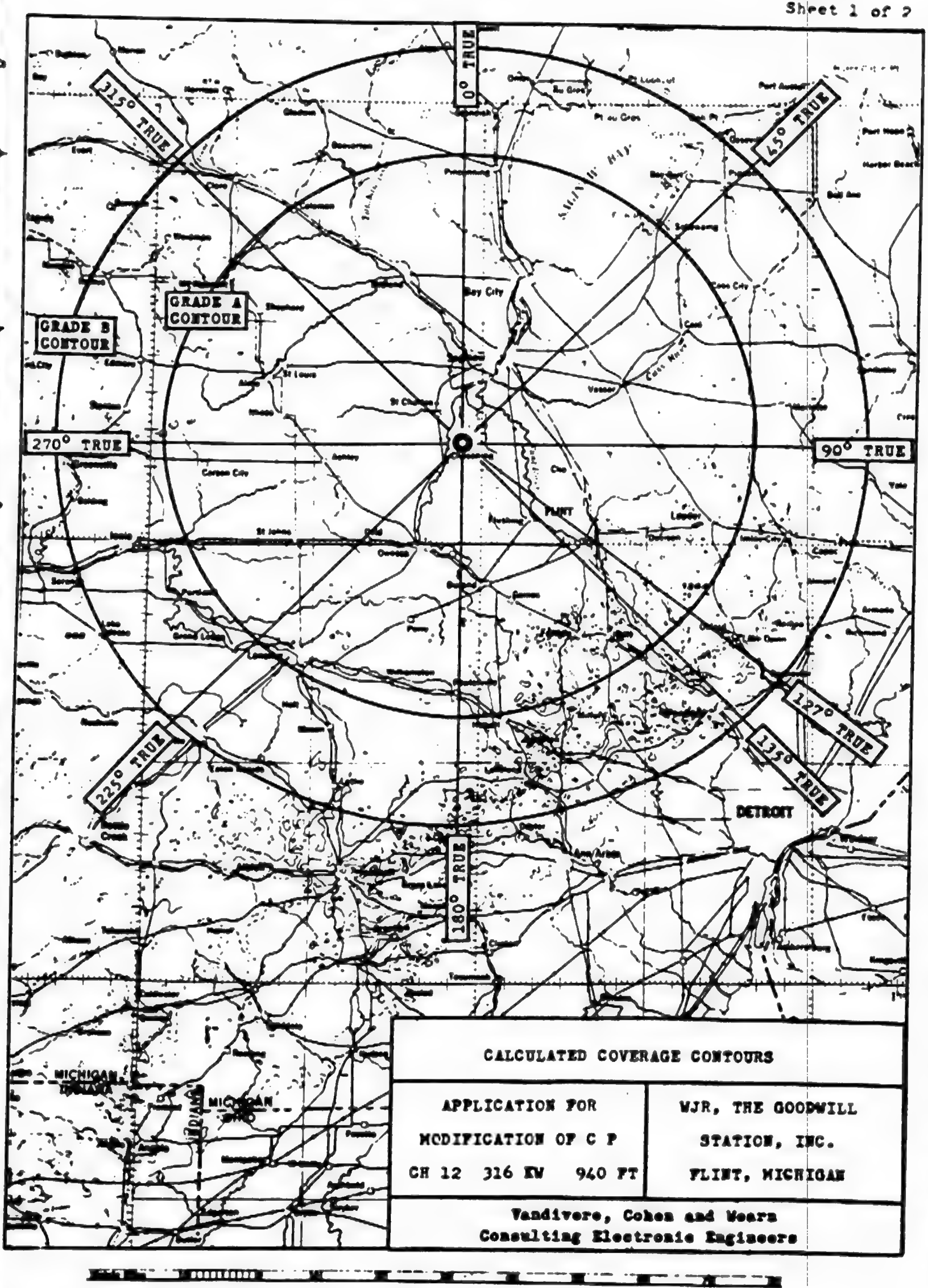
As shown in Exhibit 21 of Docket No. 10268, applicant proposed to construct a studio building at an average estimate of $766,821 and a transmitter building at an average $179,974. There has been no change in applicant's plans with respect to its transmitter building except as to location as appears in the engineering portion of this application, but plans with respect to the studio building have changed in the following particulars:

In an effort to expedite commencement of operation of station WJRT, the studios of station WTAC-TV were leased and the equipment purchased as stated above. These studios are modern in every respect, having been constructed in late 1953. Station WTAC-TV has since surrendered its construction permit. Applicant also has an option to purchase the studio building for $125,000. It is now engaged in installing additional equipment to provide the flexibility contemplated in its original plans and will expand the studios as needed to provide the locally originated program service proposed.

Figure 7
Sheet 1 of 2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45° TRUE
270° TRUE
90° TRUE
GRADE A CONTOUR
GRADE B CONTOUR
SAGINAW BAY
Bay City
FLINT
225° TRUE
127° TRUE
135° TRUE
180° TRUE
DETROIT
Ann Arbor
MICHIGAN INDIANA
MICHIGAN OHIO

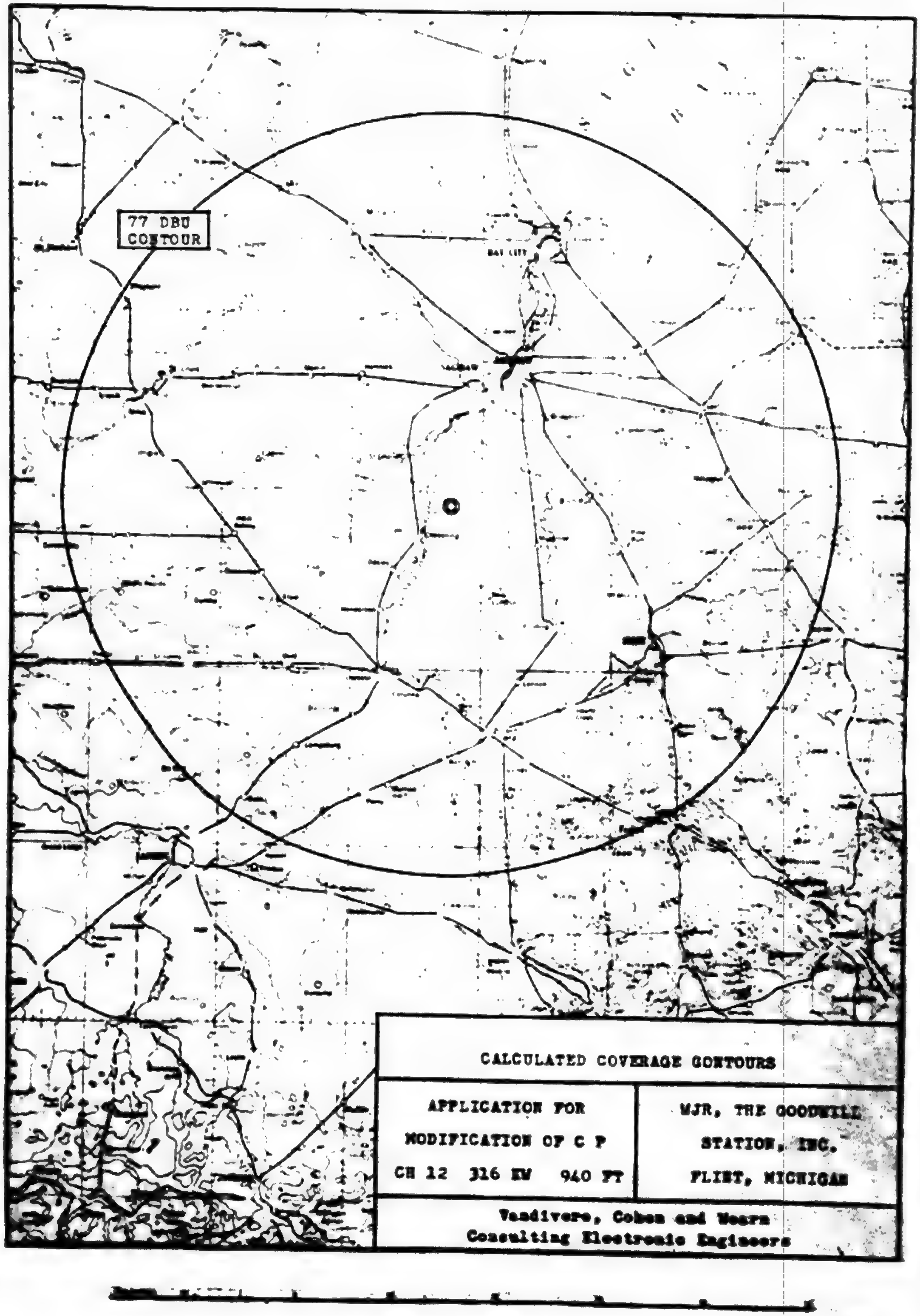
CALCULATED COVERAGE CONTOURS

APPLICATION FOR MODIFICATION OF C P CH 12 316 KW 940 FT	WJR, THE GOODWILL STATION, INC. FLINT, MICHIGAN

Vandivere, Cohen and Wearn
Consulting Electronic Engineers

73-11412 74

Figure
Sheet 2 of 2



CALCULATED COVERAGE CONTOURS

APPLICATION FOR
MODIFICATION OF C P
CH 12 316 KW 940 FT

WJR, THE GOODWILL
STATION, INC.
FLINT, MICHIGAN

Vandivere, Cohen and Wearn
Consulting Electronic Engineers

74-1141

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LAW OFFICES OF
KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS
World Center Building - 16th and K Streets, N. W.
Washington 6, D. C.

Telephone STerling 3-3200

March 15, 1955

Louis G. Caldwell
(1891-1951)
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Reed T. Rollo
Donald C. Beelar
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Kelley E. Griffith
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Frederick M. Rowe
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Main Office
33 North La Salle Street
Chicago 2, Illinois

Miss Mary Jane Morris, Secretary
Federal Communications Commission
Washington 25, D. C.

Re: Application of WJR, The Goodwill Station, Inc.,
File No. BMPCT-2689

Dear Miss Morris:

The above-described application was filed with the Commission on December 16, 1954 and an amendment changing the tower location 800 feet only was filed on March 4, 1955. The purpose of this amendment was to specify the exact site approved by the Washington Airspace Subcommittee of the Air Coordinating Committee on March 1, 1955. The transmitter site proposed in the application as amended is 20.5 miles from the nearest border of the city of Flint, Michigan (the principal city to be served) and, therefore, its approval would require a waiver under the proposed amendment to Section 3.685 set forth in the pending Notice of Proposed Rule Making, Docket No. 11297, if the amendment were to be adopted. The Notice of Proposed Rule Making was issued pursuant to a petition of WKNX-TV, Saginaw, Michigan, which, among other things, requested

> "that the Commission withhold action on applications which may be inconsistent with its proposal during the pendency of this proceeding."

The above-quoted request was specifically denied by the Commission in the Notice of Proposed Rule Making wherein it stated:

> "It is the Commission's view, however; that it should continue to consider applications which propose to locate transmitter and antenna

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> sites at some distance from the principal community to be served on a case-to-case basis as it has been doing. The Commission believes that there is no necessity for withholding action on such applications until this proceeding is completed."

Although the proposed rule has not become effective and the Commission has announced that it will continue to process applications on a case-to-case basis, which propose to locate tower sites in excess of five miles from the nearest border of the principal city to be served, we wish to submit for information purposes the facts and reasons which would be required to support a request for waiver if the rule should be adopted.

Response to Proposed Paragraph (3)(a).. "Applicant has no understandings or agreements, either oral or written, with any network organization or representatives thereof, pertaining to network affiliations or pertaining to the availability of network programs contingent upon the proposed location of the antenna. However, applicant believes that network programs are essential to successful operation, both from a financial point of view and to enable it to render the local programs and public service programs which have been proposed. Therefore, its officers, as set forth in Exhibit P-3 of the application, have had numerous discussions with the networks to determine which, if any, would be available. CBS and ABC have both indicated an interest in affiliating with WJRT *if* its transmitter is located sufficiently to the northwest of Flint to avoid any substantial degree of overlap with their respective affiliates in Detroit. Applicant has selected and proposes by its application CBS network programming (not ABC programming) at a location which will provide 77 dbu service to Flint and will not provide even Grade B service (56 dbu) to any portion of Detroit. DuMont is affiliated with CKLW-TV, Windsor, Ontario, Canada, across the river from Detroit; NBC is affiliated with WWJ-TV, Detroit; ABC is affiliated with WXYZ-TV, Detroit and CBS is affiliated with WJBK-TV, Detroit."

Response to Proposed Paragraph (3)(b). Applicant's known plans with respect to the location of all studios, main or otherwise, the hours of local programming and a description of the general nature thereof proposed to be provided through the use of each such studio have heretofore been disclosed to the Commission and are as follows:

Location of main studio—2302 Lapeer Street, Flint, Michigan. These studios, as shown in the application, are modern in every respect and additional equipment is being installed to provide the flexibility contemplated by applicant's program plans. They will be expanded as needed. All but a very few of WJRT's local programs will originate at the Flint studio.

Other studios—Fisher Building, Detroit, Michigan for originating on an occasional basis outstanding programs of regional interest in instances where the participants are available in Detroit but not in Flint. In addition, there will be a studio at the transmitter building for occasional use.

Mobile unit—completely equiped to originate programs from any location within the station's service area.

Exhibit P-1 accompanying the application contains the proposed weekly program schedule and Exhibit P-2 contains a percentage analysis by class of programming. Exhibit P-1 shows a total of 110 hours and 35 minutes of regularly scheduled programming, of which slightly over 37 hours (33.53%) will be devoted to local programming. The general nature of the local program is disclosed by their titles. In addition, time will be devoted to a number of local activities, which are seasonal in nature. They do not appear on the typical weekly program schedule.

Response to Proposed Paragraph (3)(c). In addition to the reasons set forth in paragraph (a) above, applicant has the following additional reasons for proposing its transmitter location.

"Pursuant to the provisions of Act 23 of the Public Acts of the State of Michigan for the year 1950, Genesee County is in the process of adopting an ordinance establishing airport zoning regulations restricting the height of structures and objects of natural growth within a radius of ten miles from the center of Bishop Airport (Flint). When the ordinance is adopted, it will be impossible to find a location within five miles of the city limits and beyond the ten mile radius proposed to be protected, except in a small area north and northeast of Flint. See map of Genesee County hereto attached marked Exhibit A. What the air hazard problems, zoning problems and availabilities would be in this small area have not been investigated due to the fact that this site we propose conforms with the FCC rules, was submitted on December 16, 1954 before the FCC had issued its Notice of Proposed Rule Making, and has received air space approval. Copies of pertainent extracts from the proposed ordinance are hereto attached marked Exhibit B. To the best of our knowledge, similar ordinances have already been adopted to protect the Lansing, Grand Rapids and Pontiac airports, and undoubtedly other Michigan airports either have or are in the process of adopting similar ordinances."

"Applicant has expended substantial time, effort and finances in obtaining air hazard clearance on its proposed site, having retained a consultant for this purpose who first commenced negotiations on September 7, 1954, looking toward a site which would be acceptable. Any further change in site location at this time would result in undue hardship upon the applicant."

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"Since the petition requesting the Notice of Proposed Rule Making in Docket No. 11297 was filed by WKNX-TV, Saginaw, Michigan, presumably the proposal was designed to preclude another television signal from reaching Saginaw, Michigan. We submit that it would be impossible to find a site which would conform with the proposed ordinance to protect Bishop Airport within a ten mile radius, would avoid substantial overlap from Detroit television stations and would meet the requirements of the Airspace Subcommittee of the Air Coordinating Committee without providing at least a Grade A signal to the city of Saginaw. Based upon the site now proposed, the average distance to the Grade A contour is approximately forty-five miles. This distance would not vary any substantial amount if the proposed location were changed. The distance from the center of Flint to the center of Saginaw is only approximately thirty-two miles."

"Existing Michigan television stations are largely concentrated in southern Michigan because of the population distribution in the state, and, therefore, the proposed site is also to be favored because it provides service to Flint and at the same time extends television service to areas which are poorly served at the present time."

Respectfully,

WJR, The Goodwill Station, Inc.,
By Reed T. Rollo,
Its Attorney.

RTR:ieg

* * * * * * * * * *

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Federal Communications Commission

May 12, 1955

Joint Petition for Rehearing, Reconsideration and Further Relief

Come now Trebit Corporation and W. S. Butterfield Theatres, Inc. and, pursuant to Section 405 of the Communications Act of 1934, as amended and pertinent Rules of the Federal Communications Commission referred to below, submit this Joint Petition requesting the relief set forth in the Prayer for Relief.

Jurisdictional Statement

1. Trebit Corporation (hereinafter called "Trebit"), W. S. Butterfield Theatres, Inc. (hereinafter called "Butterfield"), and WJR, The Goodwill Station, Inc. (hereinafter called "WJR"), filed mutually exclusive applications for a construction permit for a commercial television station to operate on Channel 12 at Flint, Michigan. After a comparative hearing on these applications, the Examiner rendered and Initial Decision looking toward a grant to Trebit. Exceptions were filed and oral argument was held before the Commission; and on May 14, 1954, the Commission released its Decision granting the application of WJR and denying the competing applications of Trebit and Butterfield. Timely petitions for rehearing were filed by Trebit and Butterfield. On December 6, 1954, the Commission released its Memorandum Opinion and Order changing and modifying its Decision of May 14, 1954 and reaffirming the grant to WJR.

2. On December 16, 1954, WJR filed its above-entitled application. As shown herein, by this application, WJR substituted an entirely

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new proposal for the one on which the hearing was held and on which it was preferred over Trebit and Butterfield in the comparative hearing. In summary, the comparative hearing and the Commission's actions of May 14, 1954 and December 6, 1954, deal with a comparison of the following aspects of the proposals of the three applicants for Channel 12 at Flint:

a. Location of transmitting antenna;
b. Height above average terrain of transmitting antenna;

c. Coverage of the proposed stations;
d. Network and non-network programs;
e. Studio facilities and equipment;
f. Staffing and integration; and
g. Other matters, such as the broadcast interests of the WJR principals.

With respect to each of the above-mentioned aspects of the competing proposals of WJR, Butterfield and Trebit, the Commission either awarded a preference to WJR or rejected a claim of preference asserted by either Butterfield or Trebit over WJR. And with respect to each of these aspects, WJR, in its above-entitled application, submitted an entirely new and different proposal. On April 14, 1955, the Commission granted the instant application without a hearing. Thus, by this action the Commission permitted WJR to amend its original proposal by the substitution of this new proposal.

3. On December 28, 1954, after the WJR plans for its new proposal were disclosed by the filing of the instant application on December 16, 1954, Trebit and Butterfield filed a "Joint Petition for Stay of Effective Date, Reopening of the Record, Rehearing and Further Relief" in the hearing proceeding on the Channel 12 applications. On January 5, 1955, no action having been taken on the Joint Petition, Trebit and Butterfield took separate appeals to the United States Court of Appeals for the District of Columbia Circuit. Separate petitions

by Trebit and Butterfield requesting reargument were also pending before the Commission at the time of these appeals. On February 9, 1955, the aforesaid appeals were consolidated by the Court; and on March 10, 1955, the Court stayed the proceedings before it pending action by the Commission on said petitions then pending before it.

By Memorandum Opinion and Order, dated April 1, 1955, the Commission denied said Joint Petition and the petitions requesting reargument. Thereafter, on April 26, 1955, Trebit and Butterfield each took new appeals to the Court; and these new appeals are now consolidated before said Court with the appeals previously taken. (Case Nos. 12,527, 12,528, 12,666 and 12,667.) The award of a preference to WJR on one or more of the aspects of its television proposal, mentioned in Paragraph 2, *supra,* over Butterfield and Trebit, the refusal to give due recognition and proper weight to the superiority claimed by Trebit and Butterfield over WJR in respect to matters listed above, and the denial of the petitions referred to above on April 1, 1955, are among the principal grounds alleged by Butterfield and/or Trebit in their said appeals. Moreover, the differences between the new and original WJR proposal described herein are directly related to the vital factors of the Commission's Decision in the hearing proceeding and fall within and are directly related to the proof required under the Commission's designated issues in that proceeding.

4. The Commission's action of April 14, 1955, granting the above-entitled application *ex parte* adversely affected the rights of Trebit and Butterfield as appellants before the Court of Appeals in the above-mentioned cases.[1] The Commission has, by its April 14th action,

not only acted to deprive Trebit and Butterfield of rights as appellants under Section 402 of the Communications

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[1] Trebit and Butterfield on May 5, 1955 filed a motion in the United States Court of Appeals for the District of Columbia Circuit in Cases No. 12,527, 12,528, 12,666 and 12,667, requesting an order directing the Commission to rescind its action of April 14, 1955 in order to protect the appellate jurisdiction of the Court and the rights of Trebit and Butterfield as appellants in the aforementioned cases.

Act of 1934, as amended, to obtain judicial relief from the Commission's action denying thier respective applications, but has also violated their substantive and procedural rights as applicants, under Sections 308 and 309 of the Act and the Commission's Rules. The illegality of the Commission's action of April 14, 1955 stems from the Commission's failure to recognize that when an appeal has been taken to the Court the status of both the successful and unsuccessful applicant continues to be that of an applicant for the permit in question. For there is no final action until after the Court's judgment and mandate and compliance therewith. And the Commission must preserve its power to reconsider the application of the originally successful applicant should the judgment of the Court require such action. In its consideration of the instant application the Commission completely failed to recognize the rights of Trebit and Butterfield, among which are the right to a fair comparative hearing guaranteed by the Supreme Court in *Ashbacker Radio Co.* v. *Federal Communications Commission,* 326 U. S. 327 and the right to "umbrella" protection guaranteed by Section 1.387(b) of the Commission's Rules. By the taking of the appeals, Trebit and Butterfield did not forfeit these or any other rights, rather they kept such rights alive. (See Sections 402(c) and 402(h) of the Communications Act of 1934, as amended.) Indeed, it is clear that by its grant of the above-entitled application, the Commission has permitted WJR to substitute a new proposal for that on which the comparative hearing was held—a proposal not entitled to comparative consideration with Trebit and Butterfield.

5. The instant application, an entirely new proposal filed under the guise of an application for modification of permit, is in reality an amendment to the original WJR proposal in the comparative hearing proceeding. The outcome of that proceeding is still undetermined since the

judicial consideration thereof (and for that matter the administrative consideration of the instant application) has not been concluded.

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Trebit and Butterfield are parties to that proceeding. They are therefore parties in interest with respect to the above-entitled application and as shown herein they are aggrieved and their interests are adversely affected by the grant thereof.

Comparison of the Original WJR Proposal With the New or Substituted Proposal

6. A comparison of the construction permit granted to WJR on May 14, 1954, and the application, the record and the Commission's Decision of May 14, 1954, pursuant to which said permit was granted after comparative hearing, with the new or substituted construction permit issued to WJR on April 14, 1955 and the above-entitled application pursuant to which the latter permit was issued, reveals the following differences:[2]

a. *Location of transmitting antenna.* In its application which the Commission granted by its Decision of May 14, 1954, WJR proposed that its transmitting antenna be located approximately 20 miles southeast of the center (Post Office) of Flint. From this site, WJR would render service to the City of Detroit. In its new construction permit authorized by the Commission on April 14, 1955, the location of the WJR transmitting antenna has been moved to a point approximately 24 miles northwest of the center (Post Office) of the City of Flint. Thus, WJR's new site is some 44 miles northwest of its site specified in its original construction permit, the one compared with the proposals of Butterfield and Trebit.

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[2] For additional details and supporting documents, see "Joint Petition for Stay of Effective Date, Reopening of the Record, Rehearing and Further Relief" filed December 28, 1954 by Trebit and Butterfield in the hearing proceeding for Channel 12 (Docket No. 10268, etc.) which is incorporated by reference and made a part hereof.

b. *Height above average terrain of transmitting antenna.* In its decision of May 14, 1954, the Commission in comparing the efficacies of the sites and antenna heights proposed concluded that no preference could be given WJR and Butterfield, each of whom proposed sites on high ground some distance from Flint, over Trebit, which proposed a site on lower ground but closer to Flint. Only by a comparison of the abandoned WJR proposal with the Butterfield and Trebit proposals was the Commission

able to equate the three. However, the situation is quite different under the new construction permit of WJR. Not only is the new site further from Flint than the abandoned one, but it is some 450 feet lower than the previous site and more than 200 feet lower than the site proposed by Trebit.

c. *Coverage of the proposed stations.* (1) Similarly, from a comparison of the area and population within the Grade A and Grade B contours of the new proposal of WJR with the area and population within these contours under the original construction permit, it is clear that WJR's proposal authorized by the Commission on April 14, 1955 is a new proposal. The following chart and the facts set forth below illustrate the differences:

	WJR Original Authorization of May 14, 1954	WJR[3] New Authorization of April 14, 1955
Grade A—area	6,320 sq. mi.	5,985 sq. mi.
Grade A—population	3,620,660	865,387
Grade B—area	10,800 sq. mi.	11,180 sq. mi.
Grade B—population	4,302,500	1,325,545

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[3] See Joint Petition referred to in footnote 2.

(2) A further comparison of the areas and populations relating to the old and the new proposals is equally enlightening.

(a) *Area.*

1. Sixty-nine percent of the area in the city service contour of the May 14, 1954 authorization will not receive such service under the new authorization of April 14, 1955.
2. Sixty-eight percent of the area in the city service contour of the new authorization would not receive such service under the original authorization.

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3. Fifty-nine percent of the area in the Grade A contour of the original authorization will not receive such service under the new authorization.
4. Fifty-seven percent of the area in the Grade A contour of the new proposal would not receive such service under the original authorization.
5. Thirty-seven percent of the area in the Grade B contour of the old authorization will not receive service under the new authorization.
6. Thirty-nine percent of the area in the Grade B contour of the new authorization will not receive service under the original authorization.

(b) *Population.*

1. Ninety percent of the population in the City service contour of the original authorization will not receive such service under the new authorization.
2. Fifty-two percent of the population in the city service contour of the new authorization would

not receive such service under the original authorization.

3. Eighty-nine percent of the population in the Grade A contour in the original authorization will not receive such service under the new authorization.

4. Fifty-four percent of the population in the Grade A contour of the new authorization would not receive such service under the original authorization.

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5. Seventy-five percent of the population in the Grade B contour of the original authorization will not receive such service under the new authorization.

6. Twenty percent of the population in the Grade B contour of the new authorization would not receive such service under the original authorization.

d. *Network and non-network programs.* (1) In its application granted by the Commission's Decision of May 14, 1954 WJR proposed on affiliation with the DuMont Television Network. However, it has abandoned that plan for in its new application it asserts it will affiliate with the Columbia Broadcasting System. Originally WJR proposed that 9.95% of its time would be devoted to network commercial programs and 17.41% of its time would be devoted to network sustaining programs (total network time 27.36%). It now, under its new authorization proposes that these percentages will be 39.34%, 1.35% and 40.69%, respectively. Originally, WJR proposed that 39.13% of its broadcast time would be devoted to film programs, whereas, under its new authorization only 25.78% of its broadcast time will be devoted to such programs. As of the May 14, 1954 Decision, WJR proposed that 65.94% of its time would be commercial, but now under its new authorization that figure will be 73.31%.

(2) With respect to non-network programs under its original and new authorizations there have also been substantial changes. Programs have been reclassified as to source and type, shifted on the schedule and changed as to time length. In summary, except for the titles there is little similarity between the original local program proposal and that under the new authorization.

e. *Studio facilities and equipment.* Under its original authorization, WJR was to build a new, elaborate two-story studio building costing $766,821.00. It now will use a one-story, smaller,

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second-hand structure valued at $125,000.00. And different equipment is now proposed under its new authorization.

f. *Staffing and integration.* With respect to these criteria WJR has also changed its plans under its new authroization. For example, a Vice President who originally was to devote 80% of his time to the station and other named personnel who also were to devote substantial time to the station and upon whom WJR and the Commission relied, will not so perform under the new authorization.

g. *Other matters.* In like manner, under the new authorization the WJR cost estimates and plans for financing have been changed; and the broadcast interests of WJR principals are different.

7. The *ex parte* action of the Commission taken on April 14, 1955 allowing such substntial amendments to the WJR

Channel 12 application was in direct violation of the Commission's rules governing amendments to applications (Sections 1.365 and 1.387(b)); deprived Trebit and Butterfield of the procedural due process to which they are entitled as applicants for Channel 12; and rendered futile the comparative hearing which was held on the Trebit, Butterfield and WJR Channel 12 applications, thus nullifying the requirement of *Ashbacker Radio Co.* v. *United Communications Commission,* 326 U. S. 327, that the Commission afford competing applicants a fair and meaningful hearing.

CONCLUSIONS

8. Thus, WJR abandoned its original proposal and the Commission, by its action of April 14, 1955, illegally permitted it to substitute its new proposal therefor. Moreover the differences enumerated above not only are directly related to the vital factors of the Commission's decision of May 14, 1954 but also fall within and are directly related to the proof required under the Commission's designated issues in that comparative hearing case.

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PRAYER FOR RELIEF

WHEREFORE, the premises considered it is respectfully prayed that the Commission reconsider and set aside the grant of the above-entitled application in accordance with Section 405 of the Communications Act of 1934 as amended, and Sections 1.365, 1.387(b) and 1.390(a)(3) of its Rules and deny, dismiss or return said application.

* * * * * * * * * *

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FEDERAL COMMUNICATIONS COMMISSION

JUNE 10, 1955

Memorandum Opinion and Order

By the Commission: Commissioners Hyde and Doerfer not participating; Commissioner Lee concurring and issuing additional views in which Commissioner Hennock concurs.

1. The Commission has before it for consideration (1) a "Joint Petition for Rehearing, Reconsideration and Further Relief" filed on May 12, 1955, by Trebit Corporation (Trebit), Flint, Michigan, and W. S. Butterfield Theatres, Inc. (Butterfield), Detroit, Michigan, pursuant to Section 405 of the Communications Act of 1934, as amended; (2) a "Petition Protesting Grant and For Reconsideration or Rehearing" filed on May 12, 1955, by Lake Huron Broadcasting Corporation (Lake Huron), permittee of television broadcast station, WKNX-TV, Channel 57, Saginaw, Michigan, pursuant to Sections 309(c) and 405 of the Communications Act; (3) a "Protest to Grant" filed on May 13, 1955, by Inland Broadcasting Company (Inland), permittee of television station WTOM-TV, Channel 54, Lansing, Michigan, pursuant to Section 309(c) of the Communications Act; (4) a "Protest and Petition for Reconsideration" filed on May 16, 1955, by Sparton Broadcasting Company (Sparton), permittee of television broadcast station WWTV, Channel 13, Cadillac, Michigan, pursuant to Sections 309(c) and 405 of the Communications Act; (5) a "Motion to Dismiss or Deny Joint Petition" and (6) a "Reply of WJR, The Goodwill Station, Inc.", both filed on May 17, 1955, by WJR, The Goodwill Station, Inc. (WJR): (7) "Answer to 'Reply of WJR, The Goodwill Station, Inc.' " filed on May 23, 1955, by Lake Huron; and (8)a "Response to Reply to WJR", filed on May 23, 1955, by Sparton. All of the above protests and petitions are directed against the Commission's action of April 14, 1955, granting without hearing the above-entitled application, and all, except the petition filed by Trebit and Butterfield, request that the Commission either set aside the grant or postpone the effective date thereof and designate WJR's application for hearing on the issues specified by each of

the petitioners and such further issues as may be prescribed by the Commission. In addition, Sparton requests that the Commission immediately postpone the effective date of the grant pending decision on its protest and petition. This request was denied by Commission order, dated May 25, 1955. Trebit and Butterfield's joint petition requests that the Commission reconsider and set aside the grant of the above-entitled application and deny, dismiss or return the application.

2. On May 14, 1954, the Commission, after a comparative hearing, granted the application of WJR for a construction permit for a new television broadcast station on Channel 12 assigned to Flint, Michigan, and denied the competing applications of Trebit and Butterfield. On December 6, 1954, the Commission issued a Memorandum Opinion and Order denying petitions for rehearing filed by Trebit and Butterfield. The construction permit so granted provided for a transmitter location 23 miles southeast of Flint in the direction of Detroit. On January 5, 1955, Trebit and Butterfield filed separate appeals in the United States Court of Appeals for the District of Columbia Circuit (*W. S. Butterfield Theatres, Inc.* v. *F. C. C.*, No. 12527 and *Trebit Corporation* v. *F. C. C.*, No. 12528.)

3. On December 16, 1954, WJR filed the above-entitled application for modification of its construction permit to changs its transmitter location from 23 miles southeast of Flint to 20.5 miles northwest of the city limits of Flint. The applicant also requested minor antenna changes, a change of studio location within Flint, changes in studio facilities, and indicated changes in programming, a change in network affiliation from DuMont to CBS, and a change

in staff proposals. The Commission granted the application without hearing on April 14, 1955.[1]

4. Trebit and Butterfield claim standing to request reconsideration of the grant of the above-entitled application under Section 405 of the Communications Act by reason of their status as the unsuccessful applicants for Channel 12 in Flint. They argue, in this respect, that the grant of the application adversely affected their rights as appellants before the Court of Appeals, because the application was in reality an amendment to WJR's original proposal in the comparative hearing, ". . . filed under the guise of an application for modification of permit . . ." In its opposition to Trebit and Butterfield's joint petition, WJR argues that neither has standing under Section 405 of the Act to request reconsideration; that the proceeding involving their applications has been concluded and neither is a present applicant for Channel 12; that the fact that appeals from the Commission's decision are pending before the Court does not change that fact; and that neither has alleged that economic injury will be or has been caused as a result of the modification of the original construction permit.

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5. We find no support in the Communications Act of 1934, as amended, in prior Commission decisions, or in Court decisions, for the claim to standing made by Trebit and Butterfield based on their status as the unsuccessful applicants for Channel 12 in Flint. The proceeding involving Trebit's and Butterfield's applications for construction permits has been concluded. As noted *supra*, ap-

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[1] On May 5, 1955, Trebit and Butterfield filed a motion in the United States Court of Appeals for the District of Columbia Circuit requesting an order directing the Commission to rescind its action of April 14, 1955. By order of May 20, 1955, the Court directed that the motion be held in abeyance pending hearing of the appeals on the merits. Trebit and Butterfield had also appealed from denials of subsequent pleadings related to WJR's application for modification of the construction permit. Case Nos. 12666, 12667.

peals from the Commission's decision granting the construction permit to WJR are pending in the U. S. Court of Appeals for the D. C. Circuit. This fact does not alter the petitioners' status. The Commission's decision has not been stayed, and in the event it is reversed, the basic construction permit and any modification thereof will be vacated and all of the applications reconsidered. Under Section 402(h) of the Act, this must be upon the original record unless the Court direct otherwise. The grant of the instant application does not make the appeals moot and can in no wise adversely affect the interests of the petitioners as applicants if the matter is remanded by the Court of Appeals. Since the petitioners are no longer applicants for Channel 12, standing cannot be based upon a former status. It should be noted that even if the instant grant were to be set aside, this would not serve to reinstate Trebit and Butterfield as applicants for Channel 12. Accordingly, we find that Trebit and Butterfield have no standing to request reconsideration of the grant of the above-entitled application. *Sacramento Telecasters, Inc.*, March, 1955 (FCC 55-318); *WJR, The Goodwill Station, Inc.*, April, 1955 (FCC 44-452). Therefore, the joint petition filed by Trebit and Butterfield must be dismissed.

6. Lake Huron claims standing as a party in interest under Section 309(c) of the Communications Act and a person aggrieved and whose interests are adversely affected under Section 405 of the Act, as the licensee of standard broadcast station WKNX and the permittee of television station WKNX-TV, Channel 57, Saginaw. In support of its claim to standing, Lake Huron alleges that under its original construction permit, WJR did not provide a Grade A signal to Saginaw; that under the modified permit, the transmitter location is 14 miles from the center of Saginaw; that the city of Saginaw will be entirely encompassed by the principal city (77 dbu) signal of WJRT; that op-

erating from this location WJRT will be in direct competition with Lake Huron's AM and TV stations; that in consequence of the grant Lake Huron will lose its CBS network programs and other sources of revenue; and that the additional competition will thereby result in the complete loss of Lake Huron's investment in WKNX-TV and will compel cessation of Lake Huron's television service to Saginaw and the surrounding area.

7. Inland claims standing as a party in interest under Section 309(c) of the Communications Act as the permittee of television broadcast station WTOM-TV, Channel 54, in Lansing, Michigan. Inland alleges that under WJR's original construction permit, WJRT would not have rendered Grade A service to Lansing; that as a result of the transmitter move, the Grade A contour of WJRT will substantially overlap the Grade A contour of WTOM-TV and will encompass the city of Lansing; that WJRT will be a direct competitor to WTOM-TV; that the transmitter move will result in WTOM-TV losing ABC programs which it now carries and, as a result, it will also lose regional and national advertisers; and that a Detroit advertiser has already failed to renew its advertising over WTOM-TV because of the proposed WJRT operation with a resultant loss of from $600 to $700 per month in revenue.

8. Sparton claims standing under Sections 309(c) and 405 of the Communications Act as the permittee of television broadcast station WWTV, Channel 13, Cadillac, Michigan. Sparton alleges that it is affiliated with CBS, ABC and DuMont networks; that such network programming has enabled it to sell national, regional and local spots, which sales constitute the major portion of its revenues; that operating from its proposed location, WJRT will cause destructive (adjacent channel) interference in

Sparton's present service area, which will, in turn, cause a loss of audience and advertising revenues, and will "seriously endanger" Sparton's network affiliation. In addition, Sparton alleges that the proposed transmitter move will bring WJRT into competition with WWTV for the first time through overlap of as much as 16.3% of WWTV's Grade A service area and overlap of as much as 23.4% of WWTV's Grade B service area; and that this competition will result in the loss of the "full value" of Sparton's network affiliation, to the extent that there is a "serious possibility" that Sparton would be forced to suspend or cease operations altogether.

9. Lake Huron, in support of its protest and petition, alleges, in substance, that the grant of the WJR application for modification of construction permit contravenes the requirements of Section 3.607 of the Rules, the Commission's statements of policy, and the principnles embodied in Section 307(b) of the Communications Act and adopted in the Sixth Report and Order; that the grant will impair the ability of UHF stations in Saginaw and Lansing, Michigan, to compete effectively by aggravating the intermixture of VHF and UHF service in those areas and will cause the likely loss of service of the UHF station; that the grant is in derogation of the Commission's own policy statement set forth in its Notice of Proposed Rule Making in Docket No. 11297 (proposing to limit transmitter sites to not more than five miles from a city's limits), and that the showing made by WJR in support of a waiver of the 5-mile limitation did not justify such waiver; that the grant is against the public interest because it sanctions misrepresentations and non-disclosure of material facts with respect to WJR's lack of intention to construct the station originally applied for and authorized; that the grant is against the public interest because WJR abdicated to other persons and organizations its basic and primary responsi-

bility and duty as a permittee of broadcast facilities to determine the nature of its operations in the public interest; and that the grant is in violation of Sections 1.319 and 1.387(b) of the Rules and the doctrine of the *Ashbacker* case.[2]

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10. Inland, in support of its protest, alleges in substance, that the proposed transmitter move is contrary to the principles underlying the Table of Assignments; that the grant is not in the public interest because it will seriously cripple, if not eliminate outright, the existing UHF operations in Lansing and Saginaw, and will hold off any hopes of additional UHF service in those areas; that if commercial UHF is destroyed, non-commercial educational stations in the area, which are also UHF, will also be destroyed, because people will no longer buy UHF receivers or converters; and that the WJRT transmitter move is an act of misrepresentation and non-disclosure which the Commission should not condone.

11. Sparton alleges, in support of its protest and petition for reconsideration, generally the same matters alleged by Lake Huron and Inland, and in addition, alleges that the transmitter move will cause destructive electrical interference with a resultant loss of service to an area now served by WWTV; that because of the increased overlap of WWTV with other CBS affiliates, WWTV will lose sponsors; and that its program quality will thereby suffer to the detriment of the public it serves.

12. The above protestants request that, pursuant to the provisions of Section 309 of the Communications Act, the Commission designate the above-entitled application for hearing on the issues specified in their respective pro-

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[2] *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327.

tests, together with such further issues as may be prescribed by the Commission; make each of them a party to the proceeding; and pending hearing and decision, postpone the effective date of the Commission's action to the effective date of the Commission's decision after hearing. Lake Huron and Sparton also request reconsideration or rehearing of the Commission's action under Section 405 of the Communications Act.

13. In its reply to the above protests WJR questions whether the protestants have met the statutory test of standing, but in order ". . . to expedite final action . . ." concedes that each of the protestants possesses the requisite standing. Further, WJR states that it does not object to any of the issues framed by the protestants, except the issues framed by Sparton insofar as they relate to electrical interference and overlap. WJR also urges that, in adducing evidence in support of the issues, each of the protestants be limited to the specific allegations set forth in its protest; that the burden of proceeding with the introduction of evidence and the burden of proof should be placed upon the protestants; that the hearing be set to commerce at an early date; and necessary proceedings after hearing be expedited.

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14. In light of the fact that Lake Huron, Inland and Sparton are permittees of television broadcast stations in Saginaw, Lansing and Cadillac, Michigan, respectively; that each has alleged it derives operating revenues from the sale of national, regional and local advertising from the area proposed to be served by WJRT from its new transmitter location; that the proposed transmitter move will result in WJRT placing a principal city signal over Saginaw for the first time, in placing a Grade A signal over Lansing for the first time, and in substantially over-

lapping the Grade A service area of Sparton's station WWTV for the first time, as well as causing adjacent channel interference to WWTV; and that each of the protestants has alleged that it has been or will be economically injured by the grant complained of, we find that Lake Huron, Inland and Sparton are each a "party in interest" within the meaning of Section 309(c) of the Communications Act, and Lake Huron and Sparton are each a "person aggrieved" within the meaning of Section 405 of the Communications Act. *F. C. C.* v. *Sanders Brothers Radio Station,* 309 U. S. 470; *Midwest Television, Inc.,* 9 Pike & Fischer RR611; *Metropolitan Television Company* v. *F. C. C.,* ...... U. S. Appl. D. C. ......

15. The Commission finds, further, that each of the protestants has specified with particularity the facts, matters and things relied upon as required by the provisions of Section 309(c) of the Act to warrant designation of the above-entitled application for hearing on the issues specified by each in its protest, except as indicated hereinbelow. Inasmuch as all of the issues specified by Inland and Sparton, except issues "1" and "2" specified by Sparton, are encompassed within the issues specified by Lake Huron, we are setting for hearing the issues specified by Lake Huron in lieu of these specified by Inland and Sparton.

16. Issues "1" and "2" specified by Sparton are as follows:

> "1. To determine the effect of a grant of the above-styled application upon the existing operations of Stations WWTV, Cadillac, Michigan, WKNX-TV, Saginaw, Michigan, and other television stations in the area.
>
> "2. To determine the areas and populations to be served by the applicant's proposed television station and to determine whether the type and character of the

applicant's proposed program service will meet the needs of such areas and population."

With respect to Issue "1" above, no allegations have been made by Sparton relating to the effect of a grant upon any stations other than WWTV and WKNX-TV, and the issue is therefore too broad. An issue on the economic effect of a grant upon WKNX-TV has also been requested by Lake Huron. We will,

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therefore, include WWTV in that issue, and there is, therefore, no need for the separate issue on economic effect requested by Sparton.[3] It should be noted, however, that inclusion of this issue does not constitute a determination that the competitive effect of a grant upon existing stations is a relevant consideration. See *American Southern Broadcasters (WPWR),* 11 Pike & Fischer, RR1,054. This question will be determined in the hearing.

17. Issue "2" above is not acceptable as framed by the protestant to the extent it provides for a determination of the areas and population to be served by the applicant's proposed television station. Accordingly, we are reframing this issue so that it will elicit information as to coverage of WJRT's proposed operation in terms of Grade A and B field intensity contours as determined in accordance with the Commission's Rules. See *Westinghouse Radio Stations, Inc.,* 8 Pike & Fischer, RR381. The remainder of the issue is being retained as specified by the protestant.

18. In view of the foregoing, IT IS ORDERED That, insofar as the petitions herein request reconsideration of the Com-

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[3] While it appears that Issue "1" requested by Sparton related to the economic effect of a grant upon WWTV and WKNX-TV, if it was intended to relate to the effect of the grant of WJR's application in terms of the Commission's allocation principles and Section 307(b) of the Act, it is included in Lake Huron's first issue.

mission's action of April 14, 1955, pursuant to Section 405 of the Communications Act of 1934, as amended, they are denied, except with respect to the hearing provided for below; that, effective immediately, the effective date of the grant of the above-entitled application is postponed pending a final determination by the Commission with respect to the protests herein of Lake Huron Broadcasting Corporation, Inland Broadcasting Company, and Sparton Broadcasting Company; and that, pursuant to Section 309(c) of the Communications Act of 1934, as amended, the above-entitled application for modification of construction permit is designated for hearing at the offices of the Commission in Washington, D. C. on the following issues:

(a) To determine whether the type and character of the applicant's proposed program service will meet the needs of the communities and areas within the Grade A and Grade B field intensity contours of the television station proposed in the above-entitled application.

(b) To determine whether, in the light of the plans and intentions of WJR with respect to the location of the proposed television station, a grant of the application would be consistent with the provisions of Section 3.607 of the Commissions Rules, to principles in the Commissions Sixth Report and Order, and statements of policy of the Commission, or would contravene the requirements of Section 307(b) of the

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Communications Act of 1934, as amended.

(c) To determine whether WJR misrepresented and concealed from the Commission material facts with respect to its intentions to construct and operate the television station proposed in its original application for construction permit.

(d) To determine whether WJR abdicated to other persons and organizations its basic and primary responsibility to determine the nature of its operations in the public interest.

(e) To determine whether a grant of the said application is precluded by the provisions of Section 1.319 or Section 1.387(b) of the Commissions Rules or the doctrine of *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327.

(f) To determine whether the consequences of a grant of such application would be to impair the ability of stations WKNX-TV and WWTV to compete effectively with the station proposed by WJR in said application for MP or to deprive the public of the service of WKNX-TV or WWTV.

(g) To determine, in the light of the evidence adduced upon the foregoing issues, whether public interest, convenience or necessity would be served by a grant of the application of WJR, and whether the applicant is qualified to receive a grant of the application.

The burden of proof as to each of the above issues shall be on the protestants.

It Is Further Ordered, That the protestants and the Chief of the Broadcast Bureau are hereby made parties to the proceeding herein and that:

(a) The hearing or the above issues shall commence at 10:00 A. M. on June 27, 1955, before an Examiner to be specified by the Commission;

(b) The parties to the proceeding herein shall have fifteen (15) days after the issuance of the Examiners decision to file exceptions thereto and seven (7) days thereafter to file replies to any such exceptions; and

(c) The appearances by the parties intending to participate in the above hearing shall be filed not later than June 20, 1955.

IT IS FURTHER ORDERED, That the joint petition for reconsideration filed by Trebit Corporation and W. S. Butterfield Theaters, Inc. is hereby dismissed.

FEDERAL COMMUNICATIONS COMMISSION,*

MARY JANE MORRIS,
Secretary.

Adopted: June 8, 1955.
Released: June 10, 1955.

*ADDITIONAL VIEWS OF COMMISSIONER LEE IN WHICH COMMISSIONER HENNOCK CONCURS

I concur in the action taken by the Commission in designating, for a fact-finding hearing, the protests filed against the above-entitled application. I believe, however, that the burden of proof as to each of the issues specified in the Commissions hearing order should be placed on the applicant.

The construction permit granted applicant after a hearing authorized it to construct its station at a site 23 miles southeast of Flint. It now proposes to build its station 20.5 miles northwest of the city limits of Flint. In addition, it has changed its proposed operation in a number of material respects. To all intents and purposes, we have before us a proposal raising new and serious questions. It seems to me that under such circumstances the Commission should exercise its discretion under Section 309 (c) of the Act to place the burden on the permittee in this case.

BRIEF FOR APPELLANT W. S. BUTTERFIELD THEATRES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12527, 12752, and 14685

W. S. BUTTERFIELD THEATRES, INC., *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

Nos. 12528, 12753, and 14691

TREBIT CORPORATION, *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

No. 14717

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LAKE HURON BROADCASTING CORPORATION, *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

Appeals from Actions of the Federal Communications Commission

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May 19, 1959

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 19 1959

Joseph W. Stewart
CLERK

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED*

1. Whether, under the circumstances of this case, WJR could validly file and the Commission could, by *ex parte* action, validly grant WJR's December 16, 1954 application.

2. Whether either the Commission's decision and order of May 14, 1954, or its April 14, 1955 *ex parte* grant of WJR's December 16, 1954 application could confer rights upon, or change the status of, WJR to the detriment of appellants as mutually exclusive applicants for the same facilities.

3. Whether the Commission's decision and order of July 9, 1958, was the result of a comparative hearing as required by law.

4. Whether the proceedings had and the action subsequently taken by the Commission complied with the mandate of this court issued pursuant to its May 24, 1956 opinion.

5. Whether, in the proceedings subsequent to remand, the Commission properly made findings and conclusions based on substantial evidence as to all relevant and significant points of difference between the parties, and properly evaluated the record and these points of difference in reaching its decision.

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* As set forth in the stipulation filed herein on February 18, 1959, each of the three appellants submits its own statement of questions presented.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12527, 12752, and 14685

W. S. BUTTERFIELD THEATRES, INC., *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

Nos. 12528, 12753, and 14691

TREBIT CORPORATION, *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

No. 14717

LAKE HURON BROADCASTING CORPORATION, *Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

Appeals from Actions of the Federal Communications Commission

BRIEF FOR APPELLANT W. S. BUTTERFIELD THEATRES, INC.

JURISDICTIONAL STATEMENT

The cases consolidated in this proceeding are three appeals by W. S. Butterfield Theatres, Inc., three appeals by Trebit Corporation, and one appeal by Lake Huron Broadcasting Corporation from actions of the Federal Communications Commission involving the granting of applications filed by WJR, The Goodwill Station, Inc. The appeals of Butterfield and Trebit stem from a three-party comparative proceeding for a permit to construct and operate a television broadcast station on channel 12 at Flint, Michigan. They were taken pursuant to the provisions of section 402(b) of the Communications Act[1] and section 10 of the Administrative Procedure Act.[2]

Cases No. 12527 and 12528 were filed by Butterfield and Trebit on January 5, 1955, with Cases No. 12752 and 12753 having been filed by said parties on June 22, 1955. These cases, together with Cases No. 12666 and 12667 which had been filed on April 26, 1955, were briefed and were argued orally before this Court in a consolidated proceeding on March 13, 1956. On May 24, 1956, this Court reversed the action of the Commission and remanded Cases No. 12666 and 12667 for further hearing, but did "not reach the questions in Nos. 12527, 12528, 12752 and 12753." *W. S. Butterfield Theatres, Inc.* v. *FCC,* 99 U.S. App. D.C. 71, 237 F.2d 552 (1956).

Cases No. 14685 and 14691 were filed by Butterfield and Trebit, respectively, on September 22, 1958, and September 24, 1958. These cases attacked the validity of the actions taken by the Commission in the proceedings on remand pursuant to this Court's May 24, 1956 reversal in Cases No. 12666 and 12667. On January 15, 1959, upon the joint motion of Butterfield and Trebit, this Court reinstated Cases No. 12527, 12528, 12752, and 12753, and consolidated them with Cases No. 14685 and 14691 for briefing and argument here. On motion of intervenor WJR, this Court on January 26, 1959 consolidated the Lake Huron appeal in Case No. 14717 into this proceeding.[3]

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[1] Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 66 STAT. 718, 47 U.S.C. § 402(b).

[2] Act of June 11, 1946, c. 324, § 10, 60 STAT. 243, 5 U.S.C. § 1009.

[3] Lake Huron has never been an applicant for channel 12 in Flint, and the arguments advanced by that appellant are purely incidental to the comparative hearings in which Butterfield and Trebit have been applicants and to which Butterfield and Trebit direct their appeals. Lake Huron's position and interest are set forth in its brief, and shall not be alluded to further herein.

STATEMENT OF THE CASE

This proceeding involves the mutually exclusive applications of appellants Butterfield and Trebit, and of intervenor WJR, for authority to construct and operate a television broadcast station on channel 12 in Flint, Michigan. Each of the three applicants is a Michigan corporation. This is the second time this Court has been called upon to review the merits of Commission action relating to this subject and to these parties. The prior appeals and the instant ones are so interrelated as to amount to a single case or controversy, making a presentation of the material facts in both proceedings necessary to an understanding of the questions now presented for decision. Additionally, it is Butterfield's intention that this brief be considered to supersede its prior brief with respect to all of its now-pending appeals.

Following a lengthy comparative hearing which had commenced in November of 1952, the Commission on May 12, 1954 adopted a decision which granted the application of WJR and denied the competing applications of Butterfield and Trebit. (J.A. 400-91.)[4] The Commission's grant to WJR had been preceded by an initial decision of the hearing examiner favoring Trebit and denying the applications of WJR and Butterfield. (J.A. 317-72.) Exceptions to that initial decision had been filed by WJR, Butterfield, and the Commission's Broadcast Bureau, and oral argument on such exceptions before the Commission en banc had followed. (See J.A. 399-402.)

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[4] A Joint Appendix was printed when Cases No. 12527, 12528, 12666, 12667, 12752, and 12753 were before this Court previously. As directed in the Court's order herein dated January 15, 1959, wherever relevant portions of the record have been printed in the original Joint Appendix they will be cited in the briefs as "J.A." In some instances, the pagination of the new record differs from that of the prior record. Where that occurs, material in the original Joint Appendix will be cited as "J.A." followed by a parenthetical reference to the corresponding new record pages. Material which is contained only in the new record will be cited as "R.", with the Supplemental Joint Appendix to include record pagination as well as its own, and references to the transcript of the hearing on remand are cited as "Tr."

In short, all of the customary and legally necessary procedures had been followed at the agency level before the adoption by the Commission of its May 12, 1954 decision granting WJR's application.

In reversing the hearing examiner and awarding the facility to WJR, the Commission compared the proposals of the three applicants with respect to certain specific criteria.[5] As to each of certain aspects of the proposals submitted by the competing applicants, in its conclusions the Commission awarded or rejected claimed preferences on the basis of its interpretation of the record which had been compiled during the hearing. (J.A. 452-83.) Concerning several of the criteria dealt with, the Commission found no decided preference for any applicant. For example, after an extended discussion of the facts of record and an analysis of the examiner's findings and conclusions with respect to sites, the Commission concluded that no preference could be awarded to any applicant on the basis of proposed transmitter location or antenna height, or on the basis of the areas and populations to be served by the respective applicants.[6] (J.A. 406-09, 469-82.)

The dominant facts in the proposal which WJR made on the hearing record and upon which the Commission based its May 12, 1954 grant were: (1) an affiliation with the DuMont network, which resulted in WJR's proposing a uniquely high percentage of local live programming; (2) a transmitter site some 17 miles southeast of Flint; and (3) an impressive new studio building costing approximately $750,000, with remote studios in Detroit. The controlling preferences given to WJR over both Butterfield and Trebit hinged on these and related facts. (See J.A. 482-83.) In view of what subsequently transpired, specific notice must be taken of certain aspects of these factors.

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[5] The Commission made findings of fact with respect to the following areas of comparison: (a) heights, powers, sites and predicted contours (J.A. 406-08); (b) site selection (J.A. 408-09); (c) studio and transmitter facilities (J.A. 409-11); (d) corporate matters and legal qualifications (J.A. 411-17); (e) other interests and background material, including past broadcast records and preparation for television (J.A. 417-34); proposed staffs (J.A. 434-36); (f) network affiliations (J.A. 436-37); (g) rates (J.A. 437); and (h) program proposals (J.A. 437-52).

[6] This site question later was to become critical. In its decision, the Commission went to considerable lengths to wipe out the substantial preference which the examiner had awarded to Trebit on the basis of its site selection and area of coverage. (J.A. 469-82.) However, immediately after winning the hearing, among other major changes WJR moved its transmitter site 44 miles. This was one basis for the Court's prior reversal, and will be referred to further *infra*.

After pointing out that the proposed studio facilities and technical equipment of all of the applicants were adequate, the Commission had the following to say concerning WJR's proposal:

> "WJR, however, proposes a new and modern studio building in Flint, designed especially for television, and a transmitter structure substantially more elaborate than the facilities proposed by the other two applicants. * * * In our opinion, superior studio facilities and equipment does not, in and of itself, form a proper basis for preference. However, when such superior facilities are related to the applicant's programming proposal, they become important and should be considered. * * * In extending a preference to WJR in this regard, we are not—as the Examiner feared—placing a premium on unnecessary and superfluous expenditures. * * * WJR also proposes substantially more local live programs than the other applicants. The elaborate facilities proposed by WJR, when considered in relation to these factors, entitle WJR to a preference." (J.A. 461-62.)

After the Commission's May 12, 1954 decision in favor of WJR, Butterfield and Trebit filed petitions for rehearing pursuant to section 405 of the Communications Act.[7] Among other things challenged in those pleadings were the conclusions reached by the Commission to the benefit of WJR concerning its proposed programming, studios, and transmitter site. In opposing these petitions, WJR strongly defended and relied squarely on the proposals which it had made and which had been tested by cross-examination during the comparative hearing. It made no admission that substantial changes had occurred, or even might occur, in the proposals which had formed the basis for its grant. The petitions for rehearing were denied by the Commission on December 2, 1954. (J.A. 491-503.)

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[7] Act of June 19, 1934, c. 652, § 405, 48 Stat. 1095, as amended, 66 Stat. 720, 47 U.S.C. § 405.

Two weeks thereafter—on December 16, 1954—without any notice to Butterfield or Trebit, WJR filed an application with the Commission seeking to change substantially the authority granted it by the Commission's decision of May 12, 1954. Among other things it sought: (1) to change its network from DuMont to CBS—resulting in a radical alteration of its original program proposals (see J.A. 436-37); (2) to move its transmitter some 44 miles—from a location southeast of Flint to one northwest of the city (see J.A. 525, 533-35); and (3) to substitute a $125,000 secondhand studio building for the elaborate new $750,000 structure upon which it had relied at the hearing. (See J.A. 251-55, 409-10, 526-31.)

Confronted with this situation, Butterfield and Trebit on December 28, 1954, filed a joint petition with the Commission seeking a stay, reopening of the record, rehearing, and further relief. (J.A. 503-35.) It was pointed out that WJR's conduct amounted not only in fact, but in law, to an abandonment of the application and proposals upon which it had relied in the comparative proceeding. Critical issues were also presented concerning the good faith of WJR and its principals, in view of evidence which clearly indicated that WJR had in fact abandoned its original proposals while still defending them vigorously before the Commission. The Commission was requested to vacate and set aside its grant to WJR; to reopen the record and order further hearings so that all relevant and material facts concerning WJR's abandonment of its proposals might be examined; and to explore the good faith of WJR and its principals with respect to its conduct. (J.A. 523-24.) By January 5, 1955, 30 days after the Commission released its denial of the original petitions for rehearing, the Commission had taken no action on said joint petition. Accordingly, to protect their legal positions, Butterfield and Trebit took appeals to this Court in Cases No. 12527 and 12528, such appeals being addressed to the Commission's May 12, 1954 grant of WJR's application (and the December 2, 1954 denial of the petitions for rehearing directed thereto).

On March 31, 1955, the Commission denied Butterfield and Trebit's joint petition of December 28, 1954. (J.A. 540-48.) In so doing, the Commission proceeded *ex parte* to compare the modified WJR proposals (contained in its December 16, 1954 application) with the original proposals which had been submitted in the comparative hearing. The Commission held that the differences in the two proposals were negligible and not such as to destroy preferences previously given WJR against its competitors. (J.A. 542-47.) While taking this action, the Commission incongruously stated that the second WJR application of December 16, 1954 was not before it for consideration on its merits but only for the purpose of determining the differences between WJR's two proposals. (J.A. 542.) It is pertinent here to observe that while the Commission thus compared WJR's two proposals, it compared neither with those made in the hearing by Butterfield and Trebit. On April 26, 1955, Butterfield and Trebit appealed from this action in Cases No. 12666 and 12667.

On April 14, 1955, the Commission by further *ex parte* action had granted the second WJR application of December 16, 1954, thus authorizing WJR to change radically the proposals which had served as the basis for the Commission's original May 12, 1954 grant. On May 12, 1955, Butterfield and Trebit filed a joint petition for rehearing directed to this action, pursuant to section 405 of the Act. [J.A. 598-608 (R. 8234-43).][8] This petition analyzed the basic differences between WJR's first and second proposals, and pointed out that the Commission's April 14 *ex parte* grant amounted to an acceptance of basic and substantial amendments to an application upon which hearings had been conducted, in a case in which the administrative process was still in progress. It was further pointed out that such action was contrary to sections 1.365(a)[9] and 1.387(b)(3)[10] of the Commission's rules and regulations as well as in violation of the rule of the *Ashbacker* case.[11] Reconsideration and vacating of such action was requested, as was the rejection and/or denial of WJR's second (December 16, 1954) application as dictated by sections 1.365(a) and 1.387(b)(3) of the Commission's rules.

On June 8, 1955, the Commission adopted a memorandum opinion and order dismissing the May 12, 1955 joint petition. [J.A. 608-21 (R. 8249-57).] In so doing, it held that Butterfield and Trebit had no standing to attack the action granting WJR's second application. Specifically, it held that the status of Butterfield and Trebit as applicants had terminated with the Commission's grant of WJR's original application. [J.A. 610-12 (R. 8250-51).] Cases No. 12752 and 12753, filed with this Court on January 22, 1955 by Butterfield and Trebit and reinstated by the Court in this consolidated proceeding, are directed against this action.

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[8] In the interest of avoiding possible confusion, it should be noted that the Commission's system of joining multiple dockets in a single proceeding often results (as here) in a system of pagination which is not completely consistent with the chronological sequence of events. This particular pleading, while printed in the original Joint Appendix, has a new pagination in the present record; both citations have been given.

[9] Section 1.365(a) of the Commission's rules, as then in effect, is found at 12 FED. REG. 3019, as amended, 13 FED. REG. 660 (1948). It is quoted in the Supplement to this brief. Subsequently, it was recodified and redesignated as section 1.311 of the Commission's rules, 47 C.F.R. § 1.311, 22 FED. REG. 10996 (1957).

[10] Section 1.387(b)(3) of the Commission's rules, as then in effect, is found at 18 FED. REG. 938, as amended, 19 FED. REG. 4445 (1954). It is quoted in the Supplement to this brief. Subsequently, it was recodified and redesignated as section 1.106(b)(1) of the Commission's rules, 47 C.F.R. § 1.106(b)(1), 22 FED. REG. 10988 (1957).

[11] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

In the interval between the Commission's April 14, 1955 grant of WJR's December 16, 1954 second application and the filing of the May 12, 1955 joint petition for reconsideration to the Commission addressed to such action, Butterfield and Trebit on May 5, 1955 filed a petition with this Court. That petition detailed the major and extensive changes in the WJR proposal which had been approved *ex parte* by the Commission's April 14 grant, and requested that the status quo be restored so that a meaningful appeal, based upon the comparative hearing record already under the jurisdiction of the Court, could be had.[12] On May 20, 1955, after oral argument, this Court ordered that said petition "be, and it is hereby, held in abeyance pending hearing of these appeals on the merits without prejudice to any further and proper proceedings before the Federal Communications Commission or before this Court which appellants are advised to take."

After briefing and argument in Cases No. 12527, 12528, 12666, 12667 and the subsequently filed Cases No. 12752 and 12753, this Court, on May 24, 1956, rendered its decision. *W. S. Butterfield Theatres, Inc.* v. *FCC, supra.* The Court reversed the Commission in Cases No. 12666 and 12667 for its having refused to grant the December 28, 1954 joint petition in which Butterfield and Trebit sought a reopening of the record and other relief in view of WJR's radically changed proposals. Holding that the Commission had "abused its discretion" in refusing to reopen the record and to conduct further proceedings as requested, the Court directed that such action be taken. With respect to the cases challenging the original grant to WJR and the actual grant of the subsequent modified application, the Court stated: "we do not reach the questions in Nos. 12527, 12528, 12752, and 12753."[13]

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[12] The day before that petition was filed (May 4, 1955), the Court had consolidated the four appeals then pending (Cases No. 12527, 12528, 12666, and 12667). The request for relief in the petition was based upon section 402(c) of the Communications Act, 47 U.S.C. § 402(c), which authorizes the Court to grant temporary relief to maintain the status quo of a matter under appeal, and upon the "all writs" provisions of section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a), which authorizes this Court to issue writs in aid of its appellate jurisdiction.

On the authority of the *Enterprise* case,[14] the Court flatly rejected the Commission's assertion that Butterfield and Trebit had lost their status as applicants with the original grant to WJR. In discussing the changes made by the filing of the second WJR application on December 16, 1954, the Court declared that the new proposal "goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants and 'the proceedings lose their comparative character.' "[15]

In discussing certain of the post-hearing changes in WJR's proposals—which were made without notice to either the Commission or its competitors—the Court declined to express an opinion concerning the effect thereof upon WJR's character and fitness as a licensee. It specifically refused, however, to join in the Commission's laudation of WJR's concealment and stated that its significance was one of the questions to be determined by the Commission in the reopened hearing.[16] In declining to rescind the Commission's April 14 grant of WJR's second application, the Court stated: "Appellant's rights are completely protected by our disposition of the two appeals relating to reopening of the record. The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed."[17]

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[13] W. S. Butterfield Theatres, Inc. v. FCC, *supra*, 99 U.S. App. D.C. at 73, 237 F. 2d at 554.

[14] Enterprise Co. v. FCC, 97 U.S. App. D.C. 374, 231 F. 2d 708 (1955), *cert. denied*, 351 U.S. 920 (1956).

[15] 99 U.S. App. D.C. at 75, 237 F. 2d at 556.

On October 17, 1956, the Commission adopted an order providing for further proceedings pursuant to its interpretation of this Court's May 24 opinion. An expedited hearing before an examiner was ordered on the following issues (R. 4737):

> "(1) To determine the differences between the proposals advanced by WJR, The Goodwill Station, Inc., in its original application and those proposals advanced by it in its application for modification of its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.
>
> "(2) To determine, in the light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee."

At an early date it became apparent that considerable confusion and difference of opinion existed concerning the scope and purpose of the hearing to be conducted on remand. On November 2, 1956, a joint petition was filed by Butterfield and Trebit requesting clarification of the issues and the inclusion of additional issues dealing with the meaning and application of sections 1.365(a) and 1.387(b)(3) of the Commission's rules, with it being stressed that the hearing ordered by the Commission was not in compliance with the directive of this Court. (R. 7039-54.) On December 17, 1956, the Commission released a memorandum opinion and order in which it refused any clarification or modification of the two issues which had been set forth. It refused to vacate its April 14, 1955 *ex parte* grant of WJR's December 16, 1954 second application. It specifically refused to consider the application of sections 1.365(a) and 1.387(b)(3) of its rules to WJR's second application because, in its view, "WJR was, at that time, more than a mere applicant and was not to be treated under the Rules relating to applications * * *." (R. 7078.)

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[16] 99 U.S. App. D.C. at 74, n. 7, 237 F. 2d at 555, n. 7.

[17] 99 U.S. App. D.C. at 79, 237 F. 2d at 560.

After the appointment of an examiner, further attempts to clarify and modify the issues were made, both in conferences before the examiner and in a pleading filed with the Commission. (Tr. 124-48, 162-66; R. 4951-52.) It became increasingly apparent that no further truly comparative hearing was to be conducted, and that no comparison would be made between the showings made by Butterfield and Trebit and the proposals advanced by WJR in either its original or its second application. (Tr. 140.) Incredibly, despite this Court's specific ruling in this very case that the hearing was to retain its comparative nature, it became clear that the basic question to be dealt with by the examiner was whether or not the Commission's original preference of WJR could be affirmed on a non-comparative basis in the light of WJR's more recent conduct. (See R. 5024-30.)

Confronted with this situation which was so patently destructive of appellants' rights as applicants, Butterfield and Trebit on December 14, 1956, filed a petition for writ of mandamus with this Court requesting it to direct the Commission to proceed in accordance with the Court's decision of May 24, 1956. Specifically, it was requested that the Commission be directed to set aside all grants previously made to WJR; to vacate the order of October 17, 1956, which provided for a further hearing on issues which were improper (or improperly construed); and to proceed with the comparative hearing as directed by this Court. This petition was denied by the Court on January 14, 1957.

A hearing pursuant to the Commission's order of October 17, 1956 subsequently was commenced, and was concluded in April of 1957. On September 12, 1957, the examiner released a supplemental initial decision recommending that the April 14, 1955 grant of WJR's second application be affirmed. (R. 5942-6041.) After exceptions by Butterfield and Trebit and oral argument thereon, the Commission on July 9, 1958 adopted its decision reaching this result. (R. 6367-6411.)

As had been anticipated, neither the Commission's decision nor the examiner's decision upon which it was based made comparative findings or determinations concerning the evidentiary showings made by Butterfield and Trebit vis-a-vis either the original or the modified proposals of WJR. Rather, the Commission's action amounted essentially to nothing more than a finding that WJR, in abandoning its original proposal and advancing a new one under the circumstances disclosed, had not defeated the preferences given it in the Commission's original decision of May 12, 1954. The only comparative consideration was WJR versus WJR—a contest intervenor could scarcely lose—rather than the required comparative consideration of three mutually exclusive applicants. The Commission's state of mind, rather than record disclosures, seems to have been the issue.

On July 25, 1958, Butterfield and Trebit filed a joint petition for rehearing addressed to the Commission's decision. (R. 7291-99.) The Commission was requested to consider and/or reexamine the following matters (R. 7291-92):

> "*Point 1.* WJR abandoned its application which was heard comparatively with those of petitioners.

> Since it neither did nor can amend its application in the manner presumably intended here, it is in default. Failure to dismiss the WJR application as in default is gross error prejudicial to the rights of petitioners.
>
> "*Point 2.* The Commission's decision of July 9, 1958 fails to accord petitioners the comparative consideration which is mandatory under the Communications Act and the decisions construing that act.
>
> "*Point 3.* The record in this proceeding must be reopened to consider post-hearing evidence which raises the question of whether or not WJR can or will carry out the essential program plan which represents the cornerstone of the so-called WJR modification application."

On the same day the Commission also was requested by Butterfield and Trebit to stay its decision of July 9. (R. 7301-02.) The motion for stay was predicated upon the reported, but then unconfirmed, failure of WJR to secure the network program service of CBS as it had proposed in its second application (and in the hearing on remand), resulting once again in wholesale changes in its program schedule. The motion requested that the Commission's decision be stayed pending further hearing on newly-discovered evidence that WJR could not, and would not, operate its television station in the manner most recently proposed by it in the hearings just concluded; for the second time there had been post-hearing changes in WJR's proposal.

On August 1, 1958, WJR filed an opposition to the motion for stay and petition for rehearing (R. 7304-27) in which it admitted that it would become an ABC affiliate rather than a CBS affiliate. (R. 7316.) Nonetheless, on that same day—only seven days after the motion was filed—the Commission denied the motion for stay. (R. 7330.) The stay was denied in part on the ground that the allegation of a network change "is based on industry rumors . . . and no actual facts in support of the said allegation are presented." (R. 7330.) In its haste to take such action, the Commission thus did not consider the WJR opposition in which it admitted its network change, and it denied Butterfield and Trebit the right to file a reply pleading. Thereafter, in response to Butterfield's request for reconsideration of the stay denial and for accelerated consideration of the petition for rehearing (R. 6431-36), the Commission on September 8, 1958, reaffirmed the stay denial and denied the petition for rehearing. (R. 6443-48.) Butterfield's appeal in Case No. 14685 and Trebit's appeal in Case No. 14691 were filed on September 22 and September 24, 1958, respectively.

STATUTES AND RULES INVOLVED

The relevant portions of those statutes and those rules of the Federal Communications Commission involved in the decision of these cases are set forth in a Supplement to this brief, *infra*.

STATEMENT OF POINTS

1. The Commission's original (May 12, 1954) grant to WJR, whether rightly or wrongly decided on the original hearing record, is no longer effective. The action of WJR on and subsequent to December 16, 1954 (when it filed its second application) constituted an abandonment of the bases for its grant.

2. WJR could not validly file, and the Commission could not legally grant, WJR's December 16, 1954 second application because:

   (a) The Commission's own rules precluded the acceptance and consideration of the application;

   (b) The rule of the *Ashbacker* case, and subsequent related cases, precluded the granting of the application; and

(c) Section 402(c) of the Communications Act precluded the granting of the application since "jurisdiction of the proceedings and of the questions determined therein" had been vested in this Court by virtue of then-pending appeals.

3. The hearing on remand was conducted on improper and inadequate issues, and was contrary to the decision of this Court which had directed further comparative proceedings.

4. Notwithstanding this Court's prior reversal herein, the Commission continued to consider WJR as occupying the preferred status of a permittee on remand, rather than as an applicant.

5. The decision reached by the Commission on remand was not a comparative decision as required by law.

6. At the termination of the hearing on remand, WJR once again made changes in its program proposals. The Commission abused its discretion by again refusing to reopen the record to consider the effect of those charges.

SUMMARY OF ARGUMENT

I

After a lengthy comparative hearing, the Federal Communications Commission on May 12, 1954 granted the application of intervenor WJR for channel 12 in Flint and denied the mutually exclusive applications of appellants Butterfield and Trebit. Only two weeks after the denial of petitions for rehearing directed against that decision, WJR filed on December 16, 1954 a second application in which it advanced proposals radically different from those which had been subjected to the hearing process and which had formed the basis for the Commission's preference of WJR.

The Commission ruled that WJR was then a permittee, rather than an applicant, and refused to consider the effect of the second application on its grant to WJR. On May 24, 1956 this Court reversed that determination by the Commission, holding that "the new evidence here goes to the foundation of the Commission's decision," and remanded the case for further comparative proceedings.

The proposals contained in the original WJR application were fictitious and unworkable, yet that application had formed the basis for the grant to WJR. When WJR submitted its second application, it thus abandoned the proposals contained in its first. Its actions were entirely voluntary; no government fiat prompted the abandonment of any of its original proposals. As a result of that abandonment, there is no basis for the original (May 12, 1954) grant to WJR, and the Commission's decision predicated on the abandoned proposals (challenged in Cases No. 12527 and 12528) should be vacated.

II

Judicial decisions have made it clear that a comparative hearing is not concluded at the instant of a grant. Rather, the successful applicant remains in the posture of an applicant (rather than a permittee) until the full administrative process, and judicial review thereof, are concluded. In view of this fact, two applicable rules of the Commission precluded the valid filing of the second application and precluded the Commission from giving it consideration.

The Commission's granting of WJR's second application similarly was unlawful. The *Ashbacker* doctrine makes it clear that one application cannot be granted unless full comparative consideration has been given to recognized mutually exclusive applications, yet here the Commission gave purely *ex parte* consideration to WJR's second application and never gave comparative consideration thereto. Moreover, in addition to *Ashbacker,* section 402(c) of the Communications Act was violated by the grant of the second application since jurisdiction of this proceeding was then vested in this Court as a result of pending appeals.

III

In the hearing on remand which was ordered by this Court, the Commission prescribed issues which were grossly improper, inadequate, and contrary to this Court's decision. The Commission previously had told this Court that it would vacate all grants to WJR in the event of a reversal in Cases No. 12666 and 12667, but when those cases were reversed the commitment was dishonored. On remand, in direct violation of this Court's decision, WJR again was treated as a permittee rather than an applicant, and no comparative consideration whatsoever was given to WJR's proposals vis-a-vis those of Butterfield and Trebit.

IV

The Commission adopted its decision on remand, affirming both prior grants to WJR, on July 9, 1958. Butterfield and Trebit sought a stay of that decision, after learning that WJR again planned a post-hearing change in its program proposals. Appellants were deprived of due process when the Commission hastily denied the motion without considering the WJR opposition in which a network change was admitted, and without permitting appellants the right to file a reply pleading as provided in the Commission's own rules. Later, in denying Butterfield and Trebit's petition for rehearing, the Commission ratified its prior errors on remand and committed new error by abusing its discretion in refusing to reopen the record to consider the effect of WJR's latest changes.

ARGUMENT

PRELIMINARY STATEMENT

The three-party contest for the use of channel 12 in Flint is the oldest and has been the most protracted proceeding of its kind in the history of the Commission. For consideration here, it can be divided into three phases or parts. The pending appeals by Butterfield and Trebit are addressed to the results of each of these parts.

The truly comparative part commenced in November of 1952 and culminated on May 12, 1954, when the Commission adopted its original decision granting the application of WJR and denying those of Butterfield and Trebit. This action is challenged in Cases No. 12527 and 12528. Second is the *ex parte* phase, begun on December 16, 1954 when WJR's second application was filed embodying proposals basically different from those upon which evidence had been taken in the hearing. The Commission's April 14, 1955 *ex parte* grant of this application was the final act in this phase, and is attacked in Cases No. 12752 and 12753. Third and last is that part which commenced with the Commission's October 17, 1956 order scheduling a hearing on remand pursuant to its interpretation of this Court's decision in Cases No. 12666 and 12667. The ultimate result of this phase was the Commission's action of July 9, 1958 which affirmed all previous grants to WJR, and its further action of September 8 denying Butterfield's and Trebit's petition for rehearing addressed thereto. The appeals in Cases No. 14685 and 14691 challenge these latest actions.

Butterfield asserts and will demonstrate that, whether rightly or wrongly made on the original hearing record, the Commission's May 12, 1954 grant of WJR's first application must be reversed because the proposal which the Commission preferred has been abandoned; that its April 14, 1955 *ex parte* grant of WJR's second application is void; and that its July 9, 1958 decision on remand affirming the prior grants to WJR is also contrary to law and void.

I

The Commission's May 12, 1954 Grant of WJR's Original Application Is Invalid Because the Proposals Which Formed the Basis of That Grant Have Been Abandoned

Nothing could be clearer than the fact that WJR has long since abandoned the proposals made by it in its original application which formed the basis of the Commission's decision of May 12, 1954. This is so because WJR's conduct in filing its second application of December 16, 1954 and its action since that date have made it manifestly clear that it not only would not, but could not, carry out the proposals originally made.

The basic differences between WJR's first and second proposals need not now be detailed. When recollection is had of the fact that the latter application proposed a transmitter location 44 miles distant from the first—and northwest of Flint rather than southeast; that a new and elaborate studio plant costing in excess of $750,000 was abandoned in favor of a second-hand one costing only $125,000; and that WJR's proposed network affiliation with DuMont was dropped in favor of one with CBS, the significance of the changes can readily be realized. As this Court observed in its May 24, 1956 opinion, "the effect of the new facts upon the Commission's decision is or should be palpably significant and proximate."[18] In reversing the Commission's denial of the petition to reopen the record, the Court made it clear that evidence concerning these subjects should not only have been received by the Commission because it was offered in proper and timely fashion, but because otherwise the comparative nature of the proceeding was destroyed.[19] But since then, still more has happened to demonstrate both the intention and the fact of abandonment.

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[18] 99 U.S. App. D.C. at 75, n. 10, 237 F. 2d at 556, n. 10.

In the extended proceedings conducted on remand subsequent to the Commission's hearing order of October 17, 1956, WJR offered evidence not only of its unwillingness but of its inability to carry out the proposals which it had originally made. It is of vital significance to note that the reasons given by WJR for the changes stem from the inherent unworkability of its original proposals. Thus, the important fact is abandonment, both in fact and in law. The Commission itself has recognized in other cases that an amendment can bring about such substantial changes in a basic proposal as to constitute a new application.[20] Moreover, when this matter was before the Court previously, the Court quoted and relied upon the statement of two members of the Commission who (in concurring in the granting of protests by existing licensees against WJR's new proposals) stated that: "To all intents and purposes, we have before us a proposal raising new and serious questions."[21]

Thus, in the light of WJR's abandonment of the proposals which led to its receiving a grant in the Commission's original decision of May 12, 1954, Cases No.

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[19] 99 U.S. App. D.C. at 75, 237 F. 2d at 556; McClatchy Broadcasting Co. v. FCC, 99 U.S. App. D.C. 199, 239 F. 2d 19 (1956), *cert. denied*, 353 U.S. 918 (1957). As the Court stressed in a parallel situation in the *Enterprise* case: "If this [reopening of the record] is not done the advantages of the comparative hearing are lost and its purposes frustrated." Enterprise Co. v. FCC, *supra* note 14, 99 U.S. App. D.C. at 378, 231 F.2d at 712.

[20] Crescent Broadcasting Corp., 4 PIKE & FISCHER RADIO REG. 518 (1948); Louisiana Television Broadcasting Corp., 9 PIKE & FISCHER RADIO REG. 894, 898 (1953).

[21] 99 U.S. App. D.C. at 76, 237 F. 2d at 557. As this Court stated in the *McClatchy* case, *supra* note 19, "We think that modifying some of the basic characteristics of a construction permit is tantamount to the issuance of a new and different permit." 99 U.S. App. D.C. at 204, 239 F. 2d at 24.

12527 and 12528 (which challenge that decision) must be reversed and the decision must be vacated.

II

WJR Could Not Validly File, and the Commission Could Not Legally Grant, WJR's December 16, 1954 Application

A. The Commission's Rules Precluded the Acceptance and Consideration of the Application

When WJR's second application was tendered for filing on December 16, 1954, two rules of the Commission were in effect which prevented its acceptance and consideration by the Commission. Section 1.387(b)(3) prevented its being filed and considered as an original application because it was mutually exclusive with others which had already been placed in a hearing posture in the Flint proceeding.[22] Section 1.365(a) prevented its being filed as an amendment to the original WJR proposal, because, as such, it was not timely.[23]

While regulations similar in purpose to section 1.365(a) relating to amendments antedated the *Ashbacker* case,[24] regulations of the type of section 1.387(b)(3) relating to "cut-offs" were adopted subsequent to that decision. The *Ashbacker* case specifically held that section 309 of the Communications Act, 47 U.S.C. § 309, requires mutually exclusive applications to be handled through the process of a comparative hearing. In the course of its opinion, the Supreme Court commented on the fact that the Commission had "no regulation . . . which . . . requires an application . . . to be filed within a certain date."[25] As a result, the Commission promptly adopted regulations dealing with this subject.

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[22] See note 10, *supra;* the rule as then in effect is set forth in the Supplement, *infra.*

[23] See note 9, *supra;* the rule as then in effect is set forth in the Supplement, *infra.*

[24] Ashbacker Radio Corp. v. FCC, *supra* note 11.

[25] 326 U.S. at 333, n. 9.

When the Commission promulgated its Sixth Report and Order establishing a nationwide television allocation plan in early 1952, these regulations became of paramount procedural importance. The mass of applications filed for the limited number of available television facilities (particularly in the VHF portion of the spectrum) compelled strict adherence to the terms of these rules. An examination of the two rules and their purpose readily demonstrates their controlling applicability here.

Section 1.387(b)(3), the so-called "umbrella" section, protects applicants who, by timely filing, are eligible to compete for a particular facility, and excludes other would-be applicants who seek too late to apply for such frequency. Section 1.365(a) establishes procedures which control the conduct of eligible applicants once they have been determined. It provides that the proposals advanced by such applicants cannot be changed after their applications have been designated for hearing—except upon petition and for good cause—and in no event after the submission of an initial decision.[26]

The necessity for rules of this type for the orderly handling of comparative proceedings is so apparent, and their purpose so often declared by the Commission, that extended discussion of this point is unnecessary. It suffices to quote from two of the many cases in which the Commission has invoked these rules and commented upon their use and purpose.

In *North Shore Broadcasting Co.*, the Commission observed:

> "[It is] . . . the intent and purpose of Rule 1.365 to preserve to the Commission's procedure an essential

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[26] Lubbock County Broadcasting Co., 4 Pike & Fischer Radio Reg. 493, 496 (1948); Grenada Broadcasting Co., 3 Pike & Fischer Radio Reg. 1730, 1732 (1947).

> semblance of orderliness, and to the parties in hearings before the Commission some assurance of certainty as to the issues and situations with which they are to be confronted in such proceedings."[27]

In *Abilene Broadcasting Co.*, the Commission held that amendments which materially alter applications could not be allowed after proceedings on such applications were substantially under way, and said:

> "In order best to conduce to the ends of justice and the proper dispatch of the Commission's business, we must expect and require that applicants adhere to the plans and proposals which they have made and prosecuted in the first instance."[28]

In construing and applying section 1.365(a), the Commission has consistently refused to allow amendments for "good cause" where to do so would have a substantial adverse effect upon the issues and the other parties.[29] Moreover, it has recognized the interrelationship of this rule with section 1.387(b)(3). For, even assuming good cause for an amendment otherwise to have been shown, "it is important to consider whether the amendment would bring about such a substantial change in the basic proposal as to constitute a new application rather than an amended application for the purposes of § 1.387(b)(3) of the Commission's rules."[30]

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[27] 7 Pike & Fischer Radio Reg. 815, 822 (1951).

[28] 3 Pike & Fischer Radio Reg. 1671, 1682 (1947).

[29] *E.g.*, Brush-Moore Newspapers, Inc., 9 Pike & Fischer Radio Reg. 1115 (1953); Scripps-Howard Radio, Inc., 9 Pike & Fischer Radio Reg. 1024 (1953); see also cases cited in note 30, *infra*.

[30] Louisiana Television Broadcasting Corp., 9 Pike & Fischer Radio Reg. 894, 898 (1953). See also Westinghouse Radio Stations, Inc., 9 Pike & Fischer Radio Reg. 323, 334-35 (1953); Kansas City Broadcasting Co., 5 Pike & Fischer Radio Reg. 1057, 1089-92 (1952); Hamtramck Radio Corp., 6 Pike & Fischer Radio Reg. 43, 46 (1950). As the Commission once stated in re-

We have been unable to find any case, other than the present, in which the Commission has permitted or condoned the type of action taken by WJR in the filing of its December 16, 1954 application when either section 1.387(b)(3) or section 1.365(a) was asserted as a bar to such action. The manifest error in the action taken is perhaps best illustrated by applying literally to the facts of this case what the Commission has said and done in other cases involving these rules. Had WJR tendered its application at or near the end of the taking of evidence; at or near the release of the examiner's initial decision; or at or near the date of oral argument, the Commission would unquestionably have rejected it—even upon petition for alleged good cause shown.[31] Here, where not only an initial decision but a final decision had been announced, and where such final action had been the subject of section 405 petitions for rehearing which were later denied by the Commission, WJR's second application was accepted without even an attempted compliance with "good cause" procedure.

It is unquestioned that sections 1.365(a) and 1.387(b)(3) were valid parts of the Commission's rules when WJR filed its second application on December 16, 1954. While that application made a mockery of the comparative hear-

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jecting an amendment profferred due to the death of a major stockholder one year after a hearing record had been closed:

> "The amendment in question is major in character and constitutes, in effect, a new application so that the acceptance thereof would in fact necessitate a further hearing on the [mutually exclusive] applications."

Huntington Broadcasting Co., 5 Pike & Fischer Radio Reg. 721, 742 (1950). But see Fleming v. FCC, 96 U.S. App. D.C. 223, 225 F. 2d 523 (1955), ordering further comparative proceedings to consider the death of a principal party to an application.

[31] *E.g.*, see Telephone Answering Service, 10 Pike & Fischer Radio Reg. 544 (1954), and Jose Ramon Quinones, 9 Pike & Fischer Radio Reg. 346 (1953), both of which involved rejected amendments for transmitter site changes. See also cases cited in note 29, *supra*, which involved rejected amendments for studio changes.

ing process (appellants' petitions for rehearing addressed to the original decision favoring WJR had been denied only two weeks earlier), the Commission accepted it without question although WJR has never offered any good cause for the abandonment of its illogical and unworkable original proposals. Considering the applicability of a cutoff date to another proceeding, this Court has recently spelled out a rule of law that cannot be disputed: "Agency action that substantially and prejudicially violates the agency's rules cannot stand."[32] The error of the Commission in accepting WJR's second application in violation of its rules—to the clear prejudice of appellants—is error so manifest as to vitiate all action subsequently taken on that application.

B. The Granting of WJR's Second Application Violated Both the Ashbacker Rule and Section 402(c) of the Communications Act

Quite aside from the argument advanced *supra,* the Commission's April 14, 1955 *ex parte* grant of WJR's second (December 16, 1954) application is void under the rule of the *Ashbacker* case. This is so because WJR's second application, like its first, was mutually exclusive with those submitted by Butterfield and Trebit for channel 12 in Flint.[33] No evidence had been taken prior to April 14, 1955 (when the second application was granted) concerning the relative merits of WJR's later proposals vis-a-vis those earlier submitted by Butterfield and Trebit. No clearer case for the application of the *Ashbacker* doctrine could be imagined, but still more is involved here.

On April 14, 1955, when the second application was granted *ex parte,* two appeals were pending in this Court involving the same parties and the same subject matter.

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[32] Sangamon Valley Television Corp. v. United States, U.S. Ct. of App. for D.C. Cir., Case No. 13992, Slip Op. p. 7 (May 8, 1959).

[33] *See* Enterprise Co. v. FCC, *supra* note 14, 97 U.S. App. D.C. at 378, 231 F. 2d at 712.

Cases No. 12527 and 12528 had been instituted by Butterfield and Trebit on January 5, 1955, challenging the validity of the Commission's original (May 12, 1954) grant of WJR's first application. The action appealed from was a final Commission determination of the relative merits of the parties, based upon the evidence adduced in the comparative hearing. These appeals vested jurisdiction of the proceeding in this Court, and deprived the Commission of any power which it formerly had to redetermine the merits of this case during the pendency of such appeals. Section 402(c) of the Communications Act, 47 U.S.C. § 402(c), expressly so provides.

The fact that Butterfield and Trebit did not petition this Court for the temporary relief authorized by section 402(c) until after the Commission's April 14, 1955 *ex parte* grant does not alter the division of power between this Court and the Commission. The 1952 amendments to section 402 of the Act clearly limit the power and authority of the Commission in cases such as this.

The primary purpose of the 1952 amendments to the Act was to clarify various situations and remove certain questions which had arisen.[34] Amendments relating to section 402 were intended to remove the shadowland then existing between the Commission and this Court regarding the proper interplay of administrative and judicial functions in cases on appeal.[35] Section 402 (and particularly subsections (c) and (h) thereof) was intended to govern the conduct of the parties, including the Commission, from the commencement until the termination of judicial proceedings instituted to review Commission action. By these statutory provisions it was made clear that Congress intended to confer upon this Court not only the power, but the responsibility, to maintain the status quo where necessary from the inception of an appeal until its final determination.

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[34] See S. Rep. No. 44, 82d Cong., 1st Sess. (1951), also found at 1 Pike & Fischer Radio Reg. 10:271; H. R. Rep. No. 1750, 82d Cong., 2d Sess. (1952), also found at 1 Pike & Fischer Radio Reg. 10:301.

[35] See FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

On January 5, 1955, when Cases No. 12527 and 12528 were filed in this Court, there was pending and undecided at the Commission the December 28, 1954 joint petition of Butterfield and Trebit addressed to WJR's filing of its second application on December 16. This fact strengthens rather than detracts from our contentions here.[36] This Court previously has held in this very matter that the December 28 joint petition was filed at a time and in a manner which required corrective Commission action when WJR undertook to substitute a new proposal for the one upon which the comparative proceeding had been conducted. But the effect of the Commission's April 14, 1955 *ex parte* grant of WJR's second application was not to correct previous errors, but rather to compound them.

A similar—but much less aggravated—situation was presented in the *McClatchy* case.[37] There, following a comparative hearing, the losing applicant appealed to this Court. During the pendency of the appeal the successful applicant filed, and the Commission granted, an application for modification of the original construction permit.[38] In reversing the Commission, this Court on rehearing pointed out not only the illegality but the unseemly character of this action as well. It employed the following language which is singularly applicable here:

> "But if, while the appeal was pending here, the Commission desired, without a hearing, to modify the

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[36] See Wrather-Alvarez Broadcasting, Inc. v. FCC, 101 U.S. App. D.C. 324, 326-27, 248 F. 2d 646, 648-49 (1957).

[37] McClatchy Broadcasting Co. v. FCC, *supra* note 19.

[38] The only modification in the *McClatchy* case involved the antenna location and height, changes far less substantial than those involved here—which include transmitter site, programming, and studios.

> granted construction permit so drastically as to make it a different permit from that which we were considering, it should have notified the court it was withdrawing the grant under appeal, whereupon the appeal would have been dismissed as moot. * * *.
>
> "It would obviously be unseemly for the Commission, without the knowledge or permission of the court, to substitute another grant for that which is being judicially examined on appeal, leaving the court with the time-consuming and difficult task of reaching a decision as to the validity of a construction permit which has long since ceased to exist. We held in the Albertson and Enterprise cases that the Commission has jurisdiction over its orders until the period for appeal has expired. It should not render an appeal moot without the court's knowledge or consent by in effect substituting a new and different order for that which is under challenge."[39]

We emphasize that the Commission's April 14, 1955 action granting the second application did not correct, but exaggerated and magnified error previously committed. When the matters then pending before this Court and before the Commission, as well as the provisions and purpose of section 402 of the Act—particularly subsection (c) thereof—are considered, it is manifest that the Commission was without the power to do that which it undertook to do on April 14, 1955. WJR's claim to the use of the facility here in contest therefore has no basis in law.

III

Both the Action Taken and the Result Reached on Remand Were Improper and Illegal

A. The Hearing Was Conducted on Improper and Inadequate Issues

When the Commission published its order of October 17, 1956 fixing the issues for the further hearing to be held pursuant to this Court's decision of May 24, it became clear that a restricted and highly improper view of this Court's directive had been taken. The issues specified made no reference, direct or indirect, to Butterfield or Trebit, and seemed to afford no basis for the continuance of the comparative hearing which this Court had ordered. (R. 4737.) Asked by counsel for Butterfield which of the two WJR applications could be granted on remand, the examiner candidly stated: "I am at a loss, frankly, under the present issues." (Tr. 127.) Moreover, no action was taken (or even suggested) by the Commission relative to a vacating of its April 14, 1955 *ex parte* grant of WJR's second application.

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[39] 99 U.S. App. D.C. at 203-04, 239 F. 2d at 23-24.

This latter point is of critical significance. This Court's prior reversal was rendered in Cases No. 12666 and 12667, which attacked the Commission's denial of appellants' joint petition of December 28, 1954 seeking a reopening of the record in view of the filing of WJR's second and radically different application. Thus, on remand the hearing should have been restored to that point—a point *prior* to the *ex parte* grant of the second WJR application. However, instead of reopening the record at the point of reversal and considering the effect of the second application on the original grant to WJR, the Commission on remand blithely skipped several months past the point of reversal and accepted its subsequent grant of the second application. It then proceeded to consider WJR to be a permittee as a result of that grant, rather than as an applicant in the comparative proceeding as directed by the Court.

The error of this step is so patent as to be unquestionable. If judicial review of agency action is to have any significance, a reversal of defective agency action must result in a reinstatement of the proceeding at the point at which error was committed. This is axiomatic, and was conceded by the Commission in this very case prior to the remand. In its earlier brief herein, the Commission unequivocally stated that if ". . . its decision of March 31, 1955 denying appellants' joint petition (Cases No. 12,666, 12,667) is found by the Court to be incorrect, the basic construction permit and any modification thereof or subsequent authorizations will be vacated, and the three competing applications will be reconsidered in accordance with the Court's instructions." (Brief for Appellee, pp. 82-83.) This promise by the Commission to the Court was totally violated on remand, and the examiner on remand took the position that "the most these hearings are are sort of show cause upon WJR to indicate why the modifications did not affect its application that was granted at the hearing." [sic], (Tr. 140.)

On November 2, 1956, Butterfield and Trebit jointly petitioned for relief from the Commission's October 17 hearing order because of its inadequacy and impropriety. (R. 7039-54.) All action which had been taken in the case to that date, both before the Commission and this Court, was carefully reviewed. The contentions made by Butterfield and Trebit in their joint petition of December 28, 1954 were repeated, and the language of this Court ordering further comparative proceedings was emphasized. Among other things, it was pointed out that as of December 16, 1954 (if not earlier), WJR had abandoned its original proposal; that the Commission's own rules precluded the acceptance of WJR's second application; and that the Commission's April 14, 1955 *ex parte* grant of that application was manifestly void.

The Commission was requested to adopt a hearing order which would permit the type of hearing called for by this Court's decision. Specifically, it was requested to vacate its May 12, 1954 grant of WJR's original application as well as its April 14, 1955 *ex parte* grant of WJR's application of December 16, 1954 (as it had told the Court it would do). The Commission further was requested to dismiss both the original and second applications of WJR —the first because it had been abandoned, the second because it offered no legal basis for future grant. Thus, request was made for a new hearing order which would permit the continuance of the comparative proceeding with a resulting grant of either Butterfield's or Trebit's application upon the basis of the proceedings already conducted. Oral argument, as well as a stay of further proceedings pending decision on the petition, was requested.

On December 14, 1956 the Commission, without having heard oral argument, denied this petition and refused any modification or clarification of the two issues which had been set forth. (R. 7078-79.) It declared that sections 1.387(b)(3) and 1.365(a) of its rules had no application to WJR when it submitted its second application because WJR was then a "permittee" rather than an applicant. (R. 7078.) It further declared that since the hearing to be held was pursuant to remand from this Court, section 402(h) of the Communications Act and the Court's opinion prevented it from eliminating WJR as a party to the proceeding. The Commission's reliance on section 402(h) is ludicrous, for in refusing "to forthwith give effect" to the Court's decision the Commission was in direct violation of that very statute. The Commission assigned no reasons for its failure to grant the other relief requested, nor for its failure to restore the proceeding to the posture which existed when it committed the error which had formed the basis for reversal.

On December 18, 1956, Butterfield and Trebit requested the Commission to vacate the April 14, 1955 grant of WJR's second application. (R. 4951-52.) This was done because it had then become perfectly apparent, particularly as a result of the Commission's December 14 action, that the Commission regarded the *ex parte* grant to WJR as preventing the conduct of a truly comparative hearing. Emphasis again was placed upon the rule of the *Ashbacker* case, for the Commission's ignoring of that rule as well as its total disregard of this Court's prior opinion had become too clear. The Court had told the Commission that "in the exercise of a sound discretion, [it] should have reopened the record for reception of evidence of the new developments and *to complete comparative consideration* in light of those developments.'"[40] The Court also made it clear that unless such action was taken, appellants would be deprived of "their rights as *competing applicants* and 'the proceedings lose their comparative character.' "[41]

Nonetheless, on January 23, 1957 the Commission denied the joint petition to vacate the grant of WJR's second application. (R. 5024-30.) In so doing, the Commission used language which cannot adequately be summarized; it must be quoted verbatim (R. 5029):

> "The *Ashbacker* doctrine is not applicable in the instant case, for what is at issue in the hearing on remand is whether the original television construction permit awarded to WJR should be affirmed or withdrawn and given to another, not whether the modification of construction permit should stand. Further hearings are being held not to decide whether the modification should be granted but to determine whether certain changes, and the manner of making those changes, by the winning applicant destroy the basis of the preferences which led to the award to it. It is to be noted further that the Court of Appeals specifically refused to order a vacation of WJR's modified permit commenting that Trebit and Butterfield's rights were completely protected by the procedure ordered in the remand."

This confused and inherently inconsistent statement proved to be not only a virtual confession of error, but a forecast of things to come.

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[40] 99 U.S. App. D.C. at 75, 237 F. 2d at 556. (Emphasis added.)

[41] *Ibid.* The first *Enterprise* case, on which this Court relied in its prior reversal herein, directed the Commission on remand to make a reappraisal of "the comparative qualifications" of the competing applicants. Enterprise Co. v. FCC, *supra* note 14, 97 U.S. App. D.C. at 379, 231 F. 2d at 713. In its second *Enterprise* opinion, the Court stated:

> "The significant question, when there has been a post-grant change in the status or the proposal of the successful party is whether the change, *upon new comparison of the parties,* should dictate a different result."

Enterprise Co. v. FCC, U.S. Ct. of App. for D.C. Cir., Case No. 14474, Slip Op. p. 3 (Jan. 29, 1959). (Emphasis added.)

B. The Decision Reached by the Commission on Remand Was Not a Comparative Decision as Required by Law

When examination is made of the Commission's decision of July 9, 1958 affirming its earlier awards to WJR, it becomes perfectly apparent that neither the process employed nor the result reached conforms to law. (R. 6367-6411.)

In reasserting WJR's immunity from the rules because it was a "permittee," the Commission nonetheless grudgingly made certain concessions.[42] It acknowledged that under more recent decisions of this Court "the Commission has been found to be in error in its concept as to limiting further hearings in the orderly administration of adjudicatory proceedings before it." (R. 6406.) It further conceded that until this Court had handed down its opinions in certain cited cases, including this one, the Commission "had not recognized that a permittee, emerging from a comparative hearing, remained subject to further proceedings as a result of exercise of rights arising out of its permittee status during the pendency of a petition for rehearing of, or an appeal from, a Commission decision." (R. 6406.) What the Commission should have said, but did not, was that until the time for an appeal has elapsed, or during the pendency of an appeal, the status of a successful applicant remains just that—it does not become a "permittee" immune from the processes of this Court until judicial review has been terminated, or the time for judicial review has passed. The authorities which the Commission cites for its position are so misinterpreted and misapplied as to amount to a confession of error on this basic and controlling point.

When this case was previously before the Court, the Commission argued that even if it were compelled to consider the changes in WJR's proposals, no further hearing was necessary since it had already given *ex parte* consideration to the changes and found them to be without decisional significance.[43] This position was rejected, with the Court unequivocally directing further comparative hearings with Butterfield and Trebit readmitted as contestants. Nonetheless, the Commission on remand demonstrated a persistent adherence to the position which had been rejected by the Court. Both the hearing examiner and the Commission followed the same technique on remand. Selected portions of the second WJR application were compared against the Commission's decisional standard regarding WJR's first proposal, without any comparison against Butterfield or Trebit. The hearing examiner's initial decision (R. 5942-6041, released September 12, 1957) and the Commission's decision of July 9, 1958 (R. 6367-6411) thus in no sense were comparative decisions as required by law.

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[42] In support of its redetermination that WJR was a permittee and not an applicant when it filed its second application, the Commission placed its reliance on its own prior opinion to that effect in this very proceeding. (R. 6407, relying on its December 14, 1956 opinion, R. 7078-79.)

The hearing examiner adopted the Commission's limited and erroneous view of the proceeding to be conducted. He considered any comparative factors not spelled out in the Court's opinion as the "law of the case," and limited his consideration of the issues and the evidence to the differences in WJR's two proposals with respect to studios, programming, and transmitter site—as well as the effect of WJR's conduct on its character and fitness. Thus, in summary he stated:

> "This supplemental initial decision, therefore, does not start from scratch, but with the Commission's particular findings and conclusions on matters not subsumed in the categories specifically mentioned by the Court accepted as the 'law of the case,' and a comparative evaluation then made on the composite picture." (R. 6022.)

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[43] See 99 U.S. App. D.C. at 75, 237 F. 2d at 556.

The Commission's decision discloses the same reasoning processes. The case was described as not being a "comparative proceeding *ab initio*" but one to receive evidence concerning the matters dealt with in the Butterfield and Trebit joint petition for rehearing of December 28, 1954 which related to the filing of the second WJR application. (R. 6399.) The Commission further stated:

> "These matters go to the character and fitness of WJR as a licensee and a determination as to whether the changes proposed by WJR in its modification application materially affect the decisional basis of the Commission's preference of the WJR application. In the light of such evidence, *the question to be resolved is whether the public interest would be better served by setting aside the grant to WJR of the construction permit here involved and its award to one of the other applicants.* The changes in the WJR proposal requiring rehearing were limited by the Court's order to programming, studio building and transmitter site." (R. 6399, emphasis added.)

However, while the Commission thus professed to be bound to give some consideration to whether the public interest would be better served by an award to one of the other applicants, it never reached this question since it consistently viewed WJR as a permittee and, as such, a party whose grant would have to be affirmatively set aside *before* any comparative consideration should be given to Butterfield and Trebit. We emphasize the fact that the decision adopted on July 9, 1958, not only affirmed the original grant to WJR made on May 12, 1954 as a result of the comparative proceeding, but moreover affirmed that grant "as modified by" WJR's second application of December 16, 1954. Thus the Commission ultimately approved everything proposed by WJR, regardless of the time and manner in which it was proposed, and in doing so purportedly believed that the Court's decision permitted—or even required—such action without any comparison of WJR's total case to those of its opponents.

Once this Court issued its decision of May 24, 1956 in the earlier appeals, no longer could the Commission validly contend that a hearing on remand could be conducted on narrow issues such as those set forth in its order of October 17, 1956. It is not enough to say, as the Commission now says, that WJR's allegedly decisive preferences on programming, transmitter site, and studios were not disturbed or negated by the substantial changes in WJR's proposals in each of these comparative areas. As indicated by the record and as emphasized by this Court's opinion, the changes in WJR's proposal were such as to go "to the foundation of the Commission's decision."[44] Entirely new evidence concerning WJR's plans and intentions was added to the record as a result of the hearing on remand, and, if entitled to comparative consideration (which we deny, see pp. 22-29, *supra*), it materially altered WJR's case.[45] The comparison which the Commission was required to make concerned the total case of WJR, as an applicant for the facilities in issue, as against the total cases presented by Butterfield and Trebit. Parts of the WJR case could not validly be selected and compared with an assumed standard previously arrived at. Contestants, as they appear on the date of decision, must be compared in cases such as this.

This Court's decision in the *McClatchy* case, made public the day after the adoption of the Commission's October 17, 1956 order governing the proceedings on remand, makes it abundantly clear that a comparative hearing means just that—that is, a new proposal requires a new hearing and a new comparison with others, whether that new proposal is presented as an amendment or otherwise.[46] Every case—from *Ashbacker* on—which has dealt with this subject has made it clear that a comparative hearing has been held only if a record basis for comparison has been laid and if such a comparison in fact has been made. Any conceivable doubts about this particular case were removed in this Court's second *Enterprise* decision where, citing this case as authority, it was stated:

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[44] 99 U.S. App. D.C. at 75, 237 F. 2d at 556.

[45] This points up another anomaly in the case. While WJR was permitted to amend its application extensively, Butterfield and Trebit were forbidden to make any amendment in the hearing on remand. (Tr. 124-29.) For example, Trebit in the interim had disposed of certain other broadcast properties which it had owned at the time of the original hearing. While this affected the question of diversification of control of media of mass communication, Trebit was not permitted to introduce evidence on this. Here, as in virtually every other aspect of the case, a different set of rules applied to WJR than those which limited Butterfield and Trebit.

> "The significant question, when there has been a post-grant change in the . . . proposal of the successful party is whether the change, *upon new comparison of the parties,* should dictate a different result. *See W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission,* . . . ."[47]

Clearly the Court contemplated what was referred to in *Enterprise* as a "new comparison of the parties" when it ruled that "the Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will consider its grant to WJR in the light of the differences thus disclosed."[48] For the Commission to have interpreted what was said and done by this Court in its earlier opinion in a manner wholly inconsistent with—and in fact antagonistic to—all other pronouncements concerning comparative proceedings is without justification on any basis. Regardless of the decisions reached on the other questions presented in these appeals, it is clear that the Commission's decision of September 9, 1958 must be rejected as a final determination of the rights of the parties here. It constituted neither in fact nor in law the requisite comparative determination.

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[46] McClatchy Broadcasting Co. v. FCC, *supra* note 19; see also Delta Air Lines, Inc. v. CAB, 97 U.S. App. D.C. 46, 228 F.2d 17 (1955).

[47] Enterprise Co. v. FCC, U.S. Ct. of App. for D.C. Cir., Case No. 14474, Slip Op. p. 3 (Jan. 29, 1959). (Emphasis added.)

[48] 99 U.S. App. D.C. at 79, 237 F. 2d at 560.

IV

In Its September 8, 1958 Denial of Appellants' Joint Petition for Rehearing, the Commission Reaffirmed Prior Error and Committed New Error

On July 25, 1958, Butterfield and Trebit filed a joint petition for rehearing pursuant to section 405 of the Communications Act addressed to the Commission's July 9 decision in the hearing on remand. (R. 7291-99.) Three basic points were made. It was first pointed out that WJR was in default under the applicable Commission rules and should be so declared because it voluntarily had abandoned its first application and could not legally proceed with its second. It was next pointed out that the Commission's decision of July 9 failed altogether to accord Butterfield and Trebit the comparative consideration required by law and by the specific direction of this Court. The third and final point was that the record made on the hearings after remand should be reopened to consider evidence of post-hearing changes which WJR once again had made in its program plans. That petition for rehearing was denied by the Commission on September 8, 1958 in a memorandum opinion and order in which the Commission reaffirmed prior errors, and committed still further new error. (R. 6443-48.)

A. Two Prior Errors Were Affirmed

As had been anticipated, the Commission in denying the petition for rehearing adhered to its prior refusal to give comparative consideration to the three mutually exclusive applicants. Our argument on this point of error has been set forth *supra*, and need not be enlarged upon here. The other prior error which was ratified by the Commission on September 8 was its repeated insistence that WJR occupied the preferred status of a permittee rather than an applicant. While argument on this point also has been advanced *supra*, the confused treatment of this subject in the September 8 opinion calls for further brief comment.

After referring to the permittee status which it extended to WJR with respect to the filing of its second proposal on December 16, 1954, the Commission on September 8, 1958 stated (R. 6444):

> "The theory of petitioners' present argument is that WJR abandoned its original application prior to the Commission's decision of May 12, 1954; consequently, that WJR should have been required to amend its original application at the time it abandoned its proposals, at which time such amendment would have been untimely under the Rules. This theory, however, is premised on the contention that, prior to May 12, 1954, WJR determined that it would not carry out its original proposals. As set out in our decision of July 9, 1958, petitioners have failed to establish this as a fact, and the record supports our finding therein that, as of May 12, 1954, WJR intended to perform all material aspects of its original proposal."

The foregoing neither correctly defines nor answers the question. While there actually is much evidence to suggest that WJR had in fact abandoned its first application and the proposals set forth therein long before its December 16, 1954 filing, no finding to that effect is necessary.

Butterfield and Trebit have always contended, and now contend, that in the circumstances here present WJR could not legally file, and the Commission could not legally grant, WJR's second application. WJR's state of mind, then or earlier, was not controlling. Sections 1.365(a) and 1.387 (b)(3) of the Commission's rules and WJR's conduct controlled. The result was a legal abandonment of WJR's first application and the proposal embodied therein, and an attempted but illegal substitution of its second and radically different proposal. WJR was in default then, is in default now, and should be so declared. The Commission's apparent inability or unwillingness to recognize or deal with this problem does not change its character. It is vital and controlling in the final disposition of this case.

B. New Error Was Committed at the Final Stage of the Hearing on Remand

The third point raised in the July 25 petition for rehearing dealt with an error which although recently committed is keenly reminiscent of earlier ones. It concerns the Commission's refusal to reopen the record to admit evidence of changes which WJR again made in its program plans at the conclusion of the hearing on remand.

On the same day on which Butterfield and Trebit filed their joint petition for rehearing directed against the July 9 decision on remand, they also filed a motion to stay that decision. (R. 7301-02.) The stay motion was predicated upon the reported but then unconfirmed failure of WJR to secure the network program service of CBS, as it had proposed in the hearing on remand. Such a situation would result in wholesale changes in WJR's overall program service. The motion requested "that the Commission's July 9th grant be stayed pending further hearing on newly discovered evidence that WJR cannot and will not operate its proposed television station in the manner proposed in the proceeding upon which the grant is based." (R. 7302.)

There then occurred an extraordinarily patent deprivation of due process—yet a deprivation which seems almost commonplace in the context of the treatment which WJR has received throughout the decisional stages of the proceedings at the agency level. Section 1.13 of the Commission's rules provides that oppositions to motions for stay must be filed within five days, and that a period of three days thereafter is allowed for the filing of replies to oppositions.[49] On the same day on which WJR filed its opposition to the motion for stay (August 1, 1958), the Commission denied the motion. The principal ground for the stay denial was the Commission's conclusion that the allegation of a network switch by WJR "is based on industry rumors . . . and no actual facts in support of the said allegation are presented." (R. 7330.) In so ruling, the Commission completely ignored the WJR opposition filed that same day in which WJR itself admitted the network change (R. 7316), and moreover it deprived Butterfield and Trebit of the right provided by the Commission's own rules to file a reply document. This unique—and unlawful—action of the Commission was limited to the motion for stay; no action was then taken on the pending petition for rehearing.

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[49] 1 Pike & Fischer Radio Reg. 51:136. Section 1.18(b) excludes Saturdays and Sundays from the computation of time where the period allowed is less than seven days. 1 Pike & Fischer Radio Reg. 51:137.

On August 20, no action having been taken on the July 25 petition for rehearing. Butterfield filed a further petition requesting reconsideration of the Commission's August 1 stay denial and requesting accelerated consideration of the pending petition for rehearing. (R. 6431-36.) The basis for requesting reconsideration of the stay denial was the fact that WJR's network change was confirmed—and, as has been noted, had been admitted by WJR. Butterfield's petition pointed out that neither the record showings with respect to WJR's program plans nor the Commission findings on that subject in its July 9 decision any longer had any basis in fact. A series of cases decided by this Court, including the *Johnston* case[50] and the *Plains* case,[51] were cited as authority for the requested stay and the reopening of the record. (R. 6434.)

On September 8 the Commission denied both the July 25 joint petition for rehearing and the August 20 Butterfield petition for reconsideration of the stay denial. (R. 6443-48.) In dealing with the changes made in WJR's program proposals because of its admitted inability to secure the CBS television network service, the Commission once again resolved all questions and inferences in favor of WJR and against its competitors. It stated, in substance, that all network programs are meritorious and "essentially equal" and that changes in them can occur at any time. (R. 6446.) It apparently blamed Butterfield and Trebit for their inability to indicate what, if any, changes would be made in WJR's local programming because of the network changes, notwithstanding the fact that such matters were peculiarly within the knowledge of WJR and were never submitted by application as required by section 308(b) of the Communications Act. (R. 6446-47.)

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[50] Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

[51] Plains Radio Broadcasting Co. v. FCC, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949).

It is, of course, fundamental that these facts could be shown only by reopening the record as requested. However, the Commission not only refused to so order but also absolved WJR from any lack of good faith in again making post-hearing changes in its plans. In doing so, it stated that WJR "alleges that it did not become aware of the unavailability of a primary CBS affiliation until after the Commission released its decision of July 9, 1958." (R. 6447.) Since appellants' allegations to the contrary were made "on information and belief," the Commission asserted: "We do not believe that petitioners have advanced facts sufficient to warrant a reopening of the record, for their allegations amount to no more than mere suspicion without the benefit of any actual facts to lend substance to their charge." (R. 6447.) The Commission distinguished the present case from the *Plains* case—in which this Court reversed the Commission for refusing to consider the effect of loss of a proposed network affiliation on an application[52]—on the ground that there the program service in the absence of a network affiliation was not described, whereas in the present case only a different network service would be involved. (R. 6447.) The Commission added the usual admonition that an end must come to all administrative decisions "in the absence of facts tending to alter the actual ground or reason for the decision." (R. 6447.)

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[52] *Ibid.*

Without the history of WJR's earlier post-hearing changes, and without the serious questions concerning its good faith which arise therefrom, the Commission's explanation of its last action might well be more compelling. But here, in the setting established by WJR's earlier conduct, the Commission not only denied Butterfield and Trebit the opportunity to show the true character of the changes which would occur in WJR's program service, but moreover denied appellants the opportunity to show when and how such changes in fact were decided upon. Such action was not only violative of the rule of (and reason for) this Court's earlier reversal in this very proceeding, but has an added significance. Coming as it does at the end of a six-year contest and reaffirming all that the Commission had done earlier, it is at least suggestive of an unwillingness on the part of the Commission to countenance either caution or the direction of this Court.

CONCLUSION

As has been noted, this case is the oldest and longest case of its kind in the history of the Commission. The reasons for the extended nature of the proceeding are apparent from the record. WJR has been unwilling to conform to the rules which bind others. It has done only what appeared to be to its advantage, in every conceivable way.

Because of this, and because of the Commission's apparent inability or unwillingness to require compliance with established precedent, the result reached in the Commission's decision of September 9, 1958 on remand is entirely void. Neither the first proposal abandoned by WJR on December 16, 1954, nor the second proposal unlawfully advanced by it on that date, can constitute the basis for a valid grant favoring WJR. The result below should be set aside, and this proceeding should be remanded to the Commission with instructions to declare WJR in default and to award the facility to either Butterfield or Trebit on the basis of the comparative proceedings conducted prior to the original decision of May 12, 1954.

Respectfully submitted,

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May 19, 1959

SUPPLEMENT

The following are the revelant portions of those statutes and rules which are involved in the disposition of this proceeding.

Sections 402(c) and (h) of the Communications Act, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. §§402(c) and (h):

> "Sec. 402.
>
> "* * *
>
> "(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. * * * Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.
>
> "* * *
>
> "(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

Former section 1.365(a) of the rules and regulations of the Federal Communications Commission, 12 Fed. Reg. 3019, as amended, 13 Fed. Reg. 660 (1948) [subsequently recodified and redesignated section 1.311, 47 C.F.R. § 1.311, 22 Fed. Reg. 10996 (1957)]:

> "§ 1.365 Amendments of applications.—(a) Any application may be amended as a matter of right prior to the designation of such application for hearing merely by filing the appropriate number of copies of the amendments in question duly executed. Requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record, and will be granted only for good cause shown. * * * A petition to amend an application will not be accepted (other than an amendment which is merely corrective in nature such as the removal of a named person because of death) if it is filed after public notice has been given of the issuance of a proposed decision with respect to such application, or of a recommended or an initial decision, as the case may be, where no proposed decision is to be issued."

Former section 1.387(b)(3) of the rules and regulations of the Federal Communications Commission, 18 Fed. Reg. 938, as amended, 19 Fed. Reg. 4445 (1954) [subsequently recodified and redesignated section 1.106(b)(1), 47 C.F.R. § 1.106(b)(1), 22 Fed. Reg. 10988 (1957)]:

> "§ 1.387. * * *
>
> "(b) The Commission will on its own motion name as parties to the hearing:
>
> "* * *
>
> "(3) Any person who, prior to the time the application in question was designated for hearing, had filed with the Commission a mutually exclusive application. Any application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the application

in question is filed at least 30 days before the date on which the hearing on the prior application or applications is scheduled, provided however that in the case of applications for broadcast stations the said period shall be 60 days. If the scheduled date is changed, the date last set shall govern in determining the timeliness of an application for purposes of this paragraph. If the application is filed after the 30-day period, or in the case of broadcast applications after the 60-day period, it will be dismissed without prejudice and will be eligible for refiling only after a decision is rendered by the Commission with respect to the application or applications designated for hearing or after such applications are dismissed or removed from hearing."

BRIEF FOR APPELLANT TREBIT CORPORATION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 19 1959
Joseph W. Stewart
CLERK

Nos. 12,528, 12,753, 14,691

TREBIT CORPORATION,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

Nos. 12,527, 12,752, 14,685

W. S. BUTTERFIELD THEATRES, INC., Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

No. 14,714

LAKE HURON BROADCASTING CORPORATION, Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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QUESTIONS PRESENTED

1. Whether the Commission erred in permitting WJR, after the comparative hearing was concluded, to substitute a feasible television proposal for the unworkable WJR television proposal which had been the subject of the comparative hearing.

2. Whether the Commission erred in failing to find that the post-grant changes in the WJR television proposal (a) deprived WJR of any right to further comparative consideration of its application and (b) required a dismissal of the WJR application.

3. Whether the Commission's preference of the WJR application over Trebit's application on the record of the original comparative hearing is shown to have been erroneous by the evidence adduced at the further hearing pursuant to the Court's mandate.

4. Whether the Commission erred in making only a partial comparison of WJR's post-grant proposal and in failing to reconsider the original grant to WJR in the light of the subsequent changes in its proposal.

5. Whether the evidence of concealment and misrepresentation by WJR required a finding of lack of qualifications and a denial of the WJR application on a non-comparative basis.

6. Whether the Commission erred in treating the evidence of concealment and misrepresentation by WJR as bearing exclusively on the absolute qualifications of WJR, and in failing to treat this evidence as also bearing upon the comparative qualifications of WJR and Trebit.

7. Whether, in the proceedings subsequent to remand, the Commission properly made findings and conclusions based on substantial evidence as to all relevant and significant points of difference between the parties, and properly evaluated the record and these points of difference in reaching its decision.

8. Whether the Commission erred in denying Trebit's petition to reopen the record and hold a further hearing as a result of WJR's post-second-grant change in network affiliation.

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APPEALS FROM DECISIONS AND ORDERS OF THE
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BRIEF FOR APPELLANT TREBIT CORPORATION

JURISDICTIONAL STATEMENT

These consolidated cases include three appeals by Trebit Corporation[1] from decisions and orders of the Commission granting a construction permit and a modified construction permit to WJR, The Goodwill Station, Inc. and denying Trebit's application for such permit. Trebit's appeals were taken pursuant to the provisions of Section 402(b) of the Communications Act of 1934, as amended, (66 Stat. 718, 47 USC § 402(b)), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 USC § 1009). Notice of Appeal was filed by Trebit in Case No. 12,528 on January 5, 1955; in Case No. 12,753 on June 22, 1955; and in Case No. 14,691 on September 24, 1958. These Trebit appeals were consolidated for hearing with three appeals taken by Butterfield from the same Commission actions (Case Nos. 12,527, 12,752 and 14,685) by order of the Court, dated January 15, 1959. By further order of the Court, dated January 26, 1959, an appeal of Lake Huron Broadcasting Corporation (Case No. 14,717) was consolidated for hearing with Case Nos. 14,685 and 14,691.[2]

STATEMENT OF THE CASE

Trebit agrees with the statement of the case as set forth on pages 3-15 of the Brief filed contemporaneously herewith by Butterfield.

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[1] Appellant, Trebit Corporation, is herein sometimes referred to as "Trebit"; Appellant, W. S. Butterfield Theatres, Inc., as "Butterfield"; Trebit and Butterfield as "Appellants"; Appellee, Federal Communications Commission, as "Commission"; WJR, The Goodwill Station, Inc., as "WJR"; and Lake Huron Broadcasting Corporation, as "Lake Huron".

[2] A Joint Appendix was printed when Case Nos. 12,527, 12,528, 12,666, 12,667, 12,752, and 12,753 were before this Court previously. As directed in the Court's order herein dated January 15, 1959, wherever relevant portions of the record have been printed in the original Joint Appendix they will be cited in the briefs as "J.A." In some instances, the pagination of the new record differs from that of the prior record. Where that occurs, material in the original Joint Appendix will be cited as "J.A." followed by a parenthetical reference to the corresponding new record pages. Material which is contained only in the new record will be cited as "R.", or "Tr." with the Supplemental Joint Appendix to include record pagination as well as its own.

Rather than burden the Court with another statement of the case, Trebit adopts and by reference incorporates herein Butterfield's statement of the case.[3]

STATEMENT WITH RESPECT TO RELIANCE ON EARLIER BRIEFS

Pursuant to grant of the Joint Motion of Trebit and Butterfield to reinstate and consolidate the several appeals which were not decided in the Court's decision of May 24, 1956, this Court in its order of January 15, 1959, provided for consolidation of appeals numbers 12,527, 12,528, 12,752 and 12,753 with 14,685 and 14,691. The Court further ordered that the parties may rely upon and the Court may resort to briefs heretofore filed in any of the cases so consolidated and

> "the new briefs shall specify the extent to which they incorporate by reference material in the briefs previously filed in the consolidated cases and further specify as deleted the pages in earlier briefs dealing with the issues no longer pertinent. . ."

In the earlier cases, Trebit and Butterfield divided the briefing. Trebit's brief was directed to Case Nos. 12,527 and 12,528, which were appeals from the Commission's May 12, 1954 decision. Trebit's Reply Brief, except as hereinafter indicated, was also addressed to the appeals in 12,527 and 12,528. Butterfield's brief was directed, in the main, to Case Nos. 12,666, 12,667, 12,752 and 12,753 which were appeals from subsequent actions by the Commission in the Flint Channel 12 proceeding. Trebit, in some instances, adopted and incorporated by reference in its brief, portions of the Butterfield brief.

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[3] It is to be noted that Trebit is also incorporating by reference portions of its earlier briefs in Case Nos. 12,527 and 12,528 (see Statement, infra) which includes the statement of the case as contained in its previously filed brief.

The main thrust of Trebit's latest appeal in Case No. 14,691 from the Commission's decision on the remand proceeding, is that the evidence adduced at the further hearing, after remand in Case Nos. 12,666 and 12,667, proves beyond question that the Commission's decision of May 12, 1954, granting the application of WJR, was invalid. The matters argued in Trebit's earlier briefs are also directed to the invalidity of the Commission's May 12, 1954 decision, based on errors committed by the Commission prior to taking the appeals in Case Nos. 12,527 and 12,528. Therefore, Trebit incorporates by reference and otherwise makes a part of this brief in toto, its brief of August 20, 1955. Except for the arguments under Section I (page 3) and Section VI (Pages 37-41), which Sections and pages are hereby deleted, Trebit's reply brief of February 3, 1956 is also incorporated by reference and made a part of this brief. Trebit respectfully submits that with the foregoing exception, all of the points heretofore briefed by Trebit are pertinent to the issues now before the Court in these consolidated appeals.[4]

STATUTES INVOLVED

Relevant portions of those statutes which are involved in a determination of this appeal, as well as relevant rules and regulations of the Commission, are set forth in the Supplements to Trebit's briefs previously filed in these cases.

STATEMENT OF POINTS

1. The basic error which pervades all of the actions and rulings of the Commission subsequent to its May 12, 1954 determination that WJR's comparative hearing proposal was superior to those of Trebit and Butterfield, lies in its intransigent

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[4] Although Trebit does not intend to repeat here the arguments heretofore made in the briefs being incorporated by reference, it will refer to its earlier briefs in support of some of the arguments made herein.

refusal to relate the new evidence proffered by the joint petition of December 28, 1954 to the soundness and validity of said May 12, 1954 determination.

(a) The first reason given by the Commission for refusing to relate such new evidence to its May 12, 1954 decision was that the comparative hearing process on the three competing applications had terminated when the new evidence was proffered on December 28, 1954. This reason the Court held was erroneous in Butterfield v. FCC[5] and remanded the case to the Commission for a proper disposition of the December 28, 1954 petition.

(b) In the further hearing on remand, the Commission again erroneously refused to relate the new evidence to its May 12, 1954 decision, by the device of relating it only to the merits of WJR's application for modification of construction permit.

2. The evidence adduced at the remand hearing proved conclusively that the WJR proposal on the basis of which it was preferred in the comparative hearing was unworkable and would never be effectuated by WJR. The Commission's failure to set aside its May 12, 1954 decision on this ground constitutes reversible error.

3. The Commission denied Trebit and Butterfield due process by erroneously permitting WJR to substitute a new and substantially different proposal for its defective original hearing proposal.

4. Assuming, arguendo, that WJR was entitled to a second comparative hearing on its application for modification of con-

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[5] W. S. Butterfield Theatres, Inc. v. FCC, 99 U.S. App. D.C. 71; 237 F. 2d 552 (1956), hereinafter referred to as "Butterfield v. FCC," and where appropriate with citation to 237 F. 2d p. ___.

struction permit, the remand proceedings as conducted by the Commission denied due process to Trebit and Butterfield as competing applicants.

5. In acting upon Trebit and Butterfield's joint petition of July 25, 1958 to reopen the record, the Commission repeated in aggravated form the error which resulted in the reversal of the Commission's denial of Appellants' joint petition of December 28, 1954.

SUMMARY OF ARGUMENT[6]

I

The Commission did not, in the remand proceedings, ever reconsider its May 12, 1954 decision in the light of Appellants' December 28, 1954 joint petition for rehearing or in the light of the evidence adduced at the remand hearing. This Court's judgment in Butterfield v. FCC, remanded the case to the Commission for reconsideration of its May 12, 1954 decision in the light of Appellants' December 28, 1954 joint petition and any hearing record made thereon. The Commission, in all of its actions subsequent to the remand, assumed the validity of its May 12, 1954 decision, and on that assumption considered only the WJR application for modification of construction permit. It related the evidence in the remand record of the unworkability of WJR's original hearing proposal only to the merits of WJR's modification application, and ignored the bearing of such evidence on the original preference awarded WJR. The Commission erroneously refused to treat the evidence of WJR's concealment of the abandonment of its original proposal as having any comparative significance at all, notwithstanding that it found such concealment to raise serious questions concerning WJR's character qualifications to be a licensee on a non-comparative basis.

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[6] The arguments contained in Trebit's earlier briefs, brought forward as prescribed by the Court (see Statement with respect to reliance on earlier briefs, supra), are properly summarized therein. This summary relates only to the arguments contained in this brief.

II

The evidence on the remand hearing required the Commission to set aside its May 12, 1954 decision. The remand record contains conclusive proof, including unambiguous admissions of WJR, that the proposal on which it won its original preference over Trebit and Butterfield was unworkable to such a degree that WJR would not even attempt to effectuate it. This evidence required the Commission to reject the WJR application, which was the subject of the original comparative hearing, and determine as between Trebit and Butterfield which should receive the grant. This conclusion is made even more necessary by the record evidence with respect to WJR's reprehensible conduct in concealing its abandonment of its original proposal, while seeking an affirmance by the Commission of the award to it based upon that proposal. Its conduct in this regard constituted misrepresentation to the Commission concerning the workability of its proposal and its intention with respect to effectuating it to obtain a comparative advantage over Trebit and Butterfield.

III

The Commission found WJR entitled to a comparative consideration in its application for modification of construction permit, not on the basis that it had complied with applicable Commission Rules for modification of applications, but on the ground that such rules did not apply because WJR was the holder of a valid construction permit. The validity of WJR's permit, the basic question in issue before the Commission, it did not determine by review of the remand evidence, but by what it appeared to regard as an irrebuttable presumption arising out of the fact that it had once found WJR comparatively superior in its May 12, 1954 decision. The Commission, thus, excused WJR from compliance with the requirements of amendment rules it could not meet because of the permittee status it had conferred upon WJR. By reason of the modification it was permitted to make as such permittee, the Commission found that the validity of the grant of the status was invulnerable to attack or review. Assuming that the holder of a valid permit is not required to comply with the amendment rules applicable to applicants for a permit, it does not follow that the holder of an invalid or challenged permit may cut off inquiry into the validity of his permit by modifying his proposal. Such a conclusion can only stem from a basic premise that the rights of competing applicants were cut off by the original permit grant, valid or invalid. Thus, in another form the Commission's persistence in the erroneous view which led to its first reversal by this Court permeated all of its post-remand actions.

IV

Assuming, arguendo, that WJR's original award was valid and that it was entitled to modify its construction permit without complying with the rules for amendment of applications, and obtain upon such application for modification a comparative consideration with Trebit and Butterfield, the Commission's July 9, 1958 decision affirming its ex parte grant of that application is invalid. The Commission's procedure on remand denied rights to Trebit and Butterfield established by the Ashbacker case.[7] In addition, the Commission unfairly precluded Butterfield and Trebit, not only from improving their applications, as WJR was permitted to do, but refused to permit either of them to show any changed circumstances which had occurred relating to their applications or qualifications. Further, Butterfield and Trebit were improperly barred at the remand hearing from showing portions of the original WJR proposal, which were carried bodily into the modified proposal, were not, as part of such proposal, either absolutely or comparatively in the public interest. The Commission also refused to evaluate the comparative site problems as between Trebit, Butterfield, and WJR on criteria which it used to dispose of such problems in the original proceeding.

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[7] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

Furthermore, WJR was permitted to vary the proposals contained in its modification application, as granted ex parte by the Commission, by substituting new proposals not consistent with those contained in said application during the course of the remand hearing.

V

After the July 9, 1958 decision, WJR in a manner reminiscent of its action in the May 12, 1954 decision, abandoned the proposal upon which it had been preferred. In this case WJR dropped the CBS network from its program proposal. This CBS affiliation was the basic reason previously alleged by WJR for all of the changes made in its modification application as distinguished from its original application. Notwithstanding that this radical change of programming, admitted by WJR, was challenged by Butterfield and Trebit in a joint petition for rehearing, the Commission found that the dropping of CBS did not involve any significant change in WJR's programming. It based this strange conclusion upon a representation contained in an opposition to the petition for rehearing that WJR planned to affiliate with ABC, and the gratuitous observation that there is little to choose from between ABC and CBS. This ignored the requirement of the Communications Act that any program plan for station operation must be submitted for Commission consideration by an appropriate application, under oath, not in a pleading signed only by counsel. Furthermore, it ignored the ruling of this Court in Butterfield v. FCC that competing applicants were entitled to test any substantial change of program proposal by cross-examination. The Commission's original ex parte approval of WJR's proposal to modify its hearing proposal was condemned by this Court. In this latest episode the ex parte approval was given WJR without the Commission even having before it the facts required by its own rules and regulations upon which an ex parte determination of program quality could be made. The conclusion is inescapable that the Commission treated its May 12, 1954 decision as carte blanche to WJR and lettres de cachet to Trebit and Butterfield.

ARGUMENT

I

THE COMMISSION ERRONEOUSLY FAILED AND REFUSED TO RECONSIDER ITS MAY 12, 1954 DECISION.

Cases Nos. 12,527 and 12,528 attack the validity of the Commission's decision and order of May 12, 1954 which granted WJR a construction permit after a comparative evaluation of WJR's application with those of Trebit and Butterfield for such permit. The record on which the Commission's May 12, 1954 decision and order must stand or fall includes not only the proceedings which led up to the issuance of that decision and order but also the proceedings held pursuant to the Court's remand in Cases No. 12,666 and 12,667.

It should be recalled that when these cases were previously before the Court, the Commission took the position that evidence relating to WJR's intention to substitute a different proposal for the one on which it had been preferred in the comparative hearing had no bearing on the comparative evaluation of the three applicants and their proposals, because in the Commission's view, the comparative proceedings on the three applications had terminated before Trebit and Butterfield made their proffer of such evidence. The Court rejected the Commission's premise that the comparative proceedings had terminated when Trebit and Butterfield filed their joint petition of December 28, 1954 to reopen the record of the comparative hearing. Butterfield v. FCC, supra, 237 F.2d at pp. 556, 557. The Court reversed the Commission's denial of that petition and remanded the case to the Commission to take proper action on said joint petition.

A. The validity of the May 12, 1954 decision is the basic issue in this case.

If, on review, this Court should determine that the Commission's decision of May 12, 1954 preferring WJR over Butterfield and Trebit is erroneous and sets that decision aside, there will be no need to consider the merits or demerits of the WJR application for modification of construction permit.

Cases No. 12,752 and 12,753 attack the validity of the Commission's action of April 14, 1955 which granted the application of WJR to modify the construction permit which the Commission had granted on May 12, 1954. The elementary principle on which these appeals is based is that the Commission may not validly grant a modification of a construction permit if the basic permit itself was not validly granted. When these cases were before the Court previously, the Commission had this to say regarding the grant of this modification (See Appellee's Brief, pp. 82-83):

> "The action upon which appellants may claim aggrievement, is the Commission's denial of their December 28th petition seeking reopening and rehearing on the basis of the proposed modification changes. But the subsequent grant of the WJR modification application no more adversely affected appellants than would the grant of an STA (special temporary authority given permittees to commence operation) or a license to cover the construction permit. For if the Commission's final decision of May 14, 1954, as modified by its Memorandum Opinion and Order of December 2, 1954, (Cases Nos. 12,527, 12,528), or its decision of March 31, 1955 denying appellants' December 28th joint petition (Cases Nos. 12,666, 12,667), is found by the Court to be incorrect, the basic construction permit and any modification thereof or subsequent authorizations will be vacated, and the three competing applications will be reconsidered in accordance with the Court's instructions (R. 5939)."

The Commission has conceded not once but time and again that WJR's right to any consideration of the merits of the modification application stems from its status as the holder of a permit under the May 12, 1954 decision. That decision, therefore, is the cornerstone of everything else the Commission has done concerning which Appellants complain on these appeals. Their right to a review of that decision under Section 402(b) of the Communications Act is not disputed. The Court's action in reinstating the appeals directed to that decision, which it previously had dismissed without prejudice, leaves no room for doubt that the validity of the May 12, 1954 decision is now before the Court for review.

B. The Court's decision of May 24, 1956 set aside the Commission's improper denial of Appellants' December 28, 1954 Joint Petition for Rehearing and its remand required the Commission to give proper consideration to the newly discovered evidence tendered by that petition.

This Court in its decision of May 24, 1956 held (273 F.2d, at p. 556):

> "The new evidence here goes to the foundation of the Commission's decision, ..."

The Court was referring to the newly discovered evidence brought to the Commission's attention by Appellants' Joint Petition for Rehearing of December 28, 1954. As pointed out above, the May 12, 1954 decision is the cornerstone of this case. Its foundation rests not only on the evidence in the original record but the additional evidence found in the remand record. Despite this Court's reversal of the Commission's erroneous rejection of Appellants' December 28, 1954 Joint Petition for Rehearing and its square holding that matters raised by that petition went to the foundations of the Commission's May 12, 1954 decision, the Commission's decision of July 9, 1958 after the remand hearing, affirming the grant to WJR "as modified" does not come to grips with the basic question involved in the further proceedings.

Despite the continued and persistent urging of Trebit and Butterfield that the Commission's first and foremost responsibility at the remand hearing was to determine the validity of its May 12, 1954 decision in the light of the evidence adduced relating to the post-hearing changes in WJR's proposal, the Commission refused to recognize that the validity of its May 12, 1954 decision and order was involved in the remand proceedings (R. 4951-54, 5024-30, 7039-54, 7078, 7079). Instead, the Commission conducted the remand proceedings as though the Court had affirmed the Commission's May 12, 1954 decision and had sent the case back to the Commission, not to reconsider the validity of its May 12, 1954 decision, but to determine whether WJR was properly permitted to modify that permit. The Commission completely disregarded the Court's judgment and opinion in Butterfield v. FCC, and conducted the remand hearing as though its views on the termination of the comparative proceeding had been accepted and not rejected by the Court. Neither Trebit nor Butterfield were accorded the rights of competing applicants; WJR was given a special status as the holder of a construction permit, and the real purpose of the remand hearing was never achieved. As will be shown below the Commission's post-remand proceedings flew directly in the teeth of Ashbacker by requiring Trebit and Butterfield to contest, as applicants, with WJR as the grantee of its "modified" construction permit.

Trebit and Butterfield complained to no avail from the first action of the Commission after the remand, on October 17, 1956, until the Commission's denial of their final petition for rehearing on September 10, 1958 that the Commission was refusing to reconsider the validity of its May 12, 1954 decision, when the purpose of the remand hearing was to adduce evidence which the Court had held was relevant to a determination of the validity of that decision. The Commission either could not or would not understand and accept the position consistently taken by Trebit and Butterfield in their December 28, 1954 petition to reopen the record, in the six appeals which they originally took from the Commission's grants to WJR, and at every step of the proceeding after the remand in Cases No. 12,666 and 12,667, that the evidence regarding the post-hearing changes in WJR's proposal was relevant to the soundness and validity of the findings and conclusions contained in the Commission's May 12, 1954 decision. Nothing would seem to be more obvious than that evidence which demonstrated the successful applicant in the comparative hearing had no intention of constructing and operating the station it was proposing in the comparative hearing, is relevant to a determination of whether he is entitled to receive a grant. Nothing would seem to be more inconsistent with the basic elements of a fair, comparative hearing than permitting the successful applicant to cure a fatal defect in his proposal by making his proposal conform to those of his opponents in a vital area of comparison.

C. The Commission in the remand proceeding *assumed* the validity of its May 12, 1954 decision and on that assumption gave consideration only to the merits of WJR's application for modification of construction permit.

The Commission's July 9, 1958 decision affirming its *ex parte* grant of WJR's application for modification of construction permit, not merely failed to re-evaluate its decision of May 12, 1954 in the light of the remand evidence, and thereby deprived Appellants of their right to such a reconsideration, but compounded its illegal refusal by assuming the validity of its May 12, 1954 decision (R. 6367-6411). On the basis of the *assumed* validity of the May 12, 1954 decision, the Commission dealt with WJR's application for modification of construction permit as though the only question presented for its decision by that application was whether the proposal embodied in it was as good as the original WJR proposal which it supplanted.

1. The Commission related evidence of unworkability of original proposal only to soundness of modification proposal rather than to defects in original proposal.

As is shown below, under II-A, *infra*, the record on the remand hearing contained conclusive proof that the WJR proposal, on the basis of which the Commission preferred it in the May 12, 1954 decision, was admittedly completely unworkable, so much so that WJR refused to effectuate it. As is plain from the Commission's July 9, 1958 decision, because it assumed the validity of the May 12, 1954 decision, the Commission considered this evidence only as demonstrating the superiority of the WJR modification proposal over its original proposal.

2. The Commission treated WJR's concealment of the abandonment of its original proposal as non-comparative in any sense.

It is plain from the Commission's July 9, 1958 decision that WJR's concealment of the abandonment of its original proposal throughout the period when it was seeking reaffirmation of the Commission's preference to it on the basis of that proposal was considered by the Commission only as it bore upon WJR's non-comparative qualifications. As is shown under II-B, infra, whatever the merits of the Commission's conclusion that WJR's misrepresentation did not constitute an absolute disqualification, its complete failure to consider the extent to which it constituted a comparative disqualification was prejudicial to Appellants.

II

THE EVIDENCE ADDUCED AT THE REMAND HEARING REQUIRES THAT THE COMMISSION'S MAY 12, 1954 DECISION BE SET ASIDE.

The Commission's decision of May 12, 1954 must be tested on the record of the original comparative hearing supplemented by the record made at the hearing on Appellants' December 28, 1954 petition. The latter hearing shows that the ex parte findings which the Commission had made in denying the December 28, 1954 petition, that the differences between the WJR comparative hearing proposal and its modified proposal were "too minor" to matter, were totally erroneous. The evidence showed that the post-hearing changes proposed by WJR were substantial and that they mattered. That they were substantial is an unavoidable conclusion because they involved a change of transmitter location of some 44 miles from a site 20.3 miles southeast of Flint and approximately 27 miles from the nearest boundary of Detroit to a site approximately 23.7 miles northwest of Flint and approximately 70 miles from the nearest boundary of Detroit; a change of network affiliation from Dumont to CBS; and the substitution of a $125,000 studio building for a studio plant costing in excess of $750,000. (J.A. 407, 408, R. 6370).

That these changes mattered is shown by the fact that they proved the utter impracticality of WJR's original proposal. The record made at the remand hearing proved beyond any question that WJR had won the comparative contest with a proposal which WJR was unwilling to construct. WJR was not compelled to move its site 44 miles because the site specified in its hearing proposal became unavailable to it or for any reason beyond WJR's control. The substitution of the $125,000 studio for the $750,000 plant was not compelled by a force majeure. It was simply a matter of WJR concluding that it would be uneconomic and unprofitable for it to build at the site proposed, where it would have no reasonable chance of affiliating with a major network, as compared to moving further away from Detroit where it would have a better chance of getting a major network affiliation. In any event, it was firmly and convincingly established that the WJR proposal on which it had been preferred by the Commission could not or would not be effectuated by WJR. Moreover, the record showed that WJR deliberately withheld from the Commission and the parties the information that it intended to change its proposal until such time as it thought the comparative proceeding was concluded, and it was too late for the information to affect the Commission's May 12, 1954 decision (see Argument, infra). The Commission's failure to deal with this evidence of concealment as a factor in the comparative evaluation of WJR's qualification is dealt with elsewhere in this brief. At this juncture it is sufficient to point out that the evidence adduced at the remand hearing of WJR's unwillingness to fulfill its comparative hearing proposal vitiated the Commission's May 12, 1954 decision that WJR's comparative hearing proposal is superior to those of Trebit and Butterfield.

A. The record contains by independent evidence and admissions of WJR, conclusive proof that the original WJR proposal was unworkable and that WJR would not effectuate it.[8]

Trebit contended on the original hearing record in these cases that WJR, by reason of its desire to serve Detroit, selected a site which precluded it from obtaining an affiliation with any network except Dumont, and that Dumont was, of the four networks then operating, the poorest from the standpoint of program service and commercial business (J.A. 315, 316 (R. 6777, 6778, 6931-33)). Trebit also contended that WJR's chance of affiliation with Dumont was speculative in the light of the imminent commencement of operation by CKLW-TV in Windsor, Ontario (J.A. 554 (R. 6707), 572, 573 (R. 6949-50)). This station commenced operation in 1954 and did obtain the Dumont network (R. 6389-93).

Trebit also contended that WJR's studio proposal, although more elaborate than Trebit's, was not better calculated to permit effectuation of its proposed local live programs and that the additional elaboration and cost involved were of no comparative significance. (J.A. 555-58 (R. 6751-53); R. 6933-35; J.A. 573 (R. 6950); J.A. 560-61 (R. 6773-6774)). This argument was rejected by the Commission when Trebit advanced it, but when it was later advanced by WJR during the remand proceedings, it was accepted by the Commission in its comparison of WJR's original studio proposal with its modified studio proposal consisting of a second-hand UHF studio which it purchased (R. 6375-80, 6399).

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[8] Trebit's contentions of superiority of its proposal over WJR's original application in the areas dealt with in this argument led to the Examiner's preference for Trebit in the Initial Decision (J.A. 317-72). The record facts in this connection are set out in said Initial Decision and in Trebit's earlier Brief and Reply Brief.

Trebit also contended that WJR should receive no preference on the basis of any remote live program origination from its proposed Detroit studios. Trebit conceded that such studios were desirable to provide local programs of interest to the Detroit area which WJR's original program proposal would serve, but contended that they were totally unnecessary and inappropriate for a station which would not serve Detroit and, therefore, the fact that Trebit did not have Detroit studios should not count against it comparatively (R. 6933-35, 6946-49).

Trebit further contended that WJR's transmitter site was comparatively inferior to Trebit's in the light of Section 3.685 of the Commission's Rules and Regulations because it was so far from the City of Flint that its greater height above mean sea level was completely outweighed. (R. 6714-28, 6930; J.A. 567-72 (R. 6938-42)). The Commission, rejecting the undisputed scientific fact embodied in its own rule that the ratio of height to distance rather than either one alone is the significant consideration, equated the Trebit and Butterfield sites with the loose generalization that the (insubstantial) differences in height counterbalanced the (great) differences in distance from the City of Flint (J.A. 469-72). That this was in fact unsound and improper is shown by the Commission's refusal to apply it in the evaluation of the new WJR site which is even further from Flint than the original WJR site and is at a lesser height above mean sea level than the Trebit site (R. 6402-4).

Trebit further contended that the comparative importance of Detroit as a market as compared to Flint would inevitably result in a Detroit dominance in the orientation of the WJR station and a submerging of Flint identity in service and programming (R. 6775-80, 6790-98; J.A. 307-16; R. 6929-37, 6945-49; J.A. 577-80 (R. 6955-57)). This contention was also urged against the Commission's grant to WJR by a volunteer Citizens Committee of Flint (R. 4563-4631). The remand record shows that WJR recognized the validity of this contention and represented to the Citizens Committee, in an effort to have it withdraw its opposition, that WJR would, as soon as pending petitions for rehearing by Trebit and Butterfield had been disposed of by the Commission, amend its application so as to eliminate Detroit coverage, thereby making Flint the dominant market for the station, and would by this elimination resulting from a move of its site to the north of Flint, also be able to obtain a first-class network rather than the Dumont network to serve the City of Flint (R. 5277-79, 5400-02).

Trebit also contended that the preference awarded WJR as against Trebit on the so-called diversity point was wholly unjustified (J.A. 307-16. See also Trebit Brief, pp. 36-42, Reply Brief, pp. 21-23). WJR, throughout this proceeding before the Commission and in this Court, contended vigorously that public interest would not be served by granting Trebit as against WJR because Trebit's owners at that time owned other television stations. The remand record showed that the Board of Directors of WJR, shortly after the May 12, 1954 grant to WJR, acted upon the recommendation made by Mr. Kramer, concurred in by Mr. Patt, to abandon the original WJR proposal and substitute the modified proposal in order to save over one million dollars which WJR could use for the purpose of acquiring additional television stations (R. 5223-29). WJR thus admitted that its contentions on the diversity point were only arguments to beguile the Commission and were not in fact realistic insofar as the public interest was concerned.

The anomaly of permitting an award to WJR, modified so as to provide funds with which it could acquire additional television stations, and the denial of Trebit because at the time of the original hearing it owned two television stations which at the time of the July 1958 decision had been disposed of, is obvious. Only by refusing to admit its own records in evidence was the Commission able to debit Trebit and only by refusing to look at the evidence in the record as to a primary purpose of the WJR modification was it able to credit WJR in July 1958 on the diversity point.

Although the Examiner found that Trebit's contentions were essentially correct and that on the basis of them WJR should be denied, and Trebit granted, the Commission rejected them as too speculative (J.A. 358-72, 472-84). Curiously, it did not characterize WJR's predictions as speculative but accepted them as demonstrated facts. The remand record shows that all of the proposals of WJR outlined above were admitted by WJR to be not merely speculative but unsound and unworkable and that all of them, for lack of economic feasibility, had to be abandoned. The record on remand demonstrates that instead of rejecting Trebit's contentions as speculative conjectures, the Commission should have found them to be sound predictions based upon the best factual evidence obtainable. In any event, there is no denying that on the original record, as supplemented by the remand record, the sound factual character of Trebit's contentions and the unsound character of the WJR claims in the original proceeding were established through actual proof or by admission. None of this is disputed by the Commission or rejected by it anywhere in its July 9, 1958 decision (R. 6367-6411). The Commission, rather than rejecting or accepting it, ignores it.

By the device of assuming the validity of its May 12, 1954 decision granting WJR, and relating all of the remand evidence only to the quality of the WJR modification application, the Commission was able to find that the modification application is at least as sound as WJR's original application, a point which Trebit freely concedes. It carefully avoids, however, ever re-examining the soundness of its May 12, 1954 decision. By assuming what was to be proved, the Commission avoids the question of whether a fair hearing was afforded to Trebit and Butterfield by permitting WJR to substitute for an unworkable proposal on which it had been erroneously preferred, a workable proposal embodying features to a greater or lesser degree of the Trebit and Butterfield applications which WJR recognized as better than its own, notwithstanding that it argued the contrary to the Commission. The result: WJR, with an unworkable proposal, receives a comparative award because the Commission rejects the proof of the unworkability of its proposal as speculative; WJR, by virtue of its permittee status thus acquired, is permitted by the Commission to substitute a new proposal, workable only because it eliminates the "speculative" defects; WJR, by virtue of such substitution insulates itself from any determination that its original proposal was unworkable, and, therefore, not legally a basis for preference as against Trebit and Butterfield.

B. The Record Shows that WJR's Conduct in Concealing its Abandonment of its Original Proposal Severely Impaired its Comparative Character as Against Trebit and Butterfield.

The record in the remand proceedings shows that no sooner had the Commission's decision of May 12, 1954 been handed down than WJR, through its principals, Patt and Kramer, bent every effort to find out in what ways it should change the proposal upon which it had been preferred in order to provide a sound, workable and economically feasible operation. The record does not unambiguously show that such activities were carried on prior to May 12th and may perhaps permit a finding that WJR, its officers and its agents, between the closing of the hearing and May 12, 1954, gave absolutely no thought or consideration whatever to any facts occurring after the close of the hearing which might justify or require any modification of the WJR hearing proposal. This is not important, however, for WJR's serene confidence in the efficacy of its hearing proposal to obtain a grant, is more than off-set by its very obvious, immediate, and real concern about the proposal from the standpoint of staking money on it as distinguished from using it to obtain Commission preference. Almost immediately after it was granted, WJR decided to abandon the proposal as unsound from a programming and financial basis. Dumont network affiliation plans were jettisoned forthwith. Nothing is shown to indicate that this decision could not have been made as well in the days immediately before May 12th as in the days immediately after May 12th. In fact, as Trebit had demonstrated in the original hearing, WJR should not have ever specified the Dumont network (See argument, II-A, supra). It will be remembered that WJR, in selecting its site so as to provide coverage of the City of Detroit, knew that it thereby forfeited any opportunity to affiliate with CBS, NBC or ABC, so that the need to move its site to obtain affiliation with any network other than Dumont was apparent to WJR before the first hearing on these cases commenced.

WJR lost no time at all after the Commission's May 12th decision in scrapping its plans for an elaborate new studio and office building and arranging to use a secondhand abandoned UHF television studio and office building (R. 5212-14, 5217-19, 5364, 5370, 5373).

Nor was WJR long in admitting the truth of Trebit's contention that WJR's original proposal was primarily for Detroit, not Flint service, and in admitting that from its original site and with its original proposal, it could not render an adequate Flint service. Mr. Patt, on behalf of WJR, not later than September of 1954, explicitly admitted these facts to members of the Flint Citizens Committee, and in an effort to have them withdraw their request for rehearing of the May 12, 1954 decision, promised them, on behalf of WJR, that he would shortly file a modification of construction permit application providing for a change of site from south of Flint to north of Flint and a substitution of the Columbia Broadcasting System network for the Dumont network (R. 5277-79, 5400-02, 5376, 5377, 8014).

While these events were taking place, WJR was holding out to the Commission that the preference originally awarded it on its scrapped proposal should be reaffirmed and it exacted a commitment from the members of the Flint Citizens Committee not to disclose its proposed change of plan (R. 5277-79, 5400-02, 8014, Tr. 1307). WJR was advised by its counsel that any attempt to modify its construction permit was fraught with danger to it because it would be attacked by Trebit and

Butterfield (R. 5321, 5322, 5335, 5336, 5371, 5372, 5405, 5406; Tr. 1309-23, 1336-37). The sordid history of the concealment of its complete abandonment of its award-winning proposal on the admitted ground that it was unworkable and would not provide a service in the public interest for Flint, is detailed in the remand record (R. 7100, 7102-04, 7120-29, 8001-17). Coupled with the secrecy attendant upon all of the WJR substitute planning was the frantic and somewhat unorthodox activity on its part to accelerate action by the Commission denying the Trebit and Butterfield Petition for Rehearing directed to the May 12, 1954 decision. This, too, is shown in the remand record. (R. 5376, 5470).

The record is bare, however, of any showing that WJR ever gave notice or any opportunity to take appropriate action with respect to these matters to its opponents. On the contrary, it bent all efforts to preserve the secrecy surrounding them until it thought that the administrative processes had terminated and it would be too late for its opponents to do anything about them.

Both the Examiner and the Commission found WJR's tactics reprehensible, but by different devices found means to protect WJR from any adverse consequences. The Examiner invoked (or invented) a doctrine he called locus poenitentiae. Applying this he found that WJR had confessed its conduct before it was found out and that timely confession, long recognized as good for the soul, had also acted as a legal eraser to wipe out the offense. He concluded that WJR should not be penalized for its misrepresentations (R. 6023-29). In passing, it should be noted that not even the novelty of the Examiner's legal concept justifies the result, for the confession which the Examiner attributed to WJR was repudiated by Mr. Patt.[9]

The Commission, wisely abjuring the Examiner's fanciful disposition of the problems raised by WJR's misrepresentation, sought to reach the same result by a different route. The Commission uncompromisingly found that WJR's conduct did not show the candor which the Commission had a right to expect of and require from its permittees and licensees. With piercing eye and pursed lips it thundered, tsk! tsk!, and with that admonition concluded it could count on WJR to offend no more.[10] If this were a non-comparative proceeding, recognizing that licensing proceedings are not punitive and that derelictions of applicants, however serious, cannot be met by Commission imposition of punishment, it might well be that the Commission, in the exercise of a broad discretion, could, despite WJR's conduct, conclude that it can be entrusted with the responsibilities of a licensee (Wilton E. Hall, et al., v. FCC, 237 F.2d 567, 576-77). Assuming for the present purposes that it could properly do so, it cannot stop here with such a conclusion, but it must go on and decide whether WJR, in the light of its conduct is a preferable licensee to Trebit or Butterfield, whose conduct has not brought them under a cloud of any kind. It seems particularly inappropriate to permit an applicant in a comparative proceeding to retain the prize he won unfairly. To reward such an applicant's bad conduct and punish his opponents is indefensible.

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[9] In his decision in the protest case, the Examiner had similarly granted indulgence to WJR. The confession which he attributed to WJR he found in WJR's request for extension of time to complete construction under its original construction permit. This request for extension was filed on December 1, 1954, shortly before the Commission handed down, on December 6, 1954, its decision denying Appellants' Petitions for Rehearing (R. 6023-29). Careful perusal of the form (FCC Form 701) filed by WJR fails to disclose any representation that it had (a) abandoned its original studio plans; (b) proposed to move its site from Clarkston to Chesaning; or (c) proposed to change its programming radically. (R. 6001). Mr. Patt testified that it was not his purpose or intention in filing this form to advise the Commission with respect to these matters and he did not construe the form as doing so (Tr. 1300-04). Moreover, the Examiner ignored the fact that not only was this form not served upon Trebit or Butterfield, but its existence after filing at the Commission was not disclosed until after it was acted upon.

[10] It sought to buttress this conclusion by attributing to WJR an outstanding past performance record. Perusal of the Commission's public decisions relating to WJR make it plain that it could not have found a basis for this conclusion in its records other than the present one. (See In Re Applications of KMPC, WJR, et al., 7 RR 788.) Perusal of the present record demonstrates that by stipulation of the parties, all evidence with respect to past service (except for limited purposes other than the establishing of good character) was excluded from the proceedings. That this stipulation did in fact preclude the introduction of any evidence in this proceeding upon which the Commission could have based its conclusion as to WJR's reliability is dramatically demonstrated by the dissenting opinion of Commissioner Hennock filed May 12, 1954, and the concurring opinion of Commissioner Hennock filed December 6, 1954, in which she condemned in the most vigorous fashion the failure of the parties to spread upon this record the past derelictions of WJR (J.A. 484, 485, 503).

III

THE COMMISSION ERRED IN HOLDING WJR ENTITLED TO COMPARATIVE CONSIDERATION ON ITS APPLICATION FOR MODIFICATION OF CONSTRUCTION PERMIT.

The Commission held that WJR was excused from compliance with Section 1.365(a) of the Commission's Rules and Regulations,[11] which governs the amendment of applications after their designation for hearing, because WJR was the holder of a construction permit and, as such, was subject to the provisions of the rules with respect to modification of construction permit rather than the rules dealing with amendment of applications. The rules dealing with modification of construction permit do not require notice, a showing of good cause, or the making of any formal motion for leave to substitute a different proposal for that specified in a construction permit. This is true whether the construction permit was granted without hearing or after a hearing which involved only the applicant or involved a comparison with other applicants, and is true without regard to how radical the change in the proposal may be. Assuming, arguendo, that there is no need for a construction permittee, who was granted his permit as the preferred applicant in a comparative proceeding, to give any notice to his opponents in that proceeding of the substitution of a new and different proposal by way of an application for modification of construction permit, the applicability of the rules governing modification of permits rather than the rules governing amendment of applications must turn on the existence of a valid permit.

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[11] Section 1.365(a) of the Commission's Rules, as then in effect, is printed in the Supplement to Butterfield's earlier brief. In 1957 it was recodified and redesignated as Section 1.311 of the Commission's Rules, 47 C.F.R. § 1.311.

If compliance with the amendment rules is excused by the issuance of an invalid permit, and the invalidity of that permit is protected from review by the modification thereof, the rights of applicants in comparative proceedings stand for naught. The Commission may not substitute an assumption that a challenged construction permit is valid for a proper determination and disposition of the challenge, and, on such assumption permit a modification which moots the challenge.

Stated simply, it is Appellants' contention that the Commission could not legally grant WJR's modification of construction permit unless the basic permit which WJR sought to modify was itself a valid authorization. The validity of the permit turns upon Appellants' December 28, 1954 Joint Petition for Rehearing and the significance of the newly discovered evidence it tendered. And in this case, the evidence showing the nature of and reasons for the changes embodied in the modified permit proves the invalidity of the original permit. Under the Commission's Rules, and Commission and Court decisions interpreting those rules, an applicant in a comparative television proceeding may not, after the hearing record is closed but while the comparative proceeding is still in progress, substitute a new proposal because he has learned that his hearing proposal is impracticable or incapable of effectuation. Indeed, the Commission's Rules and precedents hold that if substantial changes in an application are required at such a late stage in the comparative proceedings, the applicant must suffer a dismissal of its application.[12] Such a rule is necessary to protect the rights of the other competing applicants. If the Commission can properly permit an applicant whose grant after a comparative hearing is attacked to substitute an entirely new proposal for the one on which he was awarded the grant, the purpose of a comparative hearing is entirely frustrated, and the rights of competing applicants to a fair evaluation of their hearing proposals are rendered a nullity.

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[12] See discussion of this point and cases cited on pages 22-26 of Butterfield's Brief, filed contemporaneously herewith.

There is no sensible way in which the Court's decision in Butterfield v. FCC can be read to justify giving WJR a second comparative hearing on a WJR application with Trebit and Butterfield restricted to their original applications. Appellants in Case Nos. 12,666 and 12,667 never asked the Commission or the Court to order a new comparative hearing on WJR's modification proposal and their original proposals. It has always been Appellants' contention, first before the Commission when they filed their Joint Petition for Rehearing on December 28, 1954, in this Court on the six appeals which led to the decision in Butterfield v. FCC, and subsequently in proceedings on the remand, both before the Commission and in the Court, that the only proper purpose for which the comparative hearing record on the three competing applications could be opened was to receive evidence relating to the likelihood of WJR effectuating the proposal which had been the subject of the comparative hearing.

The Commission rejected Appellants' December 28, 1954 joint petition to reopen the record and made ex parte findings that the changes which WJR intended to make in its hearing proposal were "too minor" to matter. Then the Court reversed the Commission for making such findings ex parte and said that only on evidence adduced at a hearing in which the competing applicants were given an opportunity to participate could the Commission make valid findings as to the magnitude of the differences between WJR's two proposals. The Court never said, and it is unthinkable that the Court could have meant that if the evidentiary hearing showed that the Commission's ex parte findings were wrong and that in fact the changes in WJR's proposal were substantial and basic -- that the Commission could then decide the case as though the changes were "too minor" to matter. This case is totally different from the Enterprise case.[13] In Enterprise the Court held that an unsuccessful applicant is entitled to a further comparative evaluation with the successful applicant who makes changes in the proposal which weaken his proposal. The Court was careful to point out that its holding in Enterprise was not intended to give the successful applicant the right to a second hearing on an improved proposal. The instant case does not involve a contention by the unsuccessful applicants that they are entitled to a further comparative evaluation with WJR. Quite the contrary. Here, unlike the case in Enterprise, the unsuccessful applicants are seeking to hold the successful applicant to the proposal on which it was preferred and it is the successful applicant that is insisting that it is entitled to a further comparative evaluation of the improved proposal.

A second, and equally vital, distinction between this case and Enterprise is that in the Enterprise case the Court held that on the original record of the comparative hearing, the Commission's decision to grant the successful application was legal and proper. The Court expressly found that the Commission's grant of construction permit to the successful applicant was proper. Therefore, in remanding the case to the Commission to afford the unsuccessful applicant the further comparative hearing which it had requested, the Court did not require the Commission to set aside the construction permit which had been issued to the successful applicant. In the instant case, however, the Court did not decide on the original appeal that the Commission's grant of WJR's application on the original hearing record was legal and proper. On the contrary, the Court expressly stated that it did not reach the questions presented by the appeals from the Commission grant of WJR's application.

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[13] The Enterprise Co. v. FCC, ___ U.S. App. D.C. ___, ___ F.2d ___ (January 29, 1959). (87 W.L.R. 94).

The factual difference between the matters raised by Appellants' Joint Petition of December 28, 1954 and those raised in the Enterprise case, provides a further and most significant difference between the issues in that case and those here. In the Enterprise case, evidence of a contract entered into by the successful applicant after the comparative hearing and grant was alleged by Enterprise to require a different result than that reached by the Commission, i.e., Enterprise contended that the making of the contract in question so downgraded the successful applicant that on a second comparison, Enterprise should prevail. It did not contend that any of the new evidence related to the comparative quality of the successful applicant prior to the date of making the contract. In this case, Appellants have contended that all of the newly discovered evidence proved that the original WJR preference had been improperly granted. The fact that the evidence came to light as a consequence of the filing of an application for modification of construction permit by WJR was purely fortuitous. Had Appellants come into possession of the same evidence of abandonment of the original proposal and plan to substitute a radically new and different one by WJR prior to the filing of any application for modification, they would have filed a petition immediately upon coming into possession of such evidence and no red herring of the merits of the new proposal could have dragged across the field of contest. Appellants' December 28, 1954 petition did not seek to question the merits of the new WJR proposal but the merits of its original proposal. In this difference lies the major distinction between the instant case and the Enterprise case.

It is appropriate to point out that the point here argued would not be in this case had the Commission lived up to the commitment contained in pages 82-83 of its brief, previously filed in this Court:

> "For if the Commission's final decision of May 14, 1954, as modified by its Memorandum Opinion and Order of December 2, 1956, (Cases No. 12,527, 12,528), or its decision of March 31, 1955 denying

> appellants' December 28th joint petition (Cases No. 12,666, 12,667), is found by the Court to be incorrect, the basic construction permit and any modification thereof or subsequent authorizations will be vacated, and the three competing applications will be reconsidered in accordance with the Court's instructions (R. 5939)." (Underscoring supplied.)

For had the Commission set aside its May 12, 1954 decision, WJR obviously would have had no more than an applicant status, and comparative consideration between it and Trebit and Butterfield would have been confined to the original WJR application, unless the Commission permitted WJR to amend said application. There is no need to labor the point here that any such amendment would have been in violation of the rights of Trebit and Butterfield and in violation of the Commission's Rules and Regulations. The Commission's bland repudiation of its commitment brutally awakened Appellants to the fact that WJR was going to be treated throughout this proceeding in a preferred and favored manner to the detriment of Appellants. The Commission granted exemption from its application amendment rules to WJR on the strength of a broken promise. It allowed WJR to substitute a workable for an unworkable proposal by assuming the validity of its May 12, 1954 decision. WJR's right to a comparative consideration of its application for modification of construction can be justified only on the basis of a proper reexamination of the May 12, 1954 decision and a determination based upon such reexamination that said decision is correct. No such determination has or can be made on the record of this proceeding.

IV

ASSUMING ARGUENDO THAT WJR WAS ENTITLED TO COMPARATIVE CONSIDERATION ON ITS APPLICATION FOR MODIFICATION OF CONSTRUCTION PERMIT, THE COMMISSION'S JULY 9, 1958 DECISION AFFIRMING ITS EX PARTE GRANT OF THAT APPLICATION IS INVALID.

We have shown above that WJR was not entitled to comparative consideration on its application for modification of construction permit. In this section we will assume for the purpose of argument that WJR was entitled to such consideration and proceed to demonstrate that even on that assumption, the consideration given by the Commission was so unfair and prejudicial to Butterfield and Trebit that its July 9, 1958 decision affirming its *ex parte* grant of the WJR modification application is invalid.

A. Butterfield and Trebit were denied rights established by the *Ashbacker* case.

The Commission, *ex parte*, on April 14, 1955, granted WJR's modification of construction permit. By its order adopted December 14, 1956, released December 17, 1956, it construed the remand hearing ordered by it in this proceeding as involving in part a comparative consideration of WJR's application for modification of construction permit and Appellants' applications for construction permit (R. 4955-57). In order that any such comparative consideration be fair and in compliance with the decision of the Supreme Court in *Ashbacker* v. *Federal Communications Commission*, 326 U. S. 327, the Commission was required to set aside its *ex parte* grant of the modification application before subjecting the applications of Butterfield and Trebit to comparative consideration with the WJR modification application. As the Supreme Court said in *Ashbacker* (page 333):

> "We only hold that where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress choose to give him."

It is clear that Appellants were deprived of their statutory right to a fair comparative hearing with WJR on its modification application in the remand proceeding in which WJR enjoyed the status of a permittee with a grant of the application outstanding rather than the status of an applicant for the authorization involved.

B. The Commission refused to permit any showing by Butterfield or Trebit of changed circumstances relating to their applications while permitting WJR to revise its application without limit.

As shown above, the WJR application for modification of construction permit changed every essential proposal upon which WJR claimed and the Commission awarded a preference in the original proceeding. During the remand proceedings, it was permitted to continue prosecution of its application notwithstanding a change of control of the corporation requiring statutory approval by the Commission took place (Tr. 1219-34). Trebit and Butterfield, on the other hand, were precluded from showing any change of circumstances which related to their applications. As early as October 30, 1956, at the prehearing conference before the Examiner, the Examiner explicitly recognized that WJR would be permitted to amend without limit but that Trebit's and Butterfield's applications were frozen and they were precluded from even meeting WJR's amendments (Tr. 153-56). The gross unfairness of this proceeding can best be illustrated by reference to what has been characterized in this Court by the Commission and the Intervenor as the "decisive" basis for denying Trebit in the May 12, 1954 decision. That "decisive" factor was that the owners of Trebit had owned radio and television stations in Indianapolis, Indiana, and Grand Rapids, Michigan, and a radio station in Evansville, Indiana (J.A. 455-57, 482, 483). Prior to the commencement of the remand proceedings, the Trebit owners had divested themselves of all radio and television properties other than radio station WFDF, in Flint, Michigan. This divestment took place by specific authorization of the Commission on application for consent. Trebit was not permitted to show this divestment at the remand hearing (R. 6040). Had it been able to do so, nothing more would have been needed to prove its right to the grant over WJR. Trebit's position throughout these proceedings has been that all three of the applicants should be compared on the basis of their original hearing proposals. Trebit has been content to be judged on its proposal and has not sought to take advantage of either WJR or Butterfield by showing the later comparative improvement in its status resulting from the divestment of its radio and television properties by its owners. However, the unfairness of rejecting a comparison on the original application and permitting WJR to substitute a new proposal while freezing the records as to Trebit's changes in circumstances, is nothing short of unconscionable.

C. Butterfield and Trebit were barred at the remand hearing from showing that any portion of the original WJR proposal which was carried bodily into the modified proposal, was not absolutely or comparatively in the public interest.

One of the issues in the original hearing which led to the May 12, 1954 decision was:

> "(2) To determine the type and character of the program services proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours." (J.A. 400)

Operating from the proposed Clarkston site, WJR would place a city grade (77 dbu) and Grade A signal over the City of Detroit (J.A. 408).

WJR's original proposal specified certain "local" programs which it had lifted from an application it had filed for a Detroit television station, which was the subject of a hearing in 1947-1948. Inasmuch as its original application proposed Detroit studios and service to all of the City of Detroit and its environs, no question as to the appropriateness of these studios or programs was raised by Trebit or Butterfield at the original hearing.

Operating from the Chesaning (modification application) site, WJR will not serve Detroit with either a Grade A or Grade B signal (R. 6370), yet the same "local" programs and Detroit studios were brought forward without change as a part of the modified proposal. At the further hearing, the appropriateness of this type of "local" programming to serve the needs of the areas and communities which would receive service under the modified proposal was sought to be questioned. Butterfield and Trebit were barred from proceeding with proof that the programs in question could be justified only as local interest programs in the City of Detroit and were of no value in any of the areas or communities which would be served by the WJR modified proposal on the grounds that the evidence was not relevant under the issues for the further hearing and that any such question should have been raised in the original comparative hearing (Tr. 1738-57, R. 5517-31).

D. The Commission refused to apply its own test in comparing the new WJR site to the old one.

The Commission's attempt to avoid awarding a preference to Trebit and a demerit to WJR because of the complete compliance by Trebit with the provisions of Section 3.685 and the inferior quality of the original WJR site evaluated under that rule has been repeated to protect WJR against demerit on the site proposed in its modified construction permit. As pointed out in Trebit's briefs in the earlier appeals, the Commission's attempt to equate the Trebit site and the WJR, Clarkston site in the May 12, 1954 decision has neither logic nor law nor science to support it. (Brief, pp. 12-15, Reply Brief, pp. 23-37) But if by any stretch of the imagination it could have been called a sound way to deal with the issue in that decision, it cannot be escaped as the test to apply to the comparison of the Trebit site and WJR's new

Chesaning site. The test applied in the May 12, 1954 decision was that additional height above mean sea level compensates for additional distance from the community to be served, and this without regard to the relative disproportion in height or the relative disproportion in distance. (J.A. 470-72) What is the effect of this view in comparing the Chesaning and Trebit sites? On distance, Chesaning is some three times as far away. (R. 6371) The Trebit site is some 25% higher. (R. 6371, Tr. 1188, 89) So, being both farther away and lower, and each by substantial amounts, the WJR Chesaning site, by the Commission's own test, must be found to be inferior to Trebit's under Section 3.685. Failure so to find, failure to award Trebit the consequent preference, and failure to reevaluate Trebit's proposal against WJR's in the light of that preference is reversible error.

E. WJR was permitted to vary its studio proposal at the hearing from the plans submitted in its MP application as granted by the Commission.

The WJR modification application proposed that the new studio building would be leased and that these studios would be expanded if needed to present its programming. Said application, however, made no provision to cover the cost of expansion or for purchase of the building, nor were any specific proposals made for said expansion (J.A. 585-89). In its opposition to Appellants' Joint Petition of December 28, 1954, WJR represented:

> "Although the lease arrangement represents a change in WJR's plans to construct its own studio building, it does not truly reflect any substantial change inasmuch as the new studios will be fully adequate to effectuate the WJR program proposal." (J.A. 537-38)

The foregoing matters were before this Court in the record and these and other details concerning the studio plans as proposed in the WJR modification application were set forth in the earlier briefs

(Trebit Brief, pp. 32-33; Butterfield Brief, pp. 21, 40, 42; WJR Brief, pp. 33, 34). On the basis of the information then before it, this Court held in effect that WJR should not enjoy a preference for its studios unless it could prove its less elaborate studio building to be superior to Appellants' proposed studios, as the $776,000 studios had been held to be. Moreover, the Court held that the Commission's conclusion that the two studios were not significantly different because of WJR's promise to expand the new studios, if needed, was baseless. Said the Court:

> "It certainly cannot be supported by WJR's naked promise to repair whatever deficiencies may appear. These comparative proceedings must turn upon concrete proposals tested through the hearing process, not upon facile and untested afterthought." (237 F.2d 559)

In the further hearing, Appellants were met with a third WJR studio proposal. WJR took the position that it was not bound by the commitments and proposals as set forth in the modification application and presented to the Court, maintaining that its proposals were not frozen until they were presented in the further hearing. (Tr. 618-28) Thus, WJR, at the hearing, presented a proposal to purchase rather than lease the WTAC-TV studios and, despite the fact that WJR's modification application does not provide for same, WJR at the hearing proposed to spend $225,000 for improvement and expansion of the studio, notwithstanding that the Commission had found it financially qualified on the basis of a sworn representation that no such expenditure was entailed--and notwithstanding that Appellants were not permitted to question WJR's financial qualifications. This third studio proposal advanced at the hearing bears little resemblance to the studio proposal advanced by WJR in its modification application, or the plans and proposals upon which this Court made its ruling in its May 24, 1956 decision. Its effect, however, was to repair the defects in the studio proposals of WJR's modification application. A more patent example of fast footwork, viz. "facile afterthought", is difficult to imagine.

Despite objections by Appellants, WJR was permitted to substitute these new and different plans and proposals, concocted during the course of the hearing and, therefore, unknown to the Commission or Butterfield or Trebit, which were superior to those upon which its modification application had been granted. Trebit and Butterfield were not permitted to attack this change of plan, notwithstanding that the financial representations upon which the modification application was granted precluded the construction involved (Tr. 608-13, 617-59, 712-14).

In its July 9, 1958 decision the Commission expresses its views concerning WJR's third changed studio proposals and erroneously concludes that they were proper. (R. 6375, 76) Nowhere in its decision does the Commission take cognizance of the Court's admonition that this aspect of WJR's changed proposal must be comparatively considered with the studio proposals of Trebit and Butterfield; e.g., the Commission fails to take any cognizance of Trebit's claim advanced from the outset of this proceeding, that its proposed studios are superior to WJR's from the standpoint of location and accessibility to the public of Flint (J.A. 555-58 (R. 6751-53); J.A. 560-61 (R. 6773-74); R. 6795, J.A. 573 (R. 6950); see also Trebit's earlier brief, pp. 32-36).

V

THE COMMISSION ERRED IN REFUSING TO REOPEN THE RECORD PURSUANT TO THE JOINT PETITION FOR REHEARING FILED BY TREBIT AND BUTTERFIELD JULY 25, 1958 TO RECEIVE EVIDENCE THAT WJR WOULD NOT BE ABLE TO EFFECTUATE ITS PROGRAMMING PROPOSAL AS REPRESENTED IN THE REMAND HEARING.

In the remand hearing, the Commission permitted WJR to submit a new program proposal based on a CBS television network affiliation rather than a Dumont affiliation. Within days after the Commission's July 9, 1958 decision granting WJR's application "as modified"--the most important aspect of the modification being the change from Dumont to CBS--to propose, among other things, a CBS rather than a Dumont affiliation, information leaked out that WJR actually would not furnish CBS service at all, despite its representations to the contrary at the hearing on remand. Trebit and Butterfield promptly (July 25, 1958) filed a joint motion for rehearing and a joint motion for stay (R. 7291-99, 7301-02). In these documents, inter alia, Trebit and Butterfield alleged on information and belief that WJR had terminated its proposal for CBS affiliation and now had plans for still another totally different program service. On this basis, they asked for a reopening of the record for the purpose of introducing evidence on the vital question of whether WJR could once more radically alter its programming proposals immediately after receiving a favorable Commission decision, all without opportunity to challenge or even notice to its comparative hearing opponents.

On August 1, 1958, before WJR even filed its opposition to the motion for stay, the Commission announced by press release that it had adopted an order denying the stay. The release gave no reasons for the action. WJR later that day filed its opposition to the petition for rehearing and to the motion for stay, and in this document it admitted without qualification that it would not be a CBS affiliate and that it would instead affiliate with ABC. Three days later, on August 4, 1958, the Commission released its order denying the motion for stay and giving its reasons for such denial. The primary ground for refusing the stay was that the motion did not contain adequate factual support for its contention that WJR would not broadcast CBS programs. At the time this order was made public, WJR had admitted the fact and no further proof of it was required. The petition for rehearing was not decided by the Commission at the time it denied the stay. On the contrary, the Commission reserved decision on that petition and stated that it would be handled "in the normal course of Commission business".

By Memorandum Opinion and Order adopted September 8, 1958, released September 10, 1958, the Commission denied Appellants' petition for rehearing (R. 6443-48). The denial of rehearing takes cognizance of the WJR admission that Appellants' allegations with respect to the inability of WJR to carry out its CBS programming commitments were correct but despite this and despite the fact that WJR's substitute network proposal had not been submitted to the Commission in any application form or any other manner on which its adequacy in the public interest could be shown, prima facie, much less decided, and despite the fact that Appellants were not given any opportunity to cross-examine WJR with respect to the effect of its loss of CBS upon its other programming proposals, the Commission held that its grant to WJR should stand. No parallel can be found in any precedent for this action except in the Commission's action denying, ex parte, Appellants' December 28, 1954 petition for rehearing which this Court reversed. On the basis of that decision and this Court's decision in Plains Radio Broadcasting Company v. Federal Communications Commission, 85 U.S. App. D.C. 48, 175 F.2d 359, the Commission's denial of Appellants' joint petition of July 25, 1958 for rehearing constitutes reversible error. In fact, the Commission's denial of Appellants' July 25, 1958 petition is more flagrant when it is realized that said denial flies directly into the face of this Court's earlier ruling in this very case. Butterfield v. FCC.

CONCLUSION

For the foregoing reasons, these cases should be reversed and remanded to the Commission with directions to set aside its final decision of May 12, 1954, as modified by its decision of December 6, 1954 and as affirmed with modifications by its decisions of July 9, 1958 and September 9, 1958, with directions to deny the original WJR application and grant the application of either Butterfield or Trebit; and to grant such further relief as this Court may direct.

Respectfully submitted,

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May 19, 1959

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12527, 12752, and 14685

W. S. BUTTERFIELD THEATRES, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

Nos. 12528, 12753, and 14691

TREBIT CORPORATION, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG 18 1959

Joseph W. Stewart
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No. 14717

LAKE HURON BROADCASTING CORPORATION, Appellee,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

APPEALS FROM ACTIONS OF THE FEDERAL
COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

Appellants Trebit, Butterfield and Lake Huron set forth their respective views as to the questions presented by their appeals in their respective briefs.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12527, 12752, and 14685

W. S. BUTTERFIELD THEATRES, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

Nos. 12528, 12753, and 14691

TREBIT CORPORATION, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

No. 14717

LAKE HURON BROADCASTING CORPORATION, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WJR, THE GOODWILL STATION, INC., Intervenor.

APPEALS FROM ACTIONS OF THE FEDERAL
COMMUNICATIONS COMMISSION

COUNTERSTATEMENT OF THE CASE

This proceeding is the outgrowth of a comparative proceeding involving appellants Butterfield and Trebit and intervenor WJR, all of whom filed mutually exclusive applications for authority to construct and operate a television station on Channel 12 at Flint, Michigan. This Court has already considered this proceeding at an earlier stage, at which time it remanded this case for further consideration in accordance with its opinion. W. S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956). However, in view of the reinstatement of earlier appeals in Cases No. 12527, 12528, 12752 and 12753, we believe it appropriate to set out certain of the proceedings prior to this remand, as well as events occurring since this Court's earlier opinion.

The initial comparative hearing in this case began in November, 1952, and resulted in the examiner's initial decision (J.A. 317-372) proposing a grant to Trebit. Following exceptions and oral argument en banc, and full consideration of the respective proposals, the Commission on May 14, 1954, issued its decision (J.A. 400-491) granting WJR's application, while denying the competing applications of Butterfield and Trebit. The Commission granted WJR and Butterfield a preference over Trebit on the factor of diversification of control of the media of mass communications, at the same time finding no significant difference in this respect between WJR and Butterfield (J.A. 455-458). The Commission also concluded that WJR and Trebit were entitled to a preference over Butterfield in terms of likelihood of responsiveness to community needs and the probability of effectuating their proposals, because of their satisfactory past records in the operation of broadcast stations (J.A. 458-459). It found that none of the stockholders in any of the three applicants were Flint residents, and further that none of the applicants proposed significant integration in the management of the proposed stations. WJR was awarded a slight preference over Trebit and Butterfield as a consequence of the active participation of a greater number of WJR's principals in the day-to-day operation of the proposed station (J.A. 459-461). WJR and Trebit both were accorded clear preferences over Butterfield in respect to their preparation of their proposals and steps taken to ascertain the needs and desires of Flint (J.A. 466-468). Trebit was also found to merit "some preference" because it was in a position to be somewhat more closely attuned to the needs of Flint, through the operation of an AM broadcast station (WFDF) in that community (J.A. 465-466).

While the Commission found that all three applicants proposed well rounded program schedules, it accorded WJR a clear preference over Trebit and Butterfield because of WJR's greater provision for local live and remote programs (including those making use of Detroit programming sources) (J.A. 462, 468-469), particularly since WJR had proposed superior studio and equipment facilities directly related to its program proposals (J.A. 461-462, 468-469). No preference was awarded to any of the applicants with respect to transmitter sites, the Commission finding no significant basis for a preference between the site north of Flint chosen by Trebit and the southern sites chosen by WJR and Butterfield. (J.A. 469-482). The Commission stated, "...the most significant difference between WJR and Trebit, and what, in our mind, is the determinative factor in the comparison of these two applicants, is the fact that a grant to WJR would better serve the Commission's well-established policy of diversification of the media of mass communications and, at the same time, would avoid the concentration of control of such media within a relatively small area that would result from a grant of the Trebit application" (J.A. 482). It further held, "...the determinative factor in the comparison of [WJR and Butterfield] relates to the preparation of their program proposals to serve the needs of the Flint community. In this connection WJR warrants a significant preference" (J.A. 483). In weighing these various considerations, the Commission found the WJR proposal superior to those of Butterfield and Trebit, and accordingly granted WJR a construction permit for this station (J. A. 482-483).

Petitions for rehearing of this decision were filed by Butterfield and Trebit (R. 5732-5772; 5118-5155) and on December 6, 1954, by Memorandum Opinion and Order, the Commission denied these petitions. (J.A. 491-503) In this opinion the Commission made clear that the preference due WJR for its local live programming was not based upon quantity alone, but rather on the worthwhile character of these programs, taken together with the superior equipment for presenting them (J.A. 493-495).

On December 16, 1954, WJR filed an application for modification of its outstanding construction permit. It advised the Commission it desired: (1) to move its transmitter from Clarkston southeast of Flint to Chesaning, northwest of that city; (2) to change its network affiliation from DuMont to CBS, with the consequent changes in programming; and (3) to use a studio building formerly occupied by a UHF station, which had recently gone off the air, rather than the new structure it had set forth in its original proposal. Butterfield and Trebit on December 28, 1954, filed a joint petition with the Commission seeking a stay, reopening of the record, rehearing and further relief, based upon these modifications of WJR (J.A. 503-535). On January 5, 1955, while these pleadings were pending with the Commission, appeals were filed in Cases No. 12527 and 12528, addressed to the grant of WJR's original application.

Thereafter, on April 1, 1955, the Commission issued its Memorandum Opinion and Order denying Butterfield and Trebit's joint petition for rehearing, concluding that the changes proposed were not of sufficient importance to suggest that they would have, had they been in effect during the hearing, required any different finding concerning the preferences awarded to WJR (J.A. 540-548). Butterfield and Trebit filed appeals in Cases No. 12666 and 12667 from this action by the Commission.

On April 14, 1955, the Commission granted WJR's application for modification of its construction permit, authorizing the change in transmitter site.[1] The joint petition of Butterfield and Trebit, seeking reconsideration of this action, was dismissed on June 10, 1955 (J.A. 608-621), and thereafter appeals were filed by Butterfield and Trebit in Cases No. 12752 and 12753, attacking this grant of the modification application.

On May 24, 1954, this Court in W.S. Butterfield Theatres, Inc. v. Federal Communications Commission, supra, in Cases No. 12666 and 12667 reversed the Commission's decision denying the joint petition of December 28, 1954, in which Butterfield and Trebit had sought to reopen the record in view of WJR's modification proposals. The Court directed that further proceedings be had in this connection. At the same time it dismissed Cases No. 12527, 12528, 12752, and 12753, which appeals challenged the original grant to WJR and the grant of the subsequent modification proposal.

The Court stated in its opinion that the Commission retained jurisdiction over this comparative proceeding at the time the modification proposals were submitted, and it was an abuse of its discretion not to reopen the record as a consequence of these modifications. It concluded that this new evidence went to the foundation of the Commission's decision, and that refusal to reopen the record deprived Butterfield and Trebit of their rights as competing applicants.

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[1] The other changes, viz. network affiliation and studio plans, did not, under the Commission's rules, require Commission authorization.

The Court stated that only evidence developed at a hearing could determine whether these changes had significance affecting the basis of the Commission's decision. Additionally, the Court denied the petition filed by Butterfield and Trebit ancillary to their appeals, in which they sought an order directing the Commission to rescind its order of April 14, 1955, allowing the modification of WJR's permit. The Court noted that appellants' rights were completely protected by its disposition of the appeals relating to reopening the record. It ordered, "The Commission will conduct further hearings on the question of the differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed."

The Commission then petitioned this Court for rehearing, directed only to one issue, whether the Commission, in this further hearing held pursuant to the remand, could properly consider changes in the proposals of Butterfield and Trebit, as well as changes in WJR's proposal. The Commission sought this modification of the Court's opinion, in view of the fact that Section 402(h) of the Communications Act, 47 U.S.C. §402(h), would otherwise prevent the Commission's consideration of these changes. On July 9, 1956, the Commission's petition for rehearing (by way of modification) was denied.

Accordingly, on October 17, 1956, the Commission ordered an expedited hearing before an examiner on the following issues (R. 4737):

> (1) To determine the differences between the proposals advanced by WJR, The Goodwill Station Inc., in its original application ~~for modification of~~ and those proposals advanced by it in its application its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.
>
> (2) To determine, in the light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee.[2]

Apparently experiencing some confusion over the scope of the hearing so directed, Butterfield and Trebit filed a joint petition with the Commission, requesting clarification of the issues and the inclusion of additional issues directed to the applicability of then Sections 1.365(a) and 1.387(b)(3) of the Commission's rules. The Commission, on December 17, 1956, issued its Memorandum Opinion and Order refusing clarification or modification, and reciting that the remand contemplated a further hearing on precisely the issues designated (R. 4955). Butterfield and Trebit, differing with the Commission as to the nature and extent of the hearing directed by this Court's opinion, filed a petition for a writ of mandamus with this Court, asking that the Commission be directed to vacate its order of April 1, 1955, denying their joint petition for rehearing; vacate the construction permit granted WJR on May 14, 1954;

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[2] The Court had further stated in its opinion that the reopened hearing should consider whether WJR's "late revelation of its changed situation reflects upon its character and fitness as a licensee."

vacate the modification of this permit granted WJR on April 14, 1955; and vacate its order of October 17, 1956, providing for a hearing on the above-recited issues. (Additionally, certain other relief was requested, directed to the intervention of Lake Huron and the further conduct of this proceeding.) Having these issues thus presented, with the consequent occasion to review the contemplated procedure of the Commission pertaining to this hearing, this Court denied the petition for mandamus of Butterfield and Trebit on January 14, 1957.

This matter then proceeded to the hearing directed in this Court's opinion of May 24, 1956, and on September 12, 1957, the examiner released a supplemental initial decision, recommending that the grant to WJR be affirmed (R. 5942-6041). After exceptions were filed by the parties and oral argument heard by the Commission, the Commission issued its decision on July 11, 1958, affirming the grant to WJR (R. 6367-6411).

The Commission noted that this proceeding was not a comparative proceeding ab initio. It was faced with the question whether, in the light of these modifications, it would better serve the public interest to affirm this grant than it would to set it aside and award it to one of the other competing applicants. (R. 6399)

With regard to the studio changes proposed by WJR, the Commission noted that WJR's proposals for studio and technical equipment have not been materially altered. The studio still retained its significant value with regard to the effectuation of the remote broadcasts and local live programming proposed by WJR, the basis for award of a preference to it on this score. With respect to the programming changes resulting from the new network affiliation, the Commission found that local programming was unaltered and that there was no reason for questioning WJR's ability to fulfill its proposed local programming commitments because of network option time arrangements. It further found that substitution of network programs for proposed film programs did not adversely affect WJR's preference. Moreover, it concluded that it was a matter within WJR's sound discretion to determine that a network affiliation was desirable; and to elect the alternative of modifying a network proposal found after hearing to be impractical due to circumstances beyond its control rather than the alternative of "independent operation." (R. 6401) The basis for WJR's programming preference has consistently been its proposals for local live and remote programs, directed at Flint, the focal point for WJR's programming decisions. Therefore, the Commission concluded that the preferences originally warranted in WJR's programming proposals remain, for it retained a substantially greater amount of local live programming, as well as remote programs, implemented by the proposed studio facilities and equipment.

In discussing the change of transmitter site, the Commission noted that the vast majority of persons who would have received WJR's signal from Clarkston, but would not receive the Chesaning signal, were already well served by multiple existing stations. Thus their loss of WJR's signal is comparatively insignificant. WJR will provide service from Chesaning to more persons receiving comparatively little television service than would have been served from Clarkston. Accordingly, the Commission found that the Chesaning site is at least as beneficial in serving the public interest as was the Clarkston site. Weighing Chesaning against the transmitter sites of Butterfield and Trebit, the Commission found no significant comparative difference justifying a preference to any of the parties on the basis of population served. The greater number of persons served by Butterfield is offset by the fact that the bulk of these persons, living in the Detroit area, already receive multiple television service. Trebit's site and WJR's are not significantly different, with respect to the number of persons served and the television service they presently receive. The Commission recognized WJR was faced with evaluating conflicting considerations in arriving at its transmitter site. The Commission thus decided the choice of Chesaning in order to obtain a network service was not improper inasmuch as WJR's signal over Flint exceeds the minimum city-grade. In summary, and evaluating these various considerations, the Commission concluded there was no basis for preference on the issue of transmitter site.

(R. 6402-6404).

With respect to the issue as to whether the time at which WJR filed its modification application reflected adversely upon its character and fitness as a licensee, the Commission concluded that the record clearly established that on May 12, 1954, at the time the grant was made, WJR intended to abide by its proposals then pending before the Commission. Shortly before that time it had first become aware of the availability of the WTAC studios it subsequently acquired. While it was then becoming apprehensive about the future of the DuMont network and was beginning to think about securing supplemental network service, it at that time intended to proceed with its proposals then before the Commission as to studio, network and transmitter site.

However, subsequent developments required reassessment of the situation. Thus, WJR's officers were first advised of the availability of WTAC's studios about April 30, 1954, and WJR's president first inspected these studios on May 19. Thereafter negotiations led to the consummation of a lease on July 30, 1954. Similarly, rumors reached WJR during the course of a convention on May 23-27, 1954, which intensified its concern over the future of the DuMont network. Nevertheless, on June 1, WJR management began to proceed with construction at the original Clarkston transmitter site, anticipating a DuMont affiliation, although it recognized that this site would not be acceptable to any other network. When DuMont affiliation began more clearly to appear undesirable, and

WJR began approaching the other networks, it first sought to interest them in affiliation at the Clarkston site. Not until July 9, 1954, when affiliation with ABC, CBS or NBC appeared unlikely at Clarkston and affiliation with DuMont, on information then available, appeared to be impractical, did WJR halt construction at that location. It nevertheless continued to seek affiliation at Clarkston with these networks. It was not until early September, when CBS indicated its willingness to affiliate at a Chesaning transmitter site, that WJR definitely determinedon a site change.

The records showed that on December 1, 1954, when WJR applied for an extension of the completion date of its facilities, and on December 16, 1954, when it applied for modification of its construction permit, WJR first revealed its new proposals specifically.[3] WJR contended that it delayed advising the Commission of these changes, on advice of counsel, because it wished to avoid a charge by its competitors that it was trying to improve its comparative position while petitions for reconsideration (denied by the Commission December 6, 1954) were pending. The Commission, holding that WJR was a permittee during this period, rather than an applicant in a pending comparative hearing, and that WJR did not act in violation of Commission Rules pertaining to permittees, considered this position reasonable. As the Commission had found, this was not a case where the modifications were calculated to result in an adverse effect upon the service to the public, and accordingly the necessity for immediate Commission consideration of these changes was less apparent. Further at that time, the Commission's position was that a permittee following comparative hearing did not remain subject to further comparative proceedings because of actions taken during the pendency of petitions for rehearing or appeal.[4] In the light of these facts, the Commission concluded that it was reasonable for WJR to act as it did. Moreover, the Commission noted that WJR had an excellent past broadcast record, and even were some demerit to attach as a consequence of this delay in notification, the Commission concluded that WJR's reliability would not be substantially diminished (R. 6404-6407).

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[3] At that time WJR still had not received formal approval of the Chesaning site from the Air Coordinating Committee, although it had informal assurance of approval (R. 6398).

At the same time, the Commission noted that Section 402(h) of the Communications Act limited it here to consideration of the issues it had designated on October 17, 1956. Accordingly, it was prohibited from considering in this comparative proceeding the effect that WJR's operating as a CBS affiliate from Chesaning would have on Lake Huron's operation from Saginaw, Michigan (R. 6407-6408). In summation, the Commission concluded that the basis for its May 12, 1954, grant to WJR remained unchanged, and that the public interest, convenience and necessity would best be served by affirming the grant to WJR (R. 6408).

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[4] The decisions of this Court since that date, including the first Enterprise and Southland cases, supra, and the earlier opinion in this case of May 24, 1956, now make it clear that subsequent actions may warrant a "partial reopening" of the comparative case, and the Commission erred in holding otherwise.

At the same time this comparative reconsideration of the WJR grant was in progress, pursuant to this Court's opinion of May 24, 1956, the Commission likewise had before it a protest by appellant Lake Huron (Station WKNX-TV, Channel 57, Saginaw, Michigan) directed to the grant of WJR's December 16, 1954 modification application.[5] Following an extensive hearing on issues raised in the protests ("the protest hearing"), an Initial Decision was issued by the Examiner denying the protests and affirming the grant of WJR's modification application. After exceptions and oral argument en banc, the Commission concluded that the protestants failed to establish that the grant of the modification application was not in the public interest or that WJR was unqualified to receive the grant. Accordingly, the Commission concluded in its decision released July 16, 1958, that the grant would serve the public interest, convenience and necessity and denied these protests (R. 12887).

The Commission's consideration of these protests dealt with many of the same allegations presented in the comparative reconsideration. The record made in both cases was substantially the same on these issues. The Commission reiterated many of its conclusions in the comparative decision, released only five days before -- that WJR's programming proposals, its decision to propose a DuMont affiliation in its application in the original comparative hearing, and the allegations of concealment by WJR of its modification proposals, were not such as to warrant a conclusion that the grant of WJR's application was not in the public interest.

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[5] Similar protests were filed by Inland Broadcasting Company, permittee of WTOM-TV, Channel 54, Lansing, Michigan, and Sparton Broadcasting Company, permittee of WWTV, Channel 13, Cadillac, Michigan. Inasmuch as these protestants have not appealed from the Commission's decision denying their protests after hearing, no further reference will be made to their contentions, or to the Commission's decision insofar as it pertained solely to the contentions of these protestants.

The Commission carefully considered Lake Huron's allegations of economic injury, that authorization of WJR's modification proposals would adversely affect WKNX-TV's economic well-being and cause its demise. The Commission rejected this contention on two grounds: (1) the evidence failed to establish that Lake Huron could not effectively compete with WJR's proposed operation, and (2) considering the benefits to the public from the WJR grants, the Commission could not conclude that, overall, the public would be injured from Lake Huron's inability to continue operations to such a degree as to justify a denial of the WJR grant, even if such inability had been established (R. 12884).

The Commission observed that the evidence was insubstantial that network advertisers would prefer WJR to WKNX-TV, or would not buy both stations. It considered the fact that both Saginaw and Flint are of substantial size, that the UHF conversion rate in WKNX-TV's coverage area is relatively high (R. 12884), that the programming schedule submitted by WJR generally excluded CBS network programs carried by WKNX-TV,[6] that both stations would retain their CBS affiliations,[7] and that there was no reason to believe that WKNX-TV would be unable to obtain an ABC affiliation (R. 12884). Moreover, the Commission was not satisfied that the evidence established that WKNX-TV would be unable to operate successfully and in the public interest without a network affiliation, that it could not obtain other network programs in lieu of those it presently was transmitting, that rate differences and other factors would not affect the choice of advertisers in deciding between WJR's station and WKNX-TV, or that the potential of the markets in the respective coverage areas had been developed to their utmost and could have no future growth. Weighing all of these matters collectively, together with Lake Huron's contentions, the Commission determined that the evidence failed to establish that Lake Huron could not effectively compete with WJR's proposed operation at Chesaning. Moreover, weighing the needs of Flint, a far larger community than Saginaw, against the possibility of WKNX-TV's failure to continue operations, the Commission concluded that the public interest would be better served by providing this WJR service to Flint, especially since Saginaw would continue to receive satisfactory television service apart from WKNX-TV.[8] The Commission noted that Lake Huron's license contains no express or implied terms insuring it financial success or freedom from hurtful competition (R. 12882). Appraising this issue, the Commission concluded that the public interest, convenience and necessity called for denial of these protests and affirming the grant of WJR's modification proposals (R. 12879-12887).

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[6] These programming representations took on added significance in light of the fact that WJR had an outstanding record of complying with its programming proposals (J. App. 420, 458-459).

[7] A CBS witness testified all stations concerned would retain their CBS affiliations, notwithstanding WJR's advent on the scene (R. 12885).

Appellants then petitioned for reconsideration, in the "comparative proceeding" and the "protest hearing", respectively. On September 10, 1958, the Commission released its Memorandum Opinions in these matters, denying these petitions for reconsideration (R. 6441-2, 12918-9 in the "protest hearing"; R. 6443-6448 in the "comparative proceeding"). Appellants Butterfield and Trebit had urged that the Commission failed to accord comparative consideration to the timing of WJR's modification application, insofar as it affected its character qualifications and good faith. The Commission stated, that it did not believe that the Court's opinion of May 24, 1956, called for comparative consideration of this issue; nevertheless, even making this question a comparative issue, it found that "even if some demerit were to attach to WJR the effect thereof on that applicant's comparative reliability would not be such as to substantially diminish that reliability as established by WJR's excellent record of operation in the public interest" (R. 6445).

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[8] Service to Saginaw would be provided from WNEM, Bay City; WJIM-TV, Lansing; WWTV, Cadillac, and the WJR station in Flint (R. 12873).

Butterfield and Trebit further alleged in their petition for reconsideration that WJR would be unable to comply with its amended proposals, because "industry rumors" indicated that WJR would not become a CBS affiliate. Although these allegations did not contain any factual support, WJR in its Opposition to the Petition for Rehearing, conceded that a primary CBS affiliation was no longer available to it, but that it had obtained an ABC network affiliation (R. 6445). The Commission, noting that it had consistently refrained from awarding any comparative preference on the basis of affiliations with any of the three national networks, both because the quality of programming on each is essentially equal, and also because of the constant change in program fare among the networks, and recognizing that WJR had obtained another network service for its listening audience, concluded that this change was not of a nature to require reopening the record for reconsideration of the grant. WJR had stated that it did not become aware of the unavailability of a CBS affiliation until after the Commission's decision released July 9, 1958, and the Commission concluded that the mere suspicions of improper concealment advanced by Butterfield and Trebit, without benefit of actual facts substantiating their charge of lack of good faith, did not warrant a reopening of the record. Considering the significance of the changes in this network affiliation, the Commission said:

> If petitioners offered evidence of changes in the WJR proposal which affected the basis of the Commission's decision, we would be justified in reopening the record to examine such changes. However, the passage of time incident to the adjudication of a proceeding of this type creates a likelihood that changes will be required in some aspects of virtually all applications, and for the Commission to reopen a record to consider all such changes, regardless of their decisional significance, would completely defeat the Commission's basic function. There must be a point at which administrative decisions may be regarded as final in the absence of facts tending to alter the actual ground or reason for the decision.

With this thought in mind, the Commission concluded that the public interest required denial of this petition for reconsideration (R. 6443-6448).

Thereafter, appellants filed their appeals in Cases No. 14685, 14691, and 14717. Earlier appeals in Cases No. 12527, 12528, 12752 and 12753 have been reinstated by this Court's order of January 15, 1959.

STATUTES INVOLVED

Pertinent portions of the Communications Act of 1934, as amended, 47 U.S.C. s151 et seq., 48 Stat. 1064, and of the Rules of the Federal Communications Commission are set forth in the Supplement to the Butterfield brief.

SUMMARY OF ARGUMENT

I.

This Court's opinion of May 24, 1956, in its earlier consideration of this case, rebuts appellants' contention that WJR must be dismissed from this further comparative proceeding by reason of its modification proposal. The issues on which this hearing was held complied with this Court's opinion. The amendment and "cut-off" rules of the Commission likewise do not conflict with the Commission's reconsideration of this comparative proceeding; they clearly were not designed to prevent WJR's modification of its proposal, made as a consequence of developments subsequent to the Commission's May 14, 1954, grant to WJR.

Moreover, the hearing held pursuant to this Court's remand did not conflict with Ashbacker. The Commission was prevented by Section 402(h) of the Communications Act and this Court's order of July 9, 1956, from considering changes of Trebit and Butterfield in their proposals. Moreover, Section 402(c) did not prevent the Commission's grant of the modification proposal, or require that this modification proposal be set aside prior to the hearing directed by this Court's 1956 opinion.

Lake Huron's 1956 application for Channel 12 at Flint was properly dismissed by the Commission under its "cut-off" rules. This comparative hearing was not an *ab initio* proceeding, open to new applicants. In any event, Lake

Huron's application was not entitled to comparative consideration in this hearing, as the "cut-off" rules precluded its comparative consideration with Trebit and Butterfield's applications.

II.

The Commission's grant to WJR of May 14, 1954, on the basis of the record then before it, was reasonable and proper. DuMont affiliation at that time was reasonable, and it would have been contrary to the public interest for the Commission to have considered such an affiliation adversely. Moreover, the transmitter site proposed by WJR has been reconsidered in compliance with this Court's opinion, and further reconsideration is not warranted, particularly since WJR could have amended its transmitter site proposal after the Hall case held the propogation curves received the status they now hold in comparative determinations.

Upon new comparison of the parties, after WJR's post-grant changes, the Commission properly affirmed the grant to WJR. The studio and equipment proposals retain their value in effectuating local live and remote programming, the basis upon which they resulted in a preference to WJR. No substantial changes with regard to programming occurred in the field of importance, local live and remote programming. Moreover, the Chesaning transmitter site of WJR is as desirable as its Clarkston site and likewise serves the public interest as much as the sites of Trebit and Butterfield.

Insofar as the timing of WJR's modification proposal, the record established that these modifications were a consequence of events occurring subsequent to the May 14, 1954, grant and beyond WJR's control. Moreover, at the time the Commission's rules and applicable court decisions did not require reporting these changes at any time prior to that at which WJR acted. In addition, WJR's outstanding past record for reliability would outweigh any demerit that were to attach to it as a consequence of delay in notification of these changes.

III.

The evidence failed to establish that Lake Huron could not effectively compete with the proposed WJR operation from Chesaning. Inasmuch as Lake Huron failed to sustain this burden of proving economic injury, no useful purpose would have been served by considering this claim in the comparative proceeding, in addition to the protest proceeding. In any event, Section 402(h) of the Communications Act prevented consideration of Lake Huron's claim of economic injury in the comparative proceeding. Since WJR did not secure a CBS affiliation, upon which Lake Huron's claim of economic injury is predicated, nothing would be gained by reopening the record on this issue.

IV.

The fact that a CBS affiliation became unavailable to

WJR subsequent to the Commission's July 11, 1958, decision did not warrant a further evidentiary hearing, after WJR secured an ABC affiliation. There was no evidence of misconduct on the part of WJR in this connection. The Commission has traditionally refrained from granting any preferences on the basis of network proposals, and WJR has retained the local programming which formed the basis of the programming preference given it by the Commission. Since the passage of time necessarily results in changes in some aspects of virtually all applications, it would not be in the public interest to reopen this proceeding, where this change has no decisional significance.

ARGUMENT

I. THE COMMISSION'S PROCEDURES ON RECONSIDERATION OF THE WJR GRANT WERE PROPER IN EFFECTUATING THE COURT'S MANDATE AND THE REQUIREMENTS OF LAW

A. The Commission Properly Reconsidered The Grant to WJR and Rejected Appellants' Claim that WJR's Proposals should be Dismissed

The Commission pursuant to the May 24, 1956, remand reconsidered the grant to WJR, evaluating WJR's proposal, as modified, comparatively with the Butterfield and Trebit proposals. Appellants argue, in varying degrees, that WJR's modification application may be considered to the extent required to show that WJR has "abandoned" its original application to serve Flint, but then must be rejected from further Commission consideration pursuant to the provisions of Section 1.365(a) of the Commission's Rules. This Rule, prior to revision on February 3, 1958, stated that amendments to applications (other than those of certain routine or minor character) would not be accepted after public notice of the issuance of an initial decision.[9] We propose to show that appellants in this claim misconceive the mandate of this Court in its earlier considerations of this case, as well as the meaning and purpose of the cited Commission Rules.

This Court's opinion of May 24, 1956 succinctly set out the guide posts for the Commission in further proceedings on this grant. 47 U.S.C. §402(h). In its decision, this Court clearly envisioned further consideration of WJR, not its outright dismissal from the comparative proceedings. Thus, in discussing the need for comparison of WJR's modified proposal with the proposal upon which its grant was received, the Court expressly recognized that the hearing might properly end with affirmance of WJR's grant, notwithstanding the modifications made. W.S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 75, 237 F.2d 552, 556 (1956). The opinion of this Court directs further hearings with a view to reconsideration of the WJR grant; but in no wise does it direct a vacation of WJR's status as permittee or order dismissal of WJR from the proceeding because of this modification. In fact, when this Court was requested by appellants to rescind the grant of modification on substantially the grounds here urged, it denied appellants' petition. Ibid, Order of May 28, 1956.

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[9] Appellants also rely on the then Section 1.387(b) of the Commission's Rules, now Section 1.106(b)(1), 47 C.F.R. §1.106(b)(1), which provides for consideration on a comparative basis only of such mutually-exclusive applications as are filed at least 30 days before the designated date for commencement of the hearing, thus affording "umbrella" protection against applications filed during the course of a hearing.

Thereafter, on remand, the Commission designated this matter for further hearing. Appellants Butterfield and Trebit then petitioned the Commission, again making the claims urged here, viz. that WJR had abandoned its original application, and that its modification proposals, assertedly an amended application, were not timely filed. After this petition was rejected by the Commission (R. 4955), appellants Butterfield and Trebit filed a petition for a writ of mandamus with this

Court, claiming that the Commission's treatment of WJR as a permittee, its decision not to hold WJR had "abandoned" its original proposals, and its insistence on comparing these applicants with the modified WJR proposal for the purpose of determining whether a different result should be reached, violated this Court's mandate. Appellants Butterfield and Trebit prayed, inter alia, that the grant of the construction permit to WJR and the subsequent modification both be vacated. On January 14, 1957, this Court made its intent clear on these issues by denying the petition for mandamus, W.S. Butterfield Theatres, Inc. v. Federal Communications Commission, Case Nos. 12,666 and 12,667, Order of January 14, 1957. In the light of these facts, appellants' repeated claim that WJR should no longer have been considered for this grant warrants little consideration.

As this Court has since said, "The significant question, when there has been a post-grant change in the status or the proposal of the successful party is whether the change, upon new comparison of the parties, should dictate a different result." The Enterprise Company v. Federal Communications Commission, __ U.S. App. D.C. __ (No. 14,474, January 29, 1959). To have thrown WJR out of this proceeding, as appellants suggest, would have defeated this new comparison and failed to give effect to this Court's opinion of May 24, 1956, in violation of Section 402(h) of the Communications Act, 47 U.S.C. §402(h).

As for appellants' attempt to use Sections 1.365(a) and 1.387(b)(3) of the Commission's Rules (now Sections 1.311, 47 C.F.R. §1.311 and 1.106(b)(1), 47 C.F.R. §1.106 (b)(1), respectively) to exclude this modification proposal from Commission consideration, the Commission ruled in its Decision that WJR was, at that time, a permittee rather than an applicant, and that Section 1.365(a) and 1.387(b)(3) were inapplicable to it (R. 4955). The purpose of these Rules rebuts a claim that they can be used to dismiss one who stands in the posture of WJR, and to exclude it from further consideration. The amendment rule was designed to establish a terminal point in proceedings, thus assisting in the expeditious dispatch of Commission business (Sec. 4(j), Communications Act, 47 U.S.C. §154(j)[10] and avoiding hardship to other parties. *Independent Broadcasting Co.*, 6 Pike & Fischer, R.R. 1390, 1394. Otherwise, an amending applicant might gain an unfair advantage in a comparative proceeding by changing its proposal to cure defects indicated in the hearing and initial decision, with other parties forced to further burdensome hearings on the amended proposals. See *Indianapolis Broadcasting Co.*, 12 Pike & Fischer, R.R. 883,

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[10] As the Supreme Court stated in *Federal Communications Commission v. WJR, The Goodwill Station, Inc.* 337 U.S. 265 (1949), "In this wording [of Section 4(j)] the Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice, and left largely to [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate those ends."

947-9, pars. 53-4. Were parties permitted to amend during the course of the comparative proceeding, "...in hotly contested cases, all parties would wait until the last minute to file amendments, thus revealing for the first time important details of their applications...." (WCAX Broadcasting Corp., 10 Pike & Fischer, R.R. 327, 333) and the proceedings would be interminably prolonged (see Indianapolis Broadcasting Co., supra).

On December 16, 1954, when it filed its modification application, the Commission's position was that post-grant changes in the proposal did not affect the grant and that the comparative proceeding had come to a final end upon denial of the pending petitions for reconsideration, subject only to judicial review. Thereafter, on December 29, 1955, this Court reversed the Commission in The Enterprise Company v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708, and the Commission first realized that post-grant changes had the significance they are now afforded in comparative cases. Under these circumstances it would be inappropriate to hold that the fact that further inquiry was required in this comparative proceeding should lead to a dismissal of WJR from the proceeding. Cf. Leon Wyszatycki d/b/a Greater Erie Broadcasting Company v. Federal Communications Commission, __ U.S. App. D.C. __ (No. 14,651, decided May 26, 1959).[11] Further, this change did not represent an attempt by

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[11] The Commission recognized the difficulties attendant upon this change in the applicable law as to the effect of

WJR to increase its stature or buttress its position, the basic evil sought to be avoided by the amendment rules, but rather an effort to accommodate itself to post-grant changes over which it had no control.[12] The Commission recognizes that the validity of its grant must be judged on the quality of WJR's application at the time of its grant, as the facts then available to the Commission weighed on WJR's merits. The modification proposals are pertinent only to a determination of whether a different result should be reached because of these changes. Thus, these rules were never meant to be applicable, since there was no attempt to use these proposed changes for enhancing the permittee's status. Modification is instead pertinent only for determining whether the basic merits justifying WJR's receipt of the grant have now been extinguished.

11/ (Cont'd) post-grant changes in WJR's proposal (R. 6407). Under these circumstances it held WJR's delay in advising the Commission of these changes did not reflect concealment or poor judgment. Similarly, it would seem inappropriate to hold that these changes required WJR's outright dismissal from the proceedings under the Commission's Rules, by reason of changes formerly believed to have no bearing on the comparative proceeding.

[12] Indeed WJR contended that it delayed filing notice of these amendments because it wished to avoid a charge that it was trying to improve its competitive position (R. 6393). As the Commission held, under the state of what was then thought to be the applicable law, such a view was justified. (R. 6405) The Commission did not dismiss WJR from the proceedings on the basis of a rule fostering a Commission policy against belated attempts to improve competitive position, to which WJR wished to conform.

B. The Hearing Upon Remand, In Effectuating The Court's Mandate, Did Not Conflict With the *Ashbacker* Case.

Appellants' claim that the Commission's refusal to start the hearing anew after remand failed to give them an *Ashbacker*[13] type comparative hearing to which they were entitled, by starting the hearing anew, ignores the fact that it was only after a long and exhaustive comparative hearing involving all three applicants for this Flint television channel, in which all of the statutory procedures were afforded the parties that a grant to WJR was made on May 14, 1954. After the modification application filed by WJR and the subsequent remand of May 24, 1956, the duty of the Commission was to act in accordance with the opinion of this Court. 47 U.S.C. §402(h). Post-grant changes do not require that the proceedings begin anew, as if nothing had gone on before. The purpose of the proceedings on remand is solely to determine whether the post-grant changes require a different result, and whether the changes made by the successful party extinguish his right to preference in the comparative proceeding. *Enterprise Company* v. *Federal Communications Commission*, __ U.S. App. D.C. __, (No. 14,474, January 29, 1959). As this Court has indicated, consideration of the effect of these post-grant changes may, in appropriate cases, not even require reopening the record for further hearings. *Southland Television Company* v. *Federal Communications Commission*, __ U.S. App. D.C.

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[13] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

(No. 14,487, April 16, 1959). Moreover, as already noted, this Court expressly denied appellants' petition that the Commission be required to vacate its grant of the modification proposal. Certainly, nothing would indicate that this Court anticipated a "fresh start" upon the part of the Commission, completely expunging the proceedings that had already been had and starting the comparative hearings anew.

Appellants argue further that the Commission erred in refusing to permit Butterfield and Trebit to introduce evidence of changes in their proposals and qualifications in this remand proceeding, and use this refusal as a method of proof that the Commission ignored the fresh comparative hearing assertedly required of it. However, the record of this case buttresses the Commission's position that this Court's remand, and its duty to give effect to this Court's opinion, made such a re-opening of the proceedings improper. Following this Court's opinion of May 24, 1956, the Commission petitioned for rehearing, advising the Court that Section 402(h) of the Communications Act, 47 U.S.C. §402(h), limited the Commission's discretion as to the matters considered in the hearing pursuant to this remand, and seeking authority to consider changed circumstances relating to Butterfield and Trebit, as well as those post-grant changes of WJR already brought to the Court's attention. On July 9, 1956, this Court denied this petition. W.S. Butterfield Theatres, Inc. v. Federal Communications Commission, Nos. 12527, 12666, 12752, 12528, 12667 and 12753, Order of July 9, 1956. In view of this action by the Court it would have been inappropriate for the Commission nevertheless to consider Butterfield's and Trebit's post-grant changes.[14] As this Court indicated in its opinion, and has been made clear by its later opinions in the second Southland and Enterprise cases, *supra*, the proceedings on remand were of a limited nature, directed to a determination of whether these post-grant changes dictated, comparatively, a different result. They did not comprehend expunging the comparative consideration that had already been had.

C. Section 402(c) of the Communications Act does not Conflict with the Commission's Procedures on Remand Herein.

Appellant Butterfield further attempts to rely upon Section 402(c) of the Communications Act (Br. 26-29), 47 U.S.C. §402(c), as an argument against the Commission's consideration of WJR's modification proposal. The obvious answer to this contention is that this Court has already ruled, in its opinion of May 24, 1956, that the grant of the modification proposal need not be set aside, directing the Commission to determine only whether on a comparative basis the modifications made by WJR directed a different result from that reached in the original comparative proceeding. Butterfield cannot now be heard to complain of this Court's decision of over three years ago.

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[14] While Butterfield and Trebit allege error on the part of the Commission in failing to permit changes in their proposals that better their position, such as Trebit's divestiture of radio and television outlets bearing upon the Commission's policy favoring diversification in the media of mass communications, they do not raise the question whether Butterfield at least may also be unable to effectuate its proposals on transmitter site and network affiliation. One might conjecture somewhat on this in view of the testimony as to the reluctance of ABC, CBS and NBC to enter an affiliation agreement at any site south of Flint. The matters already detailed prevented the Commission's going into such questions in this hearing. However this possibility raises the question again of the extent to which a post-grant change, brought about by developments occurring well after the conclusion of the original hearings, should justify a "fresh start", if administrative finality is ever to be achieved.

Further, Section 402(c), in giving the Court jurisdiction of the proceedings upon the filing of a notice of appeal, was never intended to deprive the Commission of its regulatory jurisdiction over licensees or permittees. The filing of an appeal does not operate to revoke a construction permit or even terminate the Commission's authority to issue a license based thereon without affirmative action by the Court thereon. Southland Television Company v. Federal Communications Commission, supra. The Commission did not attempt, in passing on this modification application, to strengthen, weaken or affect the validity of its action in making the basic grant. Pursuant to its regulatory powers over this permittee, it acted to determine whether post-grant modifications were in the public interest, while the grant remained fully subject to judicial review based upon the conditions existing at the time of the grant. Nothing in this statute operates to deprive the Commission of this power; indeed, under the Communications

Act, it has the duty to maintain a continuing review of the activities of its licensees and permittees.

D. The Commission Properly Rejected Lake Huron's Application for Channel 12 at Flint.

Lake Huron contends (Br., p. 18) that its application for this channel tendered to the Commission for filing on October 29, 1956, should have been given comparative consideration with the applications of WJR, Butterfield and Trebit. However, this contention ignores the lengthy hearings held on these three applications over a period of four years, the Commission's "cut-off" rules, and the requirements of this Court's remand of May 24, 1956.

As we have already stated, this Court's opinion did not call for a comparative hearing _ab initio_ with respect to this television channel. Rather, it was directed to a determination of "whether the change, upon new comparison of the parties, should dictate a different result." _The Enterprise Company v. Federal Communications Commission,_ ___ U.S. App. D.C. __ (No. 14,474, January 29, 1959). It directed this reconsideration for only these stated limited purposes. Nothing in the Court's remand called for a comparative hearing, open to any new applicant that showed an interest in this channel. In view of Section 402(h) of the Communications Act, 47 U.S.C. 402(h), the Commission could not properly consider Lake Huron's application in this proceeding on remand, where it was limited by Section 402(h) to the record and proceedings already before the Commission, supplemented only to the extent that this Court's opinion permitted. Indeed, in the circumstances here presented, Section 402(h) absolutely precludes the intrusion of new applicants upon remand.

Moreover, Lake Huron's claim clearly overlooks the Commission "cut-off" rules, then Section 1.387(b)(3) of the Rules (recodified as Section 1.106(b)(1), 47 C.F.R. §1.106(b)(1)). See Mass Communicators, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __ (No. 14,630, April 16, 1959). This reconsideration on the limited issues called for by this Court's opinion, was with regard to the applications of Butterfield and Trebit, as well as WJR. Certainly Butterfield and Trebit had not amended their applications, and were reconsidered, as directed by the Court, on the basis of their applications which had been designated for hearing in November, 1952. The cut-off rules of the Commission obviously prevented any comparison of Lake Huron's tendered application with Butterfield and Trebit, as well as with WJR. No claim with respect to comparative rights as against WJR could suffice, in any event, to permit comparison with Butterfield or Trebit. Lake Huron's contentions with regard to its claimed rights as an applicant are wholly untenable and were properly rejected by the Commission.

II. THE COMMISSION'S DECISION OF MAY 14, 1954, MAKING THE GRANT TO WJR WAS REASONABLE AND WITHIN ITS SOUND DISCRETION AND REMAINS REASONABLE AS MODIFIED.

In urging its attack upon the grant to WJR, appellant Trebit assumes an "I told you so" posture, arguing that its contentions that the WJR proposals were "unworkable" have been proven by later events. However, its attempt thus to convince the Court that "hindsight is better than foresight" needs no rebuttal. It is readily apparent that if hindsight were the criterion of "reasonableness" then the action of any agency could not be expected to be either expeditious or forthright. However, the scope of judicial review as to the reasonableness of agency decisions is confined generally to the record before the agency at the time it acted. Final Report, Attorney General's Committee on Administrative Procedure, 1 Pike & Fischer, Administrative Law 37. The Supreme Court has recognized that subsequent developments are not pertinent to a determination of the reasonableness of an administrative decision. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 47 (1936). The question before this Court, both at the time appellant prosecuted its appeal and now, was whether the Commission's decision, based upon the record available to the Commission at the time the decision was made, was reasonable.[15]

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[15] Appellant Lake Huron also recognizes that the record before the Commission, and not subsequent developments, should control the Commission's deliberations (Br., p. 42, fn. 2)

We propose to show that the Commission's decision was reasonable and proper on May 14, 1954, at the time it was made and on the record then available. We further propose to show that a grant to WJR, on the basis of its application as now modified, and in the light of the additional evidence now available, remains both proper and reasonable.

A. The Commission's Decision was Reasonable and Proper in Making the Grant to WJR on May 14, 1954, on the Basis of the Record then before it.

In the earlier judicial review of this case, the Commission's brief reviewed at length the reasons why its decision making this grant to WJR was sound, reasonable and proper. In view of this detailed treatment of this matter, further discussion of this problem we believe should be held to a minimum. Accordingly, reference is made to pages 17 through 64 of the Commission's brief submitted on the first consideration of this case, which is incorporated herein, for a detailed treatment of the reasoning behind the Commission's conclusions expressed in its decision of May 14, 1954.[16]

The reasonableness of the Commission's acceptance of a DuMont network affiliation with its effect upon WJR's programming, is further illustrated by the fact that WJR, a respected and successful broadcasting enterprise, with many years of experience in this industry, had been sufficiently impressed at that time with DuMont's chances for success to rely upon affiliation with that network in presenting its application to the Commission in a comparative proceeding. 17/ Indeed, a television station in Windsor, Ontario, CKLW-TV, found it desirable to affiliate with this network subsequent to May, 1954, in this same geographic area. To suggest that the Commission should have discouraged affiliation with a new competitive network, DuMont, and thus have effectively limited television to the present network operations, because of the risk attendant upon any new venture in this field, is to suggest a position clearly repugnant to the public interest. The public interest is not always consonant with maintenance of status quo.

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[16] This Court's order of January 15, 1959, permitted such incorporation of the briefs earlier filed with this Court. No other portions of said brief are incorporated herein.

Trebit further objects to the Commission's failure to award it a preference in the initial comparative hearing, on the basis of its transmitter site, as against the Clarkston site of WJR. The propagation curves of this agency are pertinent in comparative evaluation of transmitter sites, as this Court held in Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 237 F.2d 567 (1956).

On May 24, 1956, this Court, in its opinion remanding this case, instructed the Commission that the new transmitter site should be evaluated, to determine whether it required

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17/ About the time the applications of Butterfield, Trebit and WJR were designated for comparative hearing, the DuMont network was affiliated with 73 interconnected stations, 8 non-interconnected stations and 4 non-domestic stations. Television Factbook No. 16, Jan. 15, 1953, pp. 18-20.

a different result in the comparative case. The Commission has done so, and following the doctrine of the Hall case, supra, has evaluated this new transmitter site on all relevant considerations, including that of the propagation curves. As will be discussed subsequently in this brief, the Commission's decision on this issue is wholly reasonable, and dealt with this question on issues called for by this Court's earlier opinion and within the restrictions of Section 402(h) of the Communications Act. The public interest and fairness to the parties requires no more.

Moreover, in the light of the Hall case, and its reversal of the Commission's policy on the question of comparative coverage and service areas, it would have been proper, had permission been sought, to allow WJR to amend its original proposal to change the transmitter site, even were the comparative hearing still in process. See Wyszatycki d/b/a Greater Erie Broadcasting Co. v. Federal Communications Commission, supra. This being so, it would seem fruitless to require further comparative consideration of the hypothetical question of the desirability of the abandoned Clarkston transmitter site.

As the history of this case indicates, WJR attempted at all times to present a service in the public interest, as then available evidence concerning the Flint area indicated the public interest to be. It did not use these modification proposals as an attempt to better its comparative position in the original hearing, being willing to stand on the merits of its then proposal, as the record available at that time indicated these merits to be. However, as we shall now show, when later developments indicated that modifications were necessary and appropriate, WJR proceeded to make them. In the light of these later developments, these changes did not detract from the comparative merits of WJR's application.

B. The Commission Properly Concluded that WJR's Post-Grant Changes, Upon New Comparison of the Parties, Required that the Grant be Affirmed.

As we have already set forth in the Counterstatement of the case, the Commission gave detailed consideration to the effect of these post-grant changes, to determine whether comparatively they dictated a different result. The Commission's decision indicates that the public interest would best be served by affirming the WJR grant.[18/]

These changes were in three areas-- studio and equipment, programming changes concomitant with the shift in network affiliation, and transmitter site relocation. With respect to the studio and technical equipment, detailed examination of the new plans submitted by WJR reflected that all technical facilities originally proposed were substantially unaltered (R. 6375-6380). Accordingly, the Commission logically concluded that the value of this studio in effectuating remote broadcasts and local live programming remains un-

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[18/] Trebit, of course, concedes (Trebit Br., p. 20) that WJR's proposal, as modified, is at least the equal of its original application.

diminished. The Commission had given weight to WJR's studio and equipment proposals only with respect to their value in effectuating local live programming and remote broadcasts.[19] A new proposal that furnishes the same assistance as an earlier proposal in effectuating these broadcasts should not detract from WJR's merits, merely because a variance in the amount of expenditures would occur. WJR did not know of the availability of these WTAC-TV studios when it urged its original proposals in the comparative hearing. Clearly the public interest would not be served by discouraging the utilization of these facilities when they became available, and when they were capable not only of modification and alteration to provide the same facilities for WJR's operations as the old proposals would have but also permitted earlier commencement of operation. The Commission's concern was not whether WJR expended a lesser sum of money than it had originally contemplated, but whether it would supply the studios and equipment that permitted it to effectuate this desirable remote and local live programming, the proposal that resulted in its receiving a preference in the comparative consideration.

The Commission then reviewed the programming proposals of WJR, as modified in the light of its determination not to affiliate with the DuMont network. The hearing reflected that the overall program balance remained substantially unaltered; approximately the same proportion of broadcast time would be devoted to the various classes of programming -- agricultural, educational, news and discussion, entertainment and talks. Most important, the quantity and type of local live and remote programs, the category responsible for WJR's preference in the programming field, remained unaltered. As a consequence of the hearing directed by this Court's 1956 decision, the Commission concluded that WJR remained entitled to the composite preference it had received on its programming proposals and the means of effectuating them.

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[19] The Commission has consistently held that studio facilities, staff and equipment achieve importance only insofar as they assisted in effectuating proposed programming. Oregon Television, Inc., 9 Pike & Fischer, R.R. 1401, 1450, WPTF Radio Co., 12 Pike & Fischer, R.R. 609, 662.

The Commission next made comparative evaluation of the transmitter sites. It considered the areas and populations that would receive service from the sites proposed by each of the applicants, after first noting that each of these sites provided more than the required signal intensity over Flint. Comparison of these areas and populations, and the services available to them (apart from the proposed Channel 12 operation at Flint), reflected no basis for a transmitter-site preference to any of these applicants. As we have already set forth in the Counterstatement, the Commission first concluded from the evidence that the Chesaning site was at least as beneficial in serving the public interest as was the Clarkston site; and, next, that comparison of the Chesaning site to the proposed sites of Trebit and Butterfield still justified no preference among these three proposals.

Having compared the parties in these three areas in which WJR's proposals had been modified, the Commission finally considered the issue concerning the timing of WJR's modification proposal. It investigated Trebit and Butterfield's charges that WJR attempted to conceal the nature of its proposal, which would have reflected adversely on WJR's character as an applicant. It considered both whether any such delay in notification of these changes would justify disqualification of WJR absolutely, and whether it would require a change in the comparative standing of the parties. The record supports the Commission's determination that the timing of this modification application called for neither conclusion, and that these modification proposals were a consequence of events occurring subsequent to the May 14, 1954, grant, and beyond the control of WJR.

Thus WJR actually commenced construction at the Clarkston site, and its actions were fully consistent with its intention to fulfill the obligations it incurred in its original proposal. However, subsequent to the grant two events occurred that warranted WJR in effecting this modification: (1) the DuMont network failed to fulfill WJR's hopes for that network's continued growth; and (2) the studios occupied by television station WTAC-TV first became available when that station ceased operations on April 30, 1954. Certainly none of the parties contended that the availability of the WTAC-TV studios should or could have been anticipated by WJR.

This happenstance presented WJR with the opportunity of getting on the air and rendering a new service to the area much earlier than would otherwise have been possible. Further, the record reflects that WJR was sincere in its hopes and expectations with regard to a DuMont affiliation. It held protracted negotiations with that network's officials, both before and after the May 14, 1954, grant, and actually commenced construction at Clarkston. Clearly, it would not have been in the public interest for the Commission to require WJR to abide by its earlier plans and consummate a DuMont affiliation when WJR reasonably concluded, on the basis of its continuing investigation, that that network would not prosper and grow. (See par. 47, 49, R. 6389) When the course of events established that WJR's original anticipations as to DuMont's success as an effective network and its service to the public would not be fulfilled, it would have been unreasonable to require WJR to continue to act upon them.

As the Commission stated in its July 11, 1958, opinion, WJR complied with all Commission rules and practices pertaining to it as a permittee, by not filing its modification application until December 16, 1954. (It, of course, notified the Commission on December 1, 1954, that such a modification application would soon be filed.) This Court's decisions in Enterprise, Southland, and Butterfield, supra, subsequent to that time, now make it clear that post-grant changes may impose a duty upon the recipient of a grant that was not recognized in December, 1954. But, *at the time* there was no requirement that WJR act differently than it did here, and the reasonableness of its conduct can only be judged in the context in which it occurred.[20] As we have already discussed at length in our Counterstatement, the Commission concluded that it was reasonable for WJR to act as it did. In any event, even if some demerit were to attach to WJR as a consequence of the delay in notification, the outstanding past record for reliability it had established would not be substantially diminished, even upon a comparative basis. The detailed treatment of this issue, summarized in our Counterstatement, fully supports the Commission's conclusion, that there was nothing in WJR's conduct with respect to its timing in filing its modification application that reflected adversely upon its status as a permittee of the Commission.

In summary, the Commission after a lengthy hearing concluded that the modified proposal submitted by WJR was in the public interest and that affirming the grant to WJR was required in a comparison of WJR's proposal, as modified, with the proposals of Butterfield and Trebit. A review of the record before the Commission, summarized in our Counterstatement, will reflect that the Commission's decision was reasonable and proper, supported by the evidence, and within the Commission's sound discretion.

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[20] Indeed it should be noted that its delay in filing this modification application was based, at least in part, upon the advice of its counsel, who believed that notice of these modifications might be interpreted as an attempt by WJR to buttress its case.

III. THE COMMISSION PROPERLY REJECTED LAKE HURON'S CLAIMS OF ECONOMIC INJURY, IN BOTH THE PROTEST AND THE COMPARATIVE PROCEEDINGS.

Relying primarily on this Court's holding in Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958) Lake Huron contends generally that the Commission failed to give appropriate consideration to evidence adduced in the protest proceeding dealing with the impact of WJR's modified proposal on its UHF television station (WKNX-TV) in Saginaw (Lake Huron's Br., p. 6). Without specifically asserting it anywhere in its brief, appellant appears to assume that the Commission unreasonably concluded on the basis of the evidence in the protest proceeding that Lake Huron's station (WKNX-TV) would not in fact be driven out of business by the advent of a WJR operation at Chesaning (Lake Huron Br., p. 33-4).[21] Having made this false assumption, Lake Huron goes on to argue therefrom that the basic defect in the Commission's decision in the protest proceeding stems from its "either-Flint-or-Saginaw" approach. It contends that the Commission should have denied the protested WJR modification, permitting WJR to continue operating at Clarkston without irrevocably injuring Lake Huron's station at Saginaw, thus assuring Saginaw as well as Flint a station of its own (Lake Huron, Br., p. 43). Lake Huron also argues that the Commission erred in the reopened comparative case in rejecting the same evidence which Lake Huron proffered in the protest proceedings on the economic impact of a WJR operation at Chesaning. It contends that the Commission should have considered this evidence in connection with comparing WJR to Trebit and Butterfield. (Lake Huron, Br. pp. 32-3).

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[21] A careful examination of Lake Huron's brief indicates that it relies exclusively on Commission findings 74, 75 and 76 in its decision in the protest proceedings (R. 12873-4) to establish the fact that it would be driven out of business by the grant of the WJR modification. These findings on their face are nothing more than a summary by the Commission of the testimony of certain Lake Huron witnesses (Mr. Edwards, the Lake Huron President, and Mr. Paul Mowrey, its economic consultant) who testified that in their estimation Lake Huron's economic stability would be seriously jeopardized by the advent of the WJR operation at Chesaning. There is nothing in these findings which would per se indicate that the Commission had found as a fact, or should have found, that Lake Huron could not survive with WJR operating at Chesaning. Moreover, the opinion testimony, of which the Commission takes cognizance in these findings, is properly rejected by it in its conclusions (Concls. 11, 12, R. 12884-5).

In Carroll, supra, this Court, after making it perfectly clear that the test for "economic injury" in cases such as this was not loss of profits but the actuality or substantial probability of an overall loss of service in the communities involved, stated:

> We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (i.e. if the protestant does not fail entirely to meet his burden) should make a finding or findings.

This Court further stated in its opinion in connection with the nature of the burden of proof on the economic effect of another station that:

> If the protestant fails to bear the burden of proving his point (and it is certainly a heavy burden), there may be an end to the matter. If his showing is substantial, or if there is a genuine issue posed, findings should be made. 22/ (Emphasis supplied.)

This Court thus made clear that in order to prevail Lake Huron must show that it had demonstrated by substantial evidence adduced at the protest hearing that there was such economic injury to it implicit in the grant of the protested modification that it was inevitable or at least probable that it would have been driven out of business, and a concomitant harm worked to the public interest in the form of loss of the local service it provided. 23/ Secondly, assuming that such a substantial showing had been made, Lake Huron had still to

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22/ The Court of course did not conclude in its opinion that a showing of economic injury by the existing licensee resulting in public detriment necessarily precluded the licensing of the additional station. It merely held that upon a proper showing by an existing licensee the Commission must make findings on the point.

23/ Originally, there were three protestants, Inland Broadcasting Co. (UHF station, WTOM-TV, Lansing, Michigan); Sparton Broadcasting Company, (VHF station - WWTV, Cadillac, Michigan) and Lake Huron (WKNX-TV, Saginaw, Michigan). Inland did not file proposed findings or exceptions to the examiner's initial decision and neither Inland nor Sparton filed appeals from the Commission's decision in the protest proceedings. The record does not indicate any economic injury to either Sparton or Inland stemming from the modification grant (R. 12873-12889) nor does Lake Huron here rely on anything alleged below by either Inland or Sparton or on any alleged public injury which might have resulted in connection with either of these two stations.

show that the detriment to the public interest caused by the action complained of was not outweighed by other public interest factors which nevertheless rendered the protested action beneficial to the public.

The Commission on the basis of the evidence then before it concluded "First, that the evidence fails to establish that protestants cannot effectively compete with the proposed WJR operation. Second, assuming such were established even to the degree that protestants were compelled to cease operation, the public would suffer no injury." (Conclusion 9, R. 12884).

The evidence in the record upon which the Commission based these conclusions clearly demonstrated that it was at best speculative on the basis of the facts then existing, whether Saginaw would be deprived of its local television outlet by the grant of the WJR modification. (Fdgs. 72-83, Con. 9-17; R. 12873-6, 12884-87.) All the evidence in the protest proceeding, insofar as the alleged economic injury to Lake Huron and the other protestants was concerned, revolved aroung a single critical point -- viz., that appellant Lake Huron held a CBS affiliation agreement and that the retention of this agreement, undisturbed by the operation of WJR at Chesaning as a CBS affiliate, was purportedly essential to its continued economic well being. (Fdg. 74, R. 12873, Cln. 12, R. 12885.) Lake Huron contended that its CBS affiliation would become of little, if any, value as advertisers would buy WJR only. (Fdg. 74, R. 12873-4.) The Commission conceded that, on the basis of the facts then before it, Lake Huron, even though it would not lose its CBS affiliation,[24] probably was faced with the loss of advertising revenues from its CBS programming and of spot advertising revenue from adjacencies to such programming. (Con. 11, R. 12885.) However, after noting that Lake Huron's UHF station was operating at a profit, the Commission went on to conclude that even this probable loss of network revenues turned on inconclusive opinion testimony to the effect that advertisers would inevitably prefer the WJR station and would not buy any other. (Con. 11, R. 12884.)[25] Moreover, the evidence did not establish that, on the basis of the then existing facts, appellant Lake Huron could not obtain a primary ABC network affiliation to compensate it for any revenue losses caused by the proposed WJR modification. (Con. 11, R. 12884.) In addition, as the Commission observed in its conclusions, Lake Huron offered no evidence to indicate that it had completely developed its advertising potential in its market or on the nature and extent of any efforts to do so. The communities involved in its operation are of substantial size. Saginaw, and Bay City, only 14 miles away, had 1950 populations respectively of 92,918 and 52,513 persons. (Fdg. 4, R. 12845.) and WKNX (Lake Huron's station) is Saginaw's only operating station and its advertising claimed coverage of over a million people and a billion dollar market (R. 10207-12) (Con. 11, R. 12884). Moreover, the UHF conversion rate in the area at the time of the protest hearing had progressed to a relatively high percentage. It was in fact 78 per cent in Saginaw and Bay Counties, two of the 23 counties in which Lake Huron claimed coverage. (Fdg. 76, R. 12874.)

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[24] A CBS witness Mr. Akerberg testified to this fact; (R. 10806, 10829); and Mr. Edwards, the Lake Huron President, testified that he never assumed the Lake Huron affiliation with CBS would be cancelled. (R. 10253). Moreover, with two exceptions, none of the proposed WJR programs duplicated Lake Huron's CBS programs (R. 12864).

[25] As we pointed out in fn.21 above two Lake Huron witnesses, its President Mr. Edwards and its Economic Consultant Mr. Mowrey expressed this as their view as a result of the experiences of other communities where VHF stations commenced operation in competition with existing UHF stations (Fdgs. 74-75, R. 12873-4) and on the basis of certain experiences WKNX-TV had with another VHF station in the area. These views were, contrary to Lake Huron's claim, (Lake Huron Br. p. 33) contradicted by other disinterested opinion testimony of a CBS witness Mr. Shurick who testified (1) that it was not inevitable that advertisers would in fact prefer WJR as a CBS affiliate to Lake Huron and (2) that, in a similar situation in Muncie-Indianapolis, CBS advertisers bought the same programs on the Muncie UHF station and the Indianapolis VHF station (R. 10834-37). But in any event, the Commission rejected the opinion testimony of the Lake Huron witnesses as being per se lacking in the required definiteness to establish the fact that Lake Huron would be unable to survive competitively if WJR moved to Chesaning as a CBS affiliate.

In short, the Commission, on the basis of the evidence then before it, reasonably concluded that it could not validly arrive at a determination that affirmation of the modified permit to WJR would make economic survival impossible for Lake Huron (or any of the other protestants) and in this regard be contrary to the public interest. The Commission stated that:

> "To do so would be to conclude that none of the stations could successfully operate without a network affiliation, that other network programming sources could not be utilized by protestants, that advertisers would in fact prefer the WJR service to that offered by protestants despite any rate or other differences that may be present, and that the potential of the markets involved has been developed to the utmost and could have no future growth."
> (Con. 12, R. 12885)

Fully aware of the onerous nature of establishing such a record, as was the Court in Carroll, cited above, the Commission properly determined that the protestants had not established the requisite economic injury and attendant loss of overall service, a fact which appellant Lake Huron does not seriously challenge anywhere in its brief.

We have established immediately above that, on the basis of the record evidence then before the Commission, neither appellant Lake Huron nor the other protestants sustained the required burden of proof to establish by substantial evidence that the grant of the WJR modification would cause such economic injury to each or any of them so as to work a public injury. This, of course, was the threshold proposition which had to be established by Lake Huron or any of the other protestants to compel the necessary public interest findings required by Carroll. Under this Court's holding in Carroll, the Commission's rejection of protestant's claim of economic injury apparently makes it unnecessary for the Commission to make further specific public interest findings in connection with the challenged licensing. Lake Huron having failed to prove the necessary preliminary point, that was for all significant purposes the end of the matter. See Carroll, 103 U.S. App. D.C. at 350.

However, the Commission in its decision on the protests, assumed *arguendo* that the threshold question of economic injury to Lake Huron and Sparton [26] had in fact been established, even to the degree that these protestants would actually be driven out of business, and went on to make certain public interest determinations as if Lake Huron and Sparton had actually met the required burden of proof. Acting on this hypothesis it concluded generally that, at its assumed worst, all this would amount to was that a more vigorous station, WJR, would be substituting its service for that of others, (Lake Huron and Sparton) unable to meet its competition, and that there would be no overall loss of service detrimental to the public. (Con. 15, R. 12886) But, argues Lake Huron, these public interest determinations are defective in that the Commission did not consider that the public interest would better be served by denying the modification and requiring WJR to remain at Clarkston, thus assuring the economic survival of the Lake Huron station. This contention can have no decisional importance or significance in any event, since, as already noted, protestants failed to sustain their burden within the meaning of, and to the degree required by Carroll, supra.

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[26] The third protestant Inland offered no evidence of any economic injury in the protest proceeding. (See Fdg. 83, R. 12876)

There is, additionally, an even more compelling reason to reject Lake Huron's contentions that this case should once more be remanded to the Commission. Lake Huron admits (Br. pp. 42-3, fn. 2), that (1) WKNX-TV is still on the air even though WJR has been operating at Chesaning since October 12, 1958 and that (2) WJR never did secure the CBS affiliation upon which its (and the other protestants') entire economic injury argument in the protest proceedings was predicated. Thus, it is clear that no actual harm has been done to Lake Huron. To remand this case to the Commission to make what now would be purely academic findings would be a completely futile and abortive thing.

Lake Huron also argues that the Commission in the reopened comparative proceedings improperly refused to consider the same evidence it had offered in the protest proceedings on the impact of a grant to WJR at Chesaning. (Lake Huron Br. p. 32) It contends in this connection that the Commission should have received this evidence and made a comparative determination as to whether or not it would have been in the public interest to choose Trebit or Butterfield over WJR in view of the alleged impact of a grant to WJR at Chesaning. The Commission rejected this evidence in the reopened comparative proceedings (held after the protest proceedings) as being beyond the terms of the remand and not permissible because of Section 402(h) of the Communications Act, 47 U.S.C. §402(h). The Commission's rejection was proper and fully consistent with the intendment of the remand and this section of the Act. In view of the fact, however, that the Commission concluded in the related protest proceeding to which Lake Huron, the only appellant pressing this claim, was a party, that there was no substantial proof that Lake Huron or any of the other protestants would be driven out of business with an attendant overall loss to the public in the form of service, there would obviously be no reason to reopen the comparative case for a second time to consider this contention. Moreover, just as in the case of the protest proceeding, another reopening in the comparative case would be a useless thing on the basis of the facts admitted by Lake Huron with regard to WJR not having affiliated with CBS.

IV. THE COMMISSION PROPERLY REFUSED TO ORDER A SECOND EVIDENTIARY HEARING IN THE COMPARATIVE CASE EVEN THOUGH CBS BECAME UNAVAILABLE TO WJR AFTER THE REMAND HEARING WAS CLOSED.

In their July 25, 1958 joint petition for rehearing of the Commission's reaffirmance of the WJR grant, appellants Butterfield and Trebit alleged generally that WJR would be unable to comply with its proposal to affiliate with CBS because it was their belief, on the basis of certain industry reports regarding network changes in the Michigan area, that CBS would not be available to WJR. Butterfield and Trebit contended, without averring any facts in support thereof, that they believed that WJR had known this "for some time," and had been remiss in not reporting it to the Commission.[27] They urged that this conduct required a second reopening of the comparative record.

Butterfield and Trebit also alleged in their joint petition that a further evidentiary hearing was necessary to ascertain what changes would eventuate in WJR's programs as a result of its failure to secure a CBS affiliation. In raising this additional question they likewise failed to allege any specific facts in connection with the unavailability of CBS which, if established, would indicate any material change in WJR's programming. They apparently contended that a mere change in network affiliation indicated a material change in program proposals, and called for further evidentiary hearing (R. 7292, 7294-7).

In its opposition to Trebit and Butterfield's joint petition for rehearing, filed with the Commission August 1, 1958, WJR stated under oath that it had believed that CBS would be available to it up until July 22, 1958 when it was advised to the contrary by officials of that network. WJR further stated that not until July 22, 1958 had it determined to affiliate with ABC and that its programming would substantially comply with its original proposals (R. 7304-29). After considering the allegations and the reply, the Commission concluded that there was no justification for again reopening the record to adduce evidence, either on the question of WJR's alleged delay in reporting or on the question of any significant changes in the WJR program service (R. 6443-8).

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[27] Of course Butterfield and Trebit did not bring this to the Commission's attention until July 25, 1958, although the trade reports commencing about the first part of 1958 were equally available to them. Nor did they make any attempt in their petition to state exactly when WJR had learned of the unavailability of CBS.

The Commission noted (Con. 15, R. 6447) that Trebit and Butterfield had not stated any basis for their allegations of improper concealment by WJR of its change from CBS to ABC other than their suspicions based upon industry rumors and inferences to be drawn from advertisements in the trade press, which did not _per se_ indicate any impropriety on WJR's part. The Commission also noted that WJR had conceded the unavailability of CBS in its Aug. 1, 1958 pleading and had stated under oath that it had not become aware of the unavailability of a CBS affiliation until after the Commission decision of July 9, 1958. Thus in making its determination as to whether to reopen the record, the Commission had before it Butterfield and Trebit's unfounded suspicions of misconduct based on rumor and inference and WJR's categorical denial of such remissness, and properly determined that petitioners' allegations were insufficient to warrant another reopening of the case.

In addition there were no Commission rules or regulations requiring WJR to report this change in network affiliation any sooner than it did. Indeed, under the applicable rule (Rule 1.342, 47 C.F.R. 1.342) WJR had more than promptly reported the change by its pleading of August 1, 1958, a date only ten days after it became aware that the CBS affiliation was unavailable to them, one day after ABC had made a formal offer to WJR, and five days before WJR formally executed the contract (R. 7304-29). In view of the fact that Rule 1.342 did not require any reporting at all until 30 days after the date of execution of its new ABC affiliation contract, WJR's conduct in no way reflected upon its good faith or character qualifications. Thus petitioners' allegations of failure to promptly report was completely unsubstantiated, as well as contradicted by the facts and WJR's conduct was fully consistent with the applicable Commission rules.

Insofar as petitioners urged that the comparative case should be reopened to determine what effect WJR's ABC affiliation would have on its program proposals, the Commission observed that Trebit and Butterfield had offered nothing to indicate "that WJR cannot or will not now present the local programming which formed the basis of the programming preference given it by the Commission." (R. 6446)[28]

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[28] The instant case can be distinguished from Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359, strongly relied on by appellants. As the Commission stated (R. 5447): "In that case the Court based its decision on the fact that there was no evidence as to the 'type of programs...propose[d], absent the [originally specified] network affiliation.'

As noted above WJR stated in its August 1, 1958 pleading that regardless of any changes in network affiliations, its program performance would be in substantial compliance with its previous promises (R. 7324). Nothing in the comparative record or any of the pleadings indicates that WJR could not or would not effectuate its local programming proposals. On the contrary, the very history of the proceeding demonstrates that, despite the changes in its network affiliations, WJR has been consistently diligent in its efforts to retain its original local programming proposals (R. 6446-7). Since the local live and remote programming was the sole cause of WJR's programming preference, there is nothing in this case to cast doubt on the Commission's conclusion that this change had no decisional significance.

It has recognized that there is no substantial difference between the three television networks, and further that the constant changes in their programming eliminates any substantial basis for preference among them. Accordingly, it has traditionally refrained from granting any

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28/ (Cont'd) Here, there is no suggestion that there will be any change in WJR's local programming, and the Commission is advised that another network service will be substituted for that specified in the hearing. In view of the fact that the Commission is well aware that ABC furnishes programs of the same type as those CBS programs which WJR had proposed to present, this is not a case where it would be necessary for the Commission to attempt to reach a decision in the absence of material facts respecting the proposal of one of the applicants."

preferences to applicants simply on the basis of network proposals. (R. 6446) WSAV, Inc., 10 R.R. 402, KTBS, Inc., 10 R.R. 811, and Television East Bay, 14 R.R. 1.

Moreover as the Commission noted (R. 6447):

> ...the passage of time incident to the adjudication of a proceeding of this type creates a likelihood that changes will be required in some aspects of virtually all applications, and for the Commission to reopen a record to consider all such changes, regardless of their decisional significance, would completely defeat the Commission's basic function. There must be a point at which administrative decisions may be regarded as final in the absence of facts tending to alter the actual ground or reason for the decision.

Also see Massachusetts Bay Telecasters, Inc. v. Federal Communications Commission, 261 F.2d 55 (C.A.D.C., 1958).

Thus, the Commission acted properly and within the broad ambit of its discretion when it refused to reopen the record when petitioned to do so by Trebit and Butterfield. In the recently decided Southland Television Co. v. Federal Communications Commission, (Case No. 14487, April 16, 1959) this Court affirmed a similar action of this Commission refusing to reopen the record where appellant had failed to proffer any evidence of any decisional significance. As this Court stated:

> Despite this, petitioner, as we have noted above, in seeking a further evidentiary hearing, made no proffer of evidence to be evoked which would have impaired the validity of the Commission's determination. Considering the record as a whole, therefore, we are not convinced that the Commission's order should now be set aside.

See also Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514-575 (1944), United States v. Pierce Auto Freight, 327 U.S. 515, 535 (1946), Colorado Radio Corp. v. Federal Communications Commission, 118 F.2d 24 (1941).[29]

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[29] See particularly the concurring opinion of Judge Edgerton in the Colorado case, 73 U.S. App. D.C. at 229, 118 F.2d at 28: "The statute expressly leaves the granting of rehearings to the discretion of the Commission. It cannot be required to put aside its other duties and hold a rehearing whenever a new fact arises which might conceivably lead to a new conclusion."

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the Commission should be affirmed with respect to its decisions presently under review.

Respectfully submitted,

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August 6, 1959

United States Court of Appeals
For the
District of Columbia Circuit

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BRIEF FOR INTERVENOR
WJR, THE GOODWILL STATION, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527, 12,752 and 14,685

W. S. BUTTERFIELD THEATRES, INC., Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

Nos. 12,528, 12,753 and 14,691

TREBIT CORPORATION, Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

No. 14,717

LAKE HURON BROADCASTING CORPORATION, Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WJR, THE GOODWILL STATION, INC., Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does the original comparative hearing record support the Commission's Decision released May 14, 1954 (as affirmed December 6, 1954) which granted WJR's construction permit application for Channel 12 at Flint, Michigan and denied the mutually-exclusive applications of Trebit and Butterfield?

2. Was WJR's December 16, 1954 application to modify its May 14, 1954 construction permit subject to the Commission's amendment and "cut-off" rules? Was it mutually exclusive with the Trebit and Butterfield denied applications? Did it constitute an "abandonment" by WJR of the bases for the May 14, 1954 grant to it so as to require that WJR's grant be set aside and comparative consideration be given only to Trebit and Butterfield?

3. Did the Commission's April 14, 1955 non-hearing grant of WJR's December 16, 1954 modification application violate the Ashbacker doctrine or Section 402(c) of the Communications Act?

4. Did the Commission's remand comparative hearing issues, which contemplated a further comparative evaluation of WJR, Trebit and Butterfield but which did not encompass a comparative determination of the "impact" of the proposed Flint Channel 12 operations on WKNX-TV, Saginaw, comply with the Court's May 24, 1956 Decision?

5. Does the remand comparative hearing record support the Commission's Decision released July 11, 1958 (as affirmed September 10, 1958) that the WJR post-grant changes and the time at which WJR filed its modification application, upon new comparison of the parties, should not dictate a result different from that reached in the May 14, 1954 Decision as affirmed on December 6, 1954 and April 1, 1955?

6. Did the Commission abuse its discretion in refusing to order a second further evidentiary hearing in the comparative proceeding be-

cause CBS became unavailable to WJR after the remand hearing record was closed?

7. Does the protest hearing record support the Commission's Decision released July 16, 1958 (as affirmed September 10, 1958) which reinstated the April 14, 1955 grant of WJR's December 16, 1954 modification application and concluded that the evidence failed to establish that Saginaw would be deprived of its local television outlet as a result of the grant?

8. Did the Commission commit any reversible error in dismissing on September 8, 1958, the application for Flint Channel 12 tendered for filing by Lake Huron in October of 1956, more than four years beyond the date specified in the Commission's cut-off rule?

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APPEALS FROM DECISIONS AND ORDERS OF THE
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BRIEF FOR INTERVENOR
WJR, THE GOODWILL STATION, INC.

COUNTER STATEMENT OF THE CASE[*]

On November 5, 1952, the Commission designated for consolidated hearing mutually-exclusive applications filed in 1952 by WJR, Trebit and Butterfield, each of which sought a construction permit for Channel 12 at Flint, Michigan (R. 464-65).

On May 14, 1954, the Commission released a Final Decision granting WJR's application (J.A. 400-491). The Commission found that each applicant possessed the basic statutory qualifications and that there were no significant differences among the applicants in several comparative areas, including those of network programs, film programs and transmitter sites.

In preferring WJR to Trebit, the Commission's May 14, 1954 Decision concluded that WJR's superiority over Trebit in the areas of programming and facilities, participation of principals and diversification of the ownership of the media of mass communications outweighed Trebit's superiority in the areas of prior television experience and operation of a Flint radio station. The determinative factor in the comparison of WJR and Trebit was WJR's superiority in the area of diversification. (Conclusion 35 at J.A. 482).

In preferring WJR to Butterfield, the Commission concluded that WJR's superiority over Butterfield in the areas of programming and facilities, prior broadcast experience, past broadcast record, participation of principals and preparation of program proposals outweighed Butterfield's superiority respecting the University of Michigan. WJR's preference over Butterfield in the area of preparation was considered significant (Conclusion 36 at J.A. 483).*

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[*] The appellants are Trebit Corporation (Trebit), W. S. Butterfield Theatres, Inc. (Butterfield) and Lake Huron Broadcasting Corporation (Lake Huron). The appellee is the Federal Communications Commission (Commission). The intervenor is WJR, The Goodwill Station, Inc. (WJR). All dates of Commission actions, unless otherwise noted, refer to release dates. Record references are in accord with footnote 4 on page 3 of Butterfield's brief.

Following the May 14, 1954 grant, WJR commenced construction activities looking toward operation as a DuMont affiliate at its Clarkston site by September 1, 1954. However, it later became apparent to WJR that DuMont, contrary to WJR's earlier expectations, was not likely to grow and prosper as a competitive network. Accordingly, on July 8, 1954, WJR suspended construction activities at its Clarkston site and proceeded to explore all possibilities of network or independent (non-network) operation at Clarkston.** By the fall of 1954, following consultations with representatives of non-network stations and all networks (ABC, CBS, DuMont and NBC), WJR became convinced that independent operation at Clarkston would not be feasible, that affiliation with DuMont would amount to independent operation and that no other network affiliation could be obtained unless WJR moved its transmitter site from the Clarkston location (located southeast of Flint in the direction of Detroit, some 17 miles from Flint and some 27 miles from Detroit) to the northwest side of Flint.

On September 8, 1954, WJR concluded that an affiliation could be obtained with CBS if the WJR site was moved to the vicinity of Chesaning. Since the transmitter site could not be moved without securing the prior approval of the Commission, WJR commenced at once with the preparation of a modification application. At this time, petitions for reconsideration directed against the May 14, 1954 grant were pending before the Commission. These petitions (which argued, among other things, that the grant to WJR should not have been made because of the location of the Clarkston site in relation to Detroit) were denied on December 6, 1954 (R. 491-503). WJR had expected to complete its modification application prior to action on the petitions for reconsideration but not to file the application until after such action because of the then pending arguments concerning Detroit coverage. However, the application was not completed until December 14, 1954.

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* The May 14, 1954 Final Decision was affirmed by a Memorandum Opinion and Order released December 6, 1954 which denied Section 405 petitions for rehearing filed by Trebit and Butterfield and made clear that the preference accorded WJR in the area of programming and facilities was a composite preference (JA 491-503).

** In the meantime, WJR had been approached by the licensee of a Flint UHF station (WTAC-TV, which, after building a new studio building in the fall of 1953, following the closing of the Channel 12 comparative hearing record, had suspended operations on April 30, 1954) with the suggestion that WJR could use the previously unavailable WTAC-TV studio building. On July 30, 1954, WJR leased, with an option to purchase, the WTAC-TV studio building, a fact which was publicly announced on August 4, 1954.

The WJR modification application was executed on December 15, 1954 and filed with the Commission on December 16, 1954.* As required by the application form, the WJR modification application, in addition to requesting authority to move the transmitter site from Clarkston to Chesaning,** referred to other post-grant changes which had occurred in the WJR hearing proposals (e.g., programs, network affiliation and main studios), none of which required prior approval of the Commission.

On December 28, 1954, Trebit and Butterfield filed a joint petition (JA. 503-35), which requested, inter alia, that the comparative hearing record be reopened in view of the changes in WJR's hearing proposal which were referred to in the WJR December 16, 1954 modification application.

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* On December 1, 1954, WJR filed an application to extend the time within which to complete the construction authorized by the May 14, 1954 grant. As required by the application form, WJR referred, inter alia, to the fact that the WTAC-TV studio building had been acquired, that there had been a change in network plans and transmitter site and that a modification application reflecting these and other changes was in course of preparation and would be filed in the near future. Trebit and Butterfield filed a petition for rehearing directed against the December 21, 1954 grant of this application, which petition was denied on April 15, 1955 (12 R.R. 97). This action was never appealed.

** The distance between the two sites is some 44 miles. However, each is located about the same distance from the respective nearest Flint city limits, Clarkston being some 17 miles southeast and Chesaning some 20 miles northwest (Finding 11 of July 11, 1958 Decision at R. 6370).

On April 1, 1955, the Commission released a Memorandum Opinion and Order which denied the December 28, 1954 joint petition (J.A. 540-48). The Commission considered all of the WJR post-grant changes and decided they did not require a further evidentiary hearing and did not, upon reconsideration, affect the bases for the May 14, 1954 grant to WJR in any substantial way. In ruling upon appeals directed against this action, this Court held (Justice Danaher dissenting), in a Decision issued May 24, 1956, that the Commission had abused its discretion in not holding a further evidentiary hearing on (1) the changes in WJR's hearing proposal regarding transmitter site, studios and programming and (2) the alleged late revelation by WJR of its post-grant changes before deciding the effect, if any, of these matters on the bases for the May 14, 1954 grant to WJR.* W. S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F. 2d 552 (1956).**

Prior to the above-noted May 24, 1956 Decision of this Court, the Commission on April 14, 1955 granted, without a hearing, the December 16, 1954 WJR modification application (J.A. 608-609). This grant led to (1) a joint Section 405 petition for reconsideration filed May 12, 1955 by Trebit and Butterfield requesting that the April 14, 1955 grant be set aside and (2) a Section 309(c) protest filed May 12, 1955 by Lake Huron.* On June 10, 1955, the Commission released a Memorandum Opinion and Order which dismissed the Trebit-Butterfield joint petition on the ground of lack of standing** and granted the Lake Huron protest (J.A. 608-21). Accordingly, as required by the statute, the Commission suspended the effectiveness of the April 14, 1955 modification grant and designated the WJR December 16, 1954 modification application for a Section 309(c) protest hearing. Neither Trebit nor Butterfield sought to participate in the protest proceeding, either before or after this Court's May 24, 1956 Decision.

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* The May 24, 1956 Decision did not reach and dismissed the appeals filed by Trebit and Butterfield directed against (1) the May 14, 1954 grant to WJR as affirmed December 6, 1954 and (2) the April 14, 1955 grant of WJR's December 16, 1954 modification application. These appeals (12,527 & 12,528 and 12,752 & 12,753) have since been reinstated.

** This Court's Orders of July 3 and 9, 1956, denied petitions for rehearing filed by WJR and the Commission.

The protest hearing record was closed and an Initial Decision favorable to WJR (R. 12,150-247 and 12,666-742) was released prior to the above-noted May 24, 1956 Decision of this Court. However, a final decision in the protest case was deferred, over the objection of WJR, until after the remand hearing in the comparative proceeding had been held and a decision reached therein (R. 12,826-29).***

Pursuant to this Court's May 24, 1956 Decision, the Commission ordered a further hearing in the comparative proceeding. Over the objection of all of the parties (including the Broadcast Bureau), Lake Huron was permitted to intervene in the further comparative hearing (R. 4955-56) which was held on issues[*] specified in a Commission Order released October 19, 1956 (R. 4736-37). The Commission's hearing order directed the Examiner to prepare a Supplemental Initial Decision

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* Lake Huron filed for Channel 57 in Saginaw in June of 1952, received a non-hearing grant in October of 1952 and commenced operation of UHF station WKNX-TV, Saginaw in April of 1953. Lake Huron never sought entry in the original Flint Channel 12 comparative hearing in spite of the fact that Trebit's proposed station would provide a city grade or better signal to Saginaw.

** The April 14, 1955 grant was appealed by Trebit and Butterfield. These appeals (12,752 and 12,753) were not reached by this Court in its May 24, 1956 Decision but have since been reinstated. This Court's Decision expressly refused to set aside the April 14, 1955 modification grant.

*** As a result of the mandatory stay, WJR could not complete construction at Chesaning. The mandatory stay, which had been imposed in June of 1955, was not lifted until July of 1958. WJR then resumed construction and commenced operation at Chesaning on October 12, 1958.

> "in which, in light of the evidence adduced under the issues * * * , the [May 14, 1954] grant of WJR's application will be reconsidered on a comparative basis with the applications of Trebit and Butterfield" (Emphasis added).

Following the further hearing and oral argument on exceptions to the Examiner's Supplemental Initial Decision (which was favorable to WJR, R. 5942-6401), the Commission on July 11, 1958 released a Final Decision reaffirming the comparative May 14, 1954 grant to WJR as previously affirmed on December 6, 1954 and April 1, 1955 (R. 6367-6411). The July 11, 1958 Decision was affirmed on September 10, 1958 when Section 405 petitions for rehearing filed by the three appellants were denied or dismissed (R. 6441-48).[**]

On July 16, 1958, the Commission released its Final Decision in the protest case (R. 12843-89) which reinstated the April 14, 1955 grant of WJR's December 16, 1954 modification application. The July 16, 1958 Decision was affirmed September 10, 1958 when a Section 405 petition for rehearing filed by Lake Huron was dismissed (R. 12918-19).

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[*] This Court's Order of January 14, 1957 denied a Trebit-Butterfield joint petition which argued, inter alia, that the issues were not in compliance with the May 24, 1956 Decision. The issues read as follows:

> "(1) To determine the differences between the proposals advanced by WJR, The Goodwill Station, Inc. in its original application and those proposals advanced by it in its application for modification of its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.
>
> "(2) To determine, in the light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee."

[**] The September 10, 1958 Order also reaffirmed the August 4, 1958 denial of a stay request filed by Trebit and Butterfield (R. 6412 and 6448). This Court, by an Order dated October 9, 1958 denied, without oral argument, stay requests filed by Trebit and Butterfield.

By its action announced September 8, 1958, the Commission returned, as not acceptable for filing under its rules, an application for Channel 12 at Flint which had been tendered for filing on October 29, 1956 by Lake Huron (Page A-4 of Lake Huron's Brief).

In summary, the appeals recently filed by Trebit, Butterfield and Lake Huron (14,685, 14,691 and 14,717) and the reinstated appeals previously filed by Trebit and Butterfield (12,527-28 and 12,752-53), are directed against the following actions of the Commission, all of which relate to applications for Channel 12 at Flint, Michigan.

1. May 14, 1954 comparative grant, following a hearing, of WJR's construction permit application and the denial of the mutually-exclusive applications filed by Trebit and Butterfield (JA. 400-491). This action, which was affirmed on December 6, 1954 (J.A. 491-503), is the subject of reinstated Appeals 12,527 and 12,528.

2. April 14, 1955 non-hearing grant of WJR's modification application (J.A. 608-609). This action, which was affirmed as against Trebit and Butterfield on June 10, 1955 (J.A. 608-621), is the subject of reinstated appeals 12,752 and 12,753.

3. July 11, 1958 affirmance, following a remand hearing, of the May 14, 1954 comparative grant of WJR's construction permit application as affirmed December 6, 1954 and April 1, 1955 (R. 6367-6411). This action, which was affirmed on September 10, 1958 (R. 6441-48), is one of three subjects of Appeal 14,717 and the subject of Appeals 14,685 and 14,691.

4. July 16, 1958 reinstatement, following a protest hearing, of the April 14, 1954 grant of WJR's modification application (R. 12843-89). This action, which was affirmed on September 10, 1958 (R. 12918-19), is the second subject of Appeal 14,717.

5. September 8, 1958 dismissal of an application for Channel 12 at Flint tendered for filing on October 29, 1956 by Lake Huron (see pages A-1 through A-4 of Lake Huron's Brief). This action is the third subject of Appeal 14,717.

STATUTES AND RULES INVOLVED

The pertinent provisions of the statutes and rules involved herein are set forth in Supplement A, infra.

SUMMARY OF ARGUMENT

The Commission's May 14, 1954 Decision, as affirmed December 6, 1954, granting WJR's Flint Channel 12 application and denying the mutually-exclusive applications of Trebit and Butterfield is supported by the record.*

The WJR December 16, 1954 modification application was filed by WJR as the permittee of Flint Channel 12 and therefore was not subject to the Commission's "cut-off" or "amendment" rules. This Court has already held that the WJR post-grant changes did not constitute an "abandonment" by WJR so as to require that the May 14, 1954 grant be set aside and further comparative consideration be limited to Trebit and Butterfield.

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* See pages 6 and 7 of WJR's December 9, 1955 Brief which are hereby incorporated herein.

The April 14, 1955 grant of WJR's December 16, 1954 modification application did not violate the Ashbacker doctrine or Section 402(c) of the Communications Act. The comparative rights of Trebit and Butterfield were fully protected by the remand ordered by this Court in the comparative hearing on May 24, 1956. The protestant rights of Lake Huron were fully complied with in the protest hearing.

The remand comparative hearing issues meticulously complied with this Court's May 24, 1956 Decision and correctly (1) did not exclude WJR from further comparative consideration and (2) did not encompass a comparative determination of the "impact" of the proposed Flint Channel 12 operations on WKNX-TV, Saginaw, Michigan.

The remand comparative hearing record supports the July 11, 1958 Decision that the May 14, 1954 comparative grant to WJR, as affirmed on December 6, 1954 and April 1, 1955, should be reaffirmed.

The Commission acted within its sound discretion in refusing, on the basis of the unavailability of CBS to WJR following the remand comparative hearing, to order a still further evidentiary hearing in the comparative proceeding.*

The protest hearing record supports the July 16, 1958 Decision which reinstated the April 14, 1954 grant of WJR's modification application.

The Commission correctly returned Lake Huron's application for Flint Channel 12 as not acceptable for filing inasmuch as the Court's remand of the comparative proceeding did not contemplate the admission of new applicants and the application was filed more than four years too late under the Commission's "cut-off" rule.

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* WJR did not commence operation of its Flint Channel 12 television station until after three protracted hearings before the Commission, namely (1) the original comparative hearing, (2) the protest hearing and (3) the remand comparative hearing.

ARGUMENT

I.

THE ORIGINAL COMPARATIVE HEARING RECORD SUPPORTS THE MAY 14, 1954 GRANT TO WJR.

Trebit is the sole appellant[*] to argue that the Commission, on the basis of the original hearing record, committed reversible error in granting WJR's application in preference to the applications filed by Trebit and Butterfield. In support of this position, Trebit incorporates its entire Brief filed herein on August 30, 1955 and a portion of its Reply Brief filed February 3, 1956 (Trebit May 19, 1959 Brief, p. 4).

The WJR Brief filed herein on December 9, 1955, which is hereby incorporated herein by reference,[**] demonstrates that the Commission's May 14, 1954 Decision, as affirmed December 6, 1954, is supported by the original hearing record, adheres to the requirements of Johnston Broadcasting Company v. FCC, 85 U.S. App. D.C. 40, 175 F. 2d. 351 (1949) and is well within the Commission's "discretion to choose between qualified applicants." Scripps-Howard Radio v. FCC, 89 U.S. App. D.C. 13, 189 F. 2d. 677 (1951).

II.

THE WJR MODIFICATION APPLICATION WAS NOT AN AMENDMENT, WAS NOT SUBJECT TO THE CUT-OFF RULES, WAS NOT MUTUALLY-EXCLUSIVE WITH THE TREBIT AND BUTTERFIELD DENIED APPLICATIONS AND DID NOT REQUIRE THAT THE MAY 14, 1954 GRANT TO WJR BE SET ASIDE.

At the time WJR filed its December 16, 1954 modification application, it was the permittee of Channel 12 at Flint in view of the Commission's May 14, 1954 Final Decision granting its construction permit application and denying the mutually-exclusive applications of Trebit and Butterfield. The fact that the grant to WJR was then subject to appeal did not alter this fact.

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[*] Butterfield's Brief filed herein on May 19, 1959, which supersedes its previous Brief (see page 3), raises no question concerning the validity of the original grant to WJR based on the original record. Nor does the Lake Huron Brief filed May 19, 1959.

[**] Pages 6-8 and 10-30 of WJR's Brief. See also pages 12-15 and 17-64 of the Commission's Brief filed December 9, 1955.

Since WJR was not an applicant but a permittee, its December 16, 1954 modification application was not subject to the cut-off and amendment rules and was not mutually-exclusive with the Trebit and Butterfield Flint Channel 12 applications which had been denied on May 14, 1954. Nor did the filing of the WJR modification application constitute an "abandonment" by WJR of its hearing proposals so as to require that the May 14, 1954 grant be set aside and further comparative consideration be confined to Trebit and Butterfield.

In arguing to the contrary in their Briefs filed herein on May 19, 1959,[*] appellants repeat assertions[**] which have already been rejected by this Court.[***] In doing so, appellants continue to fail to recognize that the only significance of the WJR modification application,in relation to the comparative hearing, was that it reflected post-grant changes (necessitated by the circumstances of time and passing events) in WJR's hearing proposal which, in turn, raised the following two questions: (1) Did the changes require a further evidentiary hearing? and (2) Did the changes, upon comparative reconsideration, require any result different than that set forth in the May 14, 1954 Final Decision?

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[*] Trebit, Part III; Butterfield, Parts IIA and IVA.

[**] The same arguments were advanced in their Briefs filed August 30, 1955 (Butterfield, pages 17-37 at 33 and Trebit, page 11). Lake Huron advances similar arguments (Brief, pages 14-19) in support of its assertion that the Flint Channel 12 application filed by it in October of 1956 was entitled to comparative consideration with those filed by WJR, Trebit and Butterfield in 1952. The invalidity of these assertions is dealt with further in Part VIII of this Brief.

[***] See last paragraph of this Court's May 24, 1956 Decision and Orders dated May 28, 1956 and January 14, 1957.

In considering the above-noted questions, the Commission in its April 1, 1955 Decision decided that the changes did not require a further evidentiary hearing and did not, upon reconsideration, alter the conclusion that WJR was to be preferred (J.A. 540-48). In reversing the Commission, this Court's Decision of May 24, 1956 rejected appellants' arguments that WJR should be excluded from further comparative consideration because of the cut-off and amendment rules and "abandonment", etc.* and held only that it was error on the part of the Commission not to hold a further evidentiary hearing on the matters referred to in the Decision before deciding whether the post-grant changes should dictate a result different than that reached in the Commission's May 14, 1954 Decision.

Thus, the only question which is in fact now presented by the appellants, despite the invalid, irrelevant and repetitive arguments respecting cut-off and amendment rules, abandonment, etc., is whether the Commission's July 11, 1958 reaffirmance of the May 14, 1954 grant to WJR complied with this Court's May 24, 1956 Decision and is supported by the record. As shown in Parts IV and V of this Brief, the twofold question must be answered in the affirmative.

III.

THE APRIL 14, 1955 GRANT OF WJR'S MODIFICATION APPLICATION DID NOT VIOLATE EITHER THE ASHBACKER DOCTRINE OR SECTION 402(c) OF THE COMMUNICATIONS ACT.

The Butterfield May 19, 1959 Brief, in Part IIB, argues that the April 14, 1955 grant of WJR's modification application** was

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* The same arguments were also rejected by this Court in denying the joint petitions filed by Trebit and Butterfield on May 5, 1955 and December 14, 1956 which asked the Court to (1) rescind the April 14, 1955 grant of WJR's modification application (see the last paragraph of the May 24, 1956 Decision and Order dated May 28, 1956) and (2) rescind the May 14, 1954 and April 14, 1955 grants to WJR (see January 14, 1957 Order).

** Which grant is erroneously characterized by all three appellants as "*ex parte*." The grant of WJR's modification application was a grant "without a hearing."

"unlawful" as it violated the Ashbacker doctrine and Section 402 (c) of the Communications Act. These arguments, which are advanced by all three appellants, were previously advanced by Trebit and Butterfield (see Butterfield August 30, 1955 Brief, page 36 and Trebit-Butterfield May 5, 1955 "All Writs" Petition) and were previously considered and correctly rejected by this Court in the last paragraph of its May 24, 1956 Decision and in its Orders of May 28, 1956 and January 14, 1957. The rights of Trebit and Butterfield were fully protected by the remand hearing ordered in the comparative hearing. The rights of Lake Huron were fully protected by the protest hearing held pursuant to Section 309 (c) of the Act.*

In view of the above, it is apparent that no issue as to the validity of the April 14, 1955 grant per se is presented by the appeals of Trebit, Butterfield and Lake Huron and that the pertinent appeals, in fact, go solely to the question of the validity of (1) the affirmance of the May 14, 1954 grant based on the remand comparative hearing record and (2) the reinstatement of the April 14, 1955 grant based on the protest hearing record.** As shown in Parts IV-VII of this Brief, these actions of the Commission are supported by the record and must be affirmed.

IV.

THE REMAND COMPARATIVE ISSUES COMPLIED WITH THE MAY 24, 1956 REMAND.

A reading of this Court's May 24, 1956 Decision and the Commission's October 19, 1956 Hearing Order (R. 4736-37) makes it clear that the remand hearing issues*** complied meticulously with this

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* It should be noted that neither Trebit nor Butterfield ever sought to participate in the protest hearing.

** The Lake Huron appeal is directed to both questions. The Trebit and Butterfield appeals go only to the first question.

*** The issues are set forth in the Counter Statement of the Case, supra.

Court's Decision. This is all the more apparent from the fact that this Court's Order entered herein on January 14, 1957, denied a petition filed jointly by Trebit and Butterfield on December 15, 1956 which asked this Court to set aside the Commission's October 19, 1956 Hearing Order on the ground that the remand issues did not comply with the May 24, 1956 Decision.

Butterfield, in its May 19, 1959 Brief (Point 3 on page 16), argues that the remand hearing issues were "improper," "inadequate," and "contrary to the [May 24, 1956] decision of this Court." In purported support of its argument (Part III A of Butterfield Brief), Butterfield repeats the familiar but fallacious assertions that: (1) the May 14, 1954 and April 14, 1955 grants should have been set aside, (2) WJR's application denied and (3) the remand hearing confined to the question of whether the application of Trebit or Butterfield should be granted. Trebit, in effect, makes the same argument (e.g., see Part III of Trebit's May 19, 1959 Brief). As set forth above in Parts II and III of this Brief, these arguments are invalid, irrelevant and have already been rejected by this Court.

Butterfield also states, in a tortured and patently erroneous argument, that the remand "issues specified made no reference * * * to Butterfield or Trebit, and seemed to afford no basis for the continuance of the comparative hearing which this Court had ordered" (page 30). That comparative consideration was in fact included within the remand issues is apparent from the language in the October 19, 1956 Commission Order directing the Hearing Examiner to prepare a Supplemental Initial Decision, "in which, in light of the evidence adduced under the issues * * *, the [May 14, 1954] grant of WJR's application will be reconsidered on a comparative basis with the applications of Trebit and Butterfield" (R. 4736).

Lake Huron, which was permitted to intervene in the comparative hearing after the 1956 remand over the objection of all parties, argues (without the support of any of the original parties) that it was error to exclude "evidence"[*] related to the alleged impact that WJR's operation at Chesaning would have on Saginaw's sole television station (WKNX-TV, a UHF station operated by Lake Huron). It is clear that the remand issues did not and could not encompass the question attempted to be raised by Lake Huron for the following reasons:

1. Under Section 402 (h) of the Communications Act, the Commission could not include any issue not encompassed within the Court's remand.[**]
2. The Court's remand of the comparative proceeding did not encompass the question now attempted to be raised by Lake Huron (no such question ever having been raised in the comparative proceeding prior to the Court's May 24, 1956 Decision).

It is equally clear that there is now no need for the Court to remand the comparative case for reconsideration on the basis of evidence concerning the question attempted to be raised by Lake Huron at a further remand hearing as:

1. WJR, Trebit and Butterfield all agree that no such issue was or is included within the comparative differences regarding their proposals (Tr. 1674).

2. The testimony which Lake Huron wishes to introduce in the comparative hearing was received and considered in the protest proceeding and the Commission correctly concluded the evidence did not

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[*] Lake Huron made an offer of proof to produce two witnesses who would give testimony similar to the testimony each gave in the protest case (Tr. 1680-81).

[**] Since 402(h) prohibits the Commission from adding parties as well as issues unless ordered by the Court, it appears that it was error to permit Lake Huron to intervene in the comparative hearing. For the same reason, it appears that Lake Huron has no standing to appeal from the construction permit grant to WJR.

establish, as alleged, that WKNX-TV could not compete effectively with WJR's proposed Chesaning operation (Conclusions 9-12 at R. 12,884-85).

3. WKNX-TV is still operating despite the fact that WJR has been operating from Chesaning since October 12, 1958.*

Accordingly, there is no merit to the assertions of the appellants that the remand hearing issues were not in compliance with this Court's May 24, 1956 Decision.

V.

THE REMAND RECORD SUPPORTS THE AFFIRMANCE OF THE MAY 14, 1954 GRANT TO WJR.

In its April 1, 1955 and April 15, 1955 Decisions** (J.A. 540-48 and 12 R.R. 97), the Commission considered all of the WJR post-grant changes and the time at which WJR filed its modification application and concluded these facts did not require a further evidentiary hearing and did not affect, in any substantial way, the bases for preferring WJR. This Court's May 24, 1956 Decision held that before reconsidering the effect of the above on the May 14, 1954 grant, the Commission was required to hold further evidentiary hearings on (1) certain of the changes (transmitter site, programming and studios) and (2) the time at which WJR filed its modification application.

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* On July 8, 1959, Lake Huron filed an application for Channel 9 at Alpena, Michigan which stated under oath that its existing stations WKNX and WKNX-TV "are operating at a substantial profit" (Exhibit 4 of BPCT-2661). In addition, Lake Huron has recently filed an application for a new AM station in Houston, Texas (BP-13,097 filed May 15, 1959).

** In its April 15, 1955 Decision (12 R.R. 97), the Commission denied a joint petition filed January 27, 1955 by Trebit and Butterfield directed against a December 21, 1954 grant of an extension of time within which WJR was required to complete the construction authorized by the May 14, 1954 grant. This action was never appealed.

Pursuant to this Court's May 24, 1956 Decision, the Commission held further evidentiary hearings on the matters noted in the Decision and again reconsidered the May 14, 1954 grant to WJR to determine whether the WJR post-grant changes and the time at which WJR filed its modification application, "upon new consideration of the parties, should dictate a different result." Enterprise Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 265 F. 2d. 103 (Case 14,474 decided January 29, 1959).

The Commission concluded in its July 11, 1958 Decision as affirmed September 10, 1958 (R. 6367-6411 and 6443-48) that on the basis of the entire comparative hearing record, the May 14, 1954 grant to WJR should stand. The analysis set forth below shows that the Commission's Decision is supported by the record and that appellants have failed to establish that any reversible error was committed. Accordingly, the Decision must be affirmed.

A.

THE TIME AT WHICH WJR FILED ITS DECEMBER 16, 1954 MODIFICATION APPLICATION

At the original hearing, WJR proposed, inter alia, a transmitter site at Clarkston (20 miles southeast of the nearest Flint boundary), a network affiliation with DuMont and a new main studio building to be located at a "site to be determined" within the city limits of Flint. In its May 14, 1954 Decision, which granted WJR's application in preference to those filed by Trebit and Butterfield, the Commission gave no preference to WJR because of its transmitter site or its proposed affiliation with DuMont. The proposed new main studio building was the subject of a preference. However, it was one of several factors involved in the award of a composite preference to

WJR in the area of programming and facilities,[*] which composite preference was not considered as the significant preference as against either Trebit or Butterfield.[**]

The record is clear that the above aspects (site, studios and network affiliation), as well as all aspects, of the WJR hearing proposal were made in good faith and that WJR intended to carry them out (Conclusion 16 of July 11, 1958 Decision at R. 6404).[***] However, two basic events occurred more than a year after the original hearing record was closed on February 27, 1953 which led WJR to change its plans respecting transmitter site, network affiliation and main studios. These events were the unanticipated failure of the DuMont network to grow and prosper (and its eventual demise) and the unanticipated availability of a television studio building built in Flint in the fall of 1953 after the Flint Channel 12 comparative hearing record had been closed, and used for less than six months by a Flint UHF television station (WTAC-TV, which operated from November 6, 1953 until April 30, 1954).

Upon receiving the May 14, 1954 construction permit, WJR believed that DuMont had a reasonably good opportunity for growth and issued a press release stating that it planned to start construction at the Clarkston transmitter site within 60 days (Tr. 185 and 1065). Construction activities were commenced at once at the Clarkston site (see Findings 44 and 45 of July 11, 1958 Decision at R. 6387-88) and an air target date of September 1, 1954 was established (Tr. 1903).

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[*] The other factors were: (1) Only WJR proposed a studio at its transmitter building and a completely equipped studio in Detroit, (2) Only WJR proposed a custom-built mobile unit to be based in Flint, (3) Only WJR proposed remote programs at the outset and (4) WJR proposed substantially more meritorious local live programs than either Trebit or Butterfield.

[**] As shown in the Counter Statement of the Case, the most significant preferences as against Trebit and Butterfield were in the areas of diversification and preparation. None of the WJR post-grant changes affected these areas in any way.

[***] Butterfield's argument that the WJR hearing proposals were "fictitious" (May 19, 1959 Brief, page 17) is a completely baseless charge devoid of any record support or citation.

With respect to the main studio building, the WJR Board of Directors at a meeting held May 20, 1954, decided to investigate the WTAC-TV studio building and the possibility of acquiring it if a proper price could be negotiated (Tr. 399).[*] Following meetings and discussions, a "handshake" agreement was reached in early July 1954 and on July 30, 1954, an agreement to lease (with an option to purchase) was executed (R. 6387). On August 10, 1954, WJR issued a press release announcing the lease of the WTAC studio building (R. 6387).

In the meantime, construction activities at the Clarkston transmitter site, which had commenced in May of 1954 had been suspended on July 8, 1954 in view of the fact that WJR by that time had become convinced that (1) contrary to its hearing expectation, there was no hope that DuMont would grow and prosper and that DuMont affiliation would be akin to independent operation and (2) in accordance with its hearing expectation, it appeared unlikely that affiliation at the Clarkston site could be achieved with ABC, CBS or NBC.[**] Accordingly, in July and August of 1954, WJR explored the possibilities of (1) securing a network affiliation either at Clarkston or at a site other than Clarkston with ABC, CBS or NBC and (2) a non-network (independent) operation at Clarkston. These explorations convinced WJR that it should seek affiliation with ABC, CBS or NBC and that no such affiliation could be obtained at the Clarkston site (see Findings 57-71 of July 11, 1958 Decision at R. 6392-95).

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[*] Shortly prior to April 30, 1954, one of the principals of WTAC-TV telephoned a WJR official to advise of the availability of the studio building (Tr. 393-94).

[**] See Findings 46-56 of July 11, 1958 Decision at R. 6388-92. DuMont ceased to operate as a network in September of 1955 (Broadcasting, September 5, 1955, page 7).

On September 8, 1954, WJR decided that since an affiliation with CBS apparently could be obtained if the WJR site was moved way from the Detroit side of Flint to the northwest side of Flint,[*] a modification application seeking authority to move the site should be prepared at once and filed as soon as the Commission had acted on the then pending petitions for rehearing directed against the May 14, 1954 grant.[**] Although an option on the Chesaning site (some 20 miles northwest of Flint) was obtained in September of 1954 and steps were taken to complete the modification application as soon as possible, it was not in fact completed until December 14, following the December 6, 1954 denial of the above-noted petitions for rehearing. The WJR modification application was executed on December 15, 1954 and filed on December 16, 1954 (See Findings 72-80 of July 11, 1958 Decision at R. 6395-98; Patt Tr. 1329, 1365-69 & 1372 and Cohen Tr. 1156-57).

Prior to the filing of the December 16, 1954 modification application, WJR on December 1, 1954 filed an application to extend the time within which to complete construction in accordance with the May 14, 1954 grant.[***] This application (WJR Exh. 100 at R. 5238-39), in answering the questions as to whether there had been any changes in the proposals previously submitted to the Commission, reported, inter alia, that there had been changes in network plans and the transmitter site, that the former WTAC-TV studio building had been acquired and that an application for modification of construction permit reflecting these and other changes was in course of preparation and would be filed in the near future.

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[*] WJR believed a site northwest of Flint would be attractive to ABC and NBC as well as CBS (WJR Exhibit 97 at R. 5227).

[**] Under the Commission's Rules, prior authority was required to move the transmitter site but it was not required to effectuate changes regarding network affiliation or studios.

[***] This application was not required to be filed until 30 days prior to the expiration of the construction permit which was scheduled to expire on or about January 12, 1955. As noted above, this application was granted December 21, 1954 and a joint petition filed January 27, 1955 by Trebit and Butterfield directed against the grant was denied April 15, 1955 (12 R.R. 97). The action was never appealed.

The appellants argue that WJR should have notified the Commission of its changes re (1) main studios and (2) transmitter site and network affiliation prior to the filing of the above-noted applications on December 1 and 16, 1954. As shown below, this charge is without foundation as WJR complied with all existing rules and policies.

No Commission rule or policy required the reporting of the acquisition of the former WTAC-TV studio building prior to the time it was reported. The appellants claim WJR should have referred to the change in its pleading filed June 21, 1954. However, at that time, there was nothing to report and the pleading was directed to the question of whether the record supported the May 14, 1954 grant. Lake Huron claims (Brief, page 21) that Rule 3.613 (b) required the studio change to be reported earlier than it was.[*] This charge ignores the fact that with respect to changes from one location to another within the principal city limits, the rule requires prompt notification of such a change (but not prior authority) after the change has been made and after the station is being operated from the new location. WJR did not commence operation from the former WTAC-TV studio building until October 12, 1958.

No Commission rule or policy required the reporting of the contemplated changes re transmitter site and network proposals at an earlier date than reported.[**]

No Court Decision required the reporting of any of the changes in the WJR proposals prior to the time they were reported.

WJR could not have filed its modification application any sooner than it did (Finding 72-80 of July 11, 1958 Decision at R. 6395-98; Patt Tr. 1329, 1365-69 & 1372 and Cohen Tr. 1156-57).

WJR publicly announced via an August 10, 1954 press release, its change in studio plans (R. 6387) and was advised by counsel that the contemplated change in transmitter site should not be applied for prior to a decision on the pending petitions for reconsideration. This advice was based on the premise that to do otherwise could be construed as an improper attempt to improve its comparative position in view of the then pending arguments that the Clarkston site (which was located on the Detroit side of Flint) should be considered adverse to WJR because of its location in relation to Detroit (Tr. 1323 & 1363).

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[*] Neither Trebit nor Butterfield has made such a charge and Lake Huron made no such charge in the protest hearing.

[**] Prior authority was required to effectuate the transmitter site change but not the network change. The May 14, 1954 Decision found no difference between the applicants in either of these areas.

In addition to all of the above record facts which establish that WJR adhered to all requirements respecting the reporting of changes to the Commission, the original hearing record demonstrates that WJR has had a long and distinguished history as a licensee, dating back to 1927, and that WJR's AM performance has been in substantial compliance with its AM proposals* (See Conclusion 22 of July 11, 1958 Decision at R. 6406-07 and WJR June 7, 1957 Proposed Conclusions 30 and 40-46 at R. 5703-04 & 5708-12).

The above facts support the Commission's conclusion that the time at which WJR filed its modification application did not reflect adversely upon WJR's character and constituted no reason for altering the result reached in the May 14, 1954 Decision. The charge that the Commission did not consider this issue on a comparative basis is refuted by a reading of the July 11, 1958 Decision (Findings 46-80 and Conclusions 16-22 and 28 at R. 6389-98, 6404-07 & 6408-09) and the September 10, 1958 Memorandum Opinion and Order affirming the July 11, 1958 Decision (paragraphs 7 and 8 at R. 6444-45).

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* Trebit in footnote 10 on page 24 of its May 19, 1959 Brief erroneously asserts that a stipulation "precluded" a showing re WJR's past broadcast record. The record shows just the contrary. The Examiner specifically asked for a showing respecting past broadcast records (R. 396). The record also shows that all of WJR's exhibits respecting its past broadcast record were received without objection (R. 1324-27 and 966-970). In addition, Trebit and Butterfield each asserted that its past record entitled it to a preference (Trebit Proposed Finding 215 at R. 6794 and Butterfield Proposed Conclusion 9 at R. 7737). Throughout the proceeding WJR urged that its superior past broadcast record was of decisional significance. For example, see WJR Proposed Findings filed March 30, 1953 (Findings 30-35 and Conclusion 13 at R. 4130-37 & 4198-99); WJR Reply Findings filed April 6, 1953 (Par. 15 at R. 4225-26); WJR Exceptions filed June 15, 1953 (Excs. 73 and 74 at R. 4329-31); WJR Findings filed June 7, 1957 (Conclusions 30 and 40-46, 53 and 58 at R. 5703-04, 5708-12, 5717 & 5719) and WJR Exceptions filed October 22, 1957 (Exception 26 at R. 6213). The parties did stipulate that certain matters with respect to WJR and Butterfield "are not relevant to the instant case and that no inquiry will be made into said matters." However, the stipulation went on to state as follows: "It is further stipulated and agreed that the stipulation of the matters set forth in this Stipulation in no way limits the introduction of further or additional evidence by each applicant to support its application herein and to meet the issues specified." (See Part IV of Stipulation accepted February 20, 1953, R. 2677-78).

B

THE WJR POST-GRANT CHANGES*

All of the WJR post-grant changes were considered in the Decisions released April 1, 1955 and July 11, 1958 (as affirmed September 10, 1958). An analysis of the WJR changes, in relation to the various comparative areas, supports the Commission's July 11, 1958 Decision that the May 14, 1954 grant to WJR should be reaffirmed.

Preparation for Television, Past Broadcast Record, Broadcast Experience and the University of Michigan

The May 14, 1954 Final Decision (J.A. 400-491) held that WJR was not entitled to a preference over Trebit, but was entitled to a preference over Butterfield in the areas of preparation, past broadcast record and prior broadcast experience (Conclusions 8, 19, 20 and 36). The "significant" preference with respect to Butterfield was in the area of preparation. None of the WJR changes affects these areas or the conclusions respecting them in any way nor do any of the changes affect the May 14, 1954 conclusion that any preference accruing to Butterfield from the fact that the University of Michigan is a 26% stockholder of Butterfield was not "of sufficient significance to be determinative" (Conclusion 13).**

Diversification

In the May 14, 1954 Decision (J.A. 400-491), WJR was given a "determinative" preference over Trebit and was held to be equal but not superior to

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* This Court's May 24, 1956 Decision ordered a further hearing only with respect to changes in transmitter site, studios and programming.

** The University of Michigan appears to have lost interest in the Butterfield application as in July of 1957 the University filed a pleading requesting that Channel 12 be deleted from Flint and assigned to Ann Arbor Docket 12076).

Butterfield in the area of diversification (Conclusions 6 and 35). The only changes in this area which have occurred since that time respecting WJR (disposal of WGAR and WGAR-FM),[*] if considered, would only serve to strengthen the above conclusions. In fact, these changes cannot be considered as they are beneficial rather than adverse to WJR's comparative strength.[**] Trebit's May 19, 1959 Brief speaks of possible future WJR changes as affecting this area of comparison. However, it is obvious that such speculations do not affect the fact that the record supports the above-noted conclusions.

Participation of Principals

In the May 14, 1954 Decision, WJR was given "some preference" as against Trebit and Butterfield in the area of participation of principals because of the time to be devoted during the first year by Messrs. Patt (25%), Kramer (25%) and Leydorf (80%) (J.A. 460-461). In its April 1, 1955 Decision, the Commission concluded that although this preference would be "diminished or eliminated entirely" because of the changes in the WJR staff,[***] the overall basis of the original grant to WJR "remains basically unaffected thereby" (J.A. 543-44). Nothing has been advanced by appellants to disturb the validity of this conclusion.[****]

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[*] See pages 32-36 of WJR December 9, 1955 Brief, which is incorporated herein by reference. Since that date, the WINT interests have been transferred to others.

[**] For the same reason, the disposal by Trebit, after the Court's May 24, 1956 Decision, of all of its broadcast interests except its Flint AM station for some 15 million dollars cannot inure to Trebit's benefit.

[***] See page 39 of WJR December 9, 1955 Brief, which is incorporated herein by reference, for the changes.

[****] It is noted that pages 11 and 12 of Lake Huron's Brief contain inaccurate statements which, even if true, would not affect the validity of the above noted conclusion. For example, Lake Huron states that "Patt's proposed participation was curtailed for health reasons." The record citation given (Tr. 1553) does not support this assertion. Even if true, which it is not, the assertion is meaningless as the April 1, 1955 Decision held that the preference for participation of principals was "diminished or eliminated entirely." Lake Huron also makes incomplete and inaccurate assertions regarding WJR ownership and

[continued on p. 26]

Transmitter Sites

The May 14, 1954 Final Decision (J.A. 400-491) concluded that there was no significant difference among the transmitter sites proposed by WJR, Butterfield and Trebit. The Commission's April 1, 1955 Decision (J.A. 540-48) considered the change of the WJR transmitter site from a point 17 miles southeast of Flint (Clarkston) to a point 20 miles northwest of Flint (Chesaning) and concluded the change did not affect its previous conclusion.* As shown below, the remand record supports the same conclusion, which was reached once again in the Commission's July 11, 1958 Decision.

This Court's May 24, 1956 Decision stated that the Trebit-Butterfield Joint Petition of December 28, 1954 asserted that the Chesaning site was "clearly less desirable" than the Clarkston site as it was further from Flint, on lower ground and that the adverse shadow effect

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[footnote continued from p. 25]

stock options. WJR's June 7, 1957 Proposed Findings 9-12 at R. 5621 ff show, _inter alia_, that (1) the May 14, 1954 Decision recognized that Mrs. Parker's _de facto_ control was temporary; (2) the reduction of Mrs. Parker's holdings below _de facto_ control received the prior approval of the Commission; (3) there was no change in the WJR Board of Directors and (4) although none of the options referred to in the May 14, 1954 Decision was exercised, all officers having such options, with the sole exception of Mr. Leydorf, had, as of the closing of the remand record, increased their stockholdings by more than the number of shares subject to option. Since that date further changes have occurred in stockholdings, all of which have been reported, as required. It is noted that Lake Huron on June 27, 1957 addressed a letter to the Commission containing the same erroneous arguments concerning the WJR stock options (R. 5934-35) and that although the letter was directed to the merits of the remand proceeding and copies were served on the other parties, no copy was served on WJR.

* In relation to the respective furthest and nearest Flint boundaries, the various sites are located as follows (July 11, 1958 Decision, Finding 11): Trebit (11.1 and 4.4 miles), Butterfield (21.8 and 14.4 miles), WJR's Clarkston site (24.7 and 17 miles) and WJR's Chesaning site (26.8 and 20 miles). The Trebit site is north of Flint, the WJR Clarkston and Butterfield sites are southeast of Flint and the WJR Chesaning site is northwest of Flint. Detroit is located some 57 miles south and east of Flint and Saginaw some 31 miles north and west of Flint.

was "twice as great". The Decision also stated that since the WJR Chesaning site was further from Flint and lower than Trebit's site that "Trebit would provide the better service by both standards of Rule 3.685 (b)" which "equates the best service with a transmitting antenna 'located at the most central point at the highest elevation available.' "

The July 11, 1958 Decision correctly concluded that Rule 3.685 (b) "does not prescribe a specific and definite requirement that can be determined absolutely or mathematically. Rather, it provides "merely a guide, or standard, which applicants should follow in selecting sites" (Conclusion 15 at R. 6404). Neither the Rule (which does not purport to set up the factors of height above mean sea level and distance from the principal city as standards for predicting quality of service), nor the record herein affords any basis for concluding that Trebit's site will provide a better quality of service than WJR's Chesaning site merely because the Trebit site is higher and closer to the principal city. Nor is there any evidence in the record tending to demonstrate that the Trebit or Butterfield site will provide, for any reason, a better quality of service to Flint than will be provided from the WJR Chesaning or Clarkston site. Butterfield did not submit any engineering evidence at the further hearing and the only engineering evidence adduced by Trebit related to comparative signal strengths which would be provided from the sites proposed by WJR at Clarkston and Chesaning, by Trebit and by Butterfield. The Trebit engineering witness made no attempt to controvert the prior testimony of WJR's engineering witness (Tr. 1165, 1171-74 and 1189-91) that the Chesaning site complied with the Commission's Rules and Regulations and that there was no significant difference, from the viewpoint of the coverage of Flint, among the sites proposed by WJR (Clarkston and Chesaning), Trebit and Butterfield. In reaching this conclusion, WJR's engineering witness considered, *inter alia*, the following with respect to each site: the distance from Flint, the elevation above mean sea level and shadowing effects.

The engineering evidence adduced by Trebit at the original and at the remand hearing respecting comparative signal strengths over Flint and the so-called Flint trade area did not controvert the fact that WJR from either the Clarkston or Chesaning site and Trebit and Butterfield from their sites would provide a minimum signal over Flint in excess of the 77 dbu minimum required by Rule 3.685 (a). Accordingly, for the reasons set forth in the May 14, 1954 Decision, no significance can be attached to the fact that Trebit would provide a higher signal strength over the furthest Flint boundary (99 dbu) than Butterfield (88.5 dbu) and WJR, either at Clarkston (86 dbu) or Chesaning (84.5 dbu). This is especially so in view of the fact that the Trebit engineering witness testified at the remand hearing that he could not relate the theoretical statistical showing of comparative field strengths to service (Tr. 1710) and made no attempt to controvert the prior engineering testimony (Tr. 1165, 1171-74 & 1189-91) that there was no significant difference among any of the sites respecting coverage of Flint.

In view of the above, and in view of the findings set forth in the July 11, 1958 Decision (11-17), the change of the WJR site from Clarkston to Chesaning affords no basis for holding that the WJR Chesaning site is inferior to the WJR Clarkston site or to the sites proposed by Trebit and Butterfield. Accordingly, the record supports the July 11, 1958 Decision (see Conclusions 7-15, 25 & 28 at R. 6367ff) that there is no basis for altering the May 14, 1954 conclusion that the transmitter sites proposed afford no basis for a preference to WJR, Butterfield or to Trebit.*

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* Since a party to a comparative hearing may not improve his position by post-hearing changes, it is not necessary to decide whether the WJR Chesaning site is superior to the WJR Clarkston site, or to the Butterfield site or to the Trebit site.

Studios, Equipment and Proposed Programming

The May 14, 1954 Decision (as affirmed December 6, 1954) awarded WJR a composite preference over Trebit and Butterfield in the areas of studios, equipment and programs for the following reasons (See Findings 85 and Conclusions 10, 11, 15, 21, 35 and 36 of May 14, 1954 Decision at J.A. 461 ff; Paragraphs 8 and 9 of December 6, 1954 Decision at J.A. 494-95 and Conclusion 2 of July 11, 1958 Decision at R. 6367ff):

(1) Only WJR proposed a studio at its transmitter building and a studio in Detroit in addition to main studios in Flint,

(2) Only WJR proposed a remote mobile unit,

(3) Only WJR proposed remote programs at the outset,

(4) Only WJR proposed a new Flint studio building, specifically designed for television, and

(5) WJR proposed substantially more meritorious local live programs (33.5%) than either Trebit (21.9%) or Butterfield (17.4%).

In its April 1, 1955 Decision (J.A. 540-48), the Commission concluded that the changes in WJR's main studio building and proposed programs did not materially affect the above-noted composite preference awarded WJR (Paragraph 10 at J.A. 544).

In ordering a further evidentiary hearing, this Court in its May 24, 1956 Decision, stated with respect to the studio change that "It would seem * * * [from the difference in cost figures as between the main studio building proposed at the hearing and the one proposed in the modification application] that WJR should not continue to enjoy a preference as to studio facilities" and that the Commission must determine "whether the newly proposed WJR facilities will be superior to appellants'; for such superiority was one of the grounds of the grant to WJR." (Footnote 20). The further hearing record supports the findings (18-24) and conclusions (2-3) reached in the July 11, 1958 Decision (R. 6367-6411) that comparison of the changed WJR proposed facilities with the facilities proposed by Trebit and Butterfield does not affect the composite preference awarded WJR as:

1. WJR remains the sole applicant to propose (a) studios in Detroit and at its transmitter building as well as in Flint; (b) remote programs at the outset; (c) a custom built mobile unit and (d) substantially more meritorious local live programs.
2. WJR proposes all of the studio and technical equipment originally proposed.
3. WJR proposes a main studio building in Flint, which, like the building proposed at the original hearing, is capable of effectuating the remote and local live programs proposed to be originated from Flint.*

The only other changes made by WJR which affect the several factors which led to its composite preference are changes related to its program proposals resulting from the change from DuMont to CBS. These changes may be summarized as follows:

1. With respect to "types" of programs, no changes at all were made with respect to the amount of time to be devoted to Religious, Agricultural, Educational, News and Discussion programs, and only slight changes were made respecting Entertainment (0.30% less) and talks (0.30% more).

2. With respect to classes of programs, the same percentage of time was proposed regarding local live programs but changes were made respecting network (13.34% more) and recorded (13.34% less) programs.

3. With respect to the commercial and sustaining percentages, the modification proposal increased the total commercial percentage by 8.13% to 74.07%.

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* The record also shows that WJR's present main studio building is superior to the ones proposed by Trebit and Butterfield (See June 7, 1957 WJR Proposed Findings 101-108 and Proposed Conclusions 32-38 at R. 5681-86 & 5705-07).

4. The modified proposal included each and every one of the 30 local live programs discussed in paragraph 88 of the May 14, 1954 Decision (J.A. 440-444) although some changes were made respecting scheduled times and classifications.[*]

In its April 1, 1955 Decision, the Commission considered all of the above-noted program changes and concluded they did not require any change in the composite preference awarded WJR (Paragraphs 11-13 at J.A. 545-46). This Court's May 24, 1956 Decision held that there was "no basis" for this conclusion and stated "It may be that these changes would indeed turn out to be insignificantly minor, as the Commission concluded. * * * But only hearings can produce a definite answer."

The remand hearing answered all of the questions posed by this Court's May 24, 1956 Decision[**] and supports the July 11, 1958 findings

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[*] See Findings 26 and 34 of July 11, 1958 Decision (R. 6367ff).

[**] The Commission considered "the sharp curtailment of film programming" and correctly concluded that "the substitution of network for film programs by WJR for 13.34% of its total broadcast time is without significance." (Conclusion 5). The Commission considered the assertions that the modified proposal "was deliberately juggled to make a pose of retaining basically the same amount of live programming and the same amount of programming as to type; and the assertion that the network option privileges would prevent WJR from programming local shows during certain of the option hours as proposed and concluded that the assertions were without foundation (Conclusion 4). The reclassification of the Local and State "Your Government" programs from talks to discussion was made in view of the fact that these programs will be presented by means of forum or round table discussions rather than by means of a single speaker (Finding 34). "Sports Arena" was cut from 30 minutes to 15 minutes, changed from film (recorded) to live and reclassified from entertainment to talk in view of the fact that the original program was proposed as a syndicated film sports show whereas the program proposed in the modification application is a live talk program to follow the network Pabst Blue Ribbon fights which vary in length from week to week. (WJR Exhibit 88, R. 5132). With respect to the program "Symphony at Work" there was no change in the proposal to use films of orchestra rehearsals for a substantial part of the 35 minute period. However, the classification was changed from recorded to live in view of the fact that it should have been so classified originally because of the Commission's definition that "a recorded program which is a local live program produced by the station and recorded for later broadcasting by the station shall be considered a local live program" (WJR Exhibit 87, R. 5127).

(25-38) and conclusions (4-6) leading to the ultimate conclusion that the original composite preference awarded to WJR should remain.

C.

SUMMARY

Accordingly, the entire hearing record supports the Commission's conclusions that after consideration of (1) the changes in WJR's proposal (including those concerning which the Court ordered a further hearing) and (2) the time at which WJR filed its modification application, the public interest, convenience and necessity would be served best by affirmation of the May 14, 1954 grant to WJR.

VI.

THE COMMISSION ACTED WITHIN ITS SOUND DISCRETION IN REFUSING TO ORDER A SECOND FURTHER HEARING BECAUSE CBS BECAME UNAVAILABLE TO WJR.

At the time WJR filed its December 16, 1954 modification application, it contemplated and proposed a CBS affiliation.* Following the grant on April 14, 1955 of the WJR modification application but before the effectiveness of the grant was suspended on June 10, 1955, WJR (on April 29, 1955) signed an affiliation agreement with CBS. This agreement (which was filed with the Commission on May 31, 1955 and produced, at the request of the appellants (Tr. 790) at the remand hearing) provided it would be effective for a two year period commencing September 1, 1955 with the provision that it would be automatically extended for a two year period unless either party sent contrary written notice at least six months in advance of September 1, 1957. In February of 1957, when the effectiveness of the April 14, 1955 grant was still suspended, CBS exercised its six months notice rights and sent WJR a new contract which provided affiliation would be effective for a two year period commencing with the date WJR went on the air but that the contract would be null and void if WJR had not commenced operation within six months (i.e., September 1, 1957).* The second CBS contract, which was filed with the Commission on March 25, 1957, well in advance of the closing of the hearing record on April 17, 1957, was never the subject of a request for production at the remand hearing. No issue was ever attempted to be raised, either in the protest hearing or in the further comparative hearing, that CBS would not be available to WJR at Chesaning.

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* WJR was of the opinion that the proposed Chesaning site would be equally attractive to ABC, CBS and NBC (WJR Exhibit 97 at R. 5227; Patt, Tr. 1244-45, 1251 & 1380-81 and Kramer, Tr. 1021 & 1147-48).

On July 25, 1958, Trebit and Butterfield filed a joint petition for rehearing which alleged, inter alia, that a further evidentiary hearing was required "to take evidence of the unavailability to WJR of the Columbia Broadcasting System programs" because (1) it appeared that WJR had been aware for "some time" that CBS would not be available to WJR and that WJR was "remiss" in not advising the Commission of this fact prior to the July 11, 1958 Final Decision and (2) because of the assumed unavailability of CBS, "it is obvious that the programs it proposed in the further hearing and which form the basis of the Commission's Final Decision cannot be carried out as proposed by WJR."** (R. 7291-7300).

In its opposition filed August 1, 1958, which was attested to under oath by the President of WJR (R. 7304-7329), WJR pointed out, inter alia, that CBS had become unavailable and would be replaced with ABC but that this would not affect any comparative area and that regardless of its present or future network affiliation, "WJR's performance will, to the best of its ability, be in substantial compliance with its promises."

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* The universal practice of networks is to provide that affiliation agreements be effective within at least six months (as required by Rule 3.658 (c)) and not to sign affiliation agreements unless a valid permit is outstanding (see quotation from Butterfield 1953 Proposed Conclusions, page 36, infra). In the original hearing, none of the applicants possessed signed affiliation agreements.

** In this connection, appellants also cited the case of Plains Radio Broadcasting Co. v. FCC, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949).

In connection with the charge that WJR had been "remiss" in reporting the unavailability of CBS to the Commission, the WJR opposition advised the Commission as follows: Although the CBS contract became null and void by its terms on September 1, 1957 and in early April of 1958, CBS announced a change in its affiliation with WJIM-TV, Lansing from a secondary to a primary affiliation,* WJR continued to believe that CBS would be available to it when and if its April 14, 1955 grant was reinstated. No change in this belief occurred until July 22, 1958 (following the release of the Decisions of July 11, 1958 and July 16, 1958 affirming the May 14, 1954 and April 14, 1955 grants to WJR) when CBS advised WJR it could not obtain a primary affiliation because of the nature of the CBS affiliation agreement with WJIM-TV, Lansing, which was not temporary or cancellable as WJR had believed. Accordingly, WJR proceeded at once to hold discussions with ABC with the result that WJR expected to become an ABC affiliate and would file a copy of the agreement after it was formally signed.**

On September 10, 1958, the Commission, after considering the above-noted pleadings and the reply filed by Trebit and Butterfield, released its Memorandum Opinion and Order denying the July 25, 1958 joint petition for rehearing because of the insufficiency of the allegations set forth therein (R. 6443-48).

The only grounds advanced by appellants (see Butterfield May 19, 1959 Brief, pages 41-44) that the Commission abused its Section 405 discretion in refusing to order a second further hearing because of the change from CBS to ABC are that an evidentiary hearing was required to inquire into (1) WJR's "good faith" (i.e., whether WJR was "remiss" in not reporting the change from CBS to ABC sooner than it did (R. 7295) and (2) the "true character of the changes which would occur in WJR's program service." Both grounds lack substance and ignore the recent holding of this Court that a further evidentiary hearing is not required where petitioners make "no proffer of evidence to be evoked which would have impaired the validity of the Commission's determination." Southland Television Company v. FCC, __ U.S. App. D.C. __, __ F.2d __ (Case No. 14,487 decided April 16, 1959, at page 5 of Slip Opinion).

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* WJR attempted, about April 15, 1958, without success to learn from CBS the nature of the agreement with WJIM-TV (R. 7316).

** The ABC agreement, which was dated July 31, 1958, was signed by WJR on August 6, 1958 and filed with the Commission on August 21, 1958. The discussions with ABC had not been completed when the July 25, 1958 Petition for Rehearing was filed.

The Commission's September 10, 1958 Decision correctly concluded (Par. 15 at R. 6447) that there was no need for a further hearing concerning WJR's "good faith" as (1) no issue was ever raised during the remand hearing as to the availability of CBS,* (2) WJR remained of the opinion until July 22, 1958 that CBS would be available to it, (3) WJR timely reported the change from CBS to ABC to the Commission in its pleading of August 1, 1958 and by its formal filing of the ABC contract on August 22, 1958 and (4) nothing alleged by Trebit and Butterfield indicates that WJR was, as charged, "remiss" in reporting information to the Commission.

The Commission's September 10, 1958 Decision also correctly concluded (Paragraphs 11-13 at R. 6446-47) that there was no need for a further hearing concerning "the true character of the changes which would occur in WJR's program service" as no allegation was made that the change from CBS to ABC would affect any comparative area in which WJR was preferred and nothing was advanced to indicate WJR could not or would not present the local programming which formed one element of the composite preference awarded to it in the area of programming and facilities. The Commission also noted correctly that the doctrine of the Plains case was not applicable as here, unlike the

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* In fact, each appellant advanced arguments adverse to WJR on the premise that CBS would, in fact, be available. Trebit and Butterfield argued CBS option time would prevent WJR from carrying out its local live proposals and Lake Huron argued the CBS affiliation was the crux of the alleged economic injury.

Plains case, the Commission was advised of the nature of the programming which would be substituted for that furnished by the unavailable network (Paragraph 14 at R. 6447).

It is further noted in connection with the change from CBS to ABC that even if WJR had affiliated with CBS, it is beyond peradventure that it would not, in fact, have been able to carry in 1958 the exact network programs set forth in its 1954 modification application due to the changes which are constantly occurring in all network programs.* Butterfield itself has recognized the impossibility of attempting to compare applicants based on network proposals. In its Proposed Conclusion 2 filed March 30, 1953 (R. 7733), Butterfield stated:**

> "The Commission must also take into account the uncertainties that surround the matter of network affiliations during the present period of rapid growth of television. Moreover, an applicant can do little more than express his considered views with respect to his network affiliation plans. Our rules are such that an applicant cannot affiliate substantially in advance of securing an authorization; and we are aware that as a matter of practice networks will not affiliate with applicants prior to a grant. Absent a binding affiliation, the factors we must consider are so speculative and illusory as to make definite conclusions impossible. For example, consideration of those affiliations which are in existence at the time of hearing is of little value since they are subject to termination by their terms. Additionally, any testimony by an applicant that he will secure a certain affiliation must at all times be subject to alteration by the granting of other applications in the immediate area and the commencement of network affiliations during the very pendency of the proceeding."

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* The numerous NBC programs proposed by Trebit and Butterfield which were no longer offered by NBC in the fall of 1958 are set forth in Exhibit B attached to WJR's pleading filed August 1, 1958 (R. 7325).

** Trebit, recognizing the constant changes in network programs, did not assign program titles with respect to any of its proposed network programs set forth in its application (R. 6544-50) and stated that titles were assigned in its hearing exhibits as "window dressing" (R. 1938).

Accordingly, it would be a useless gesture to hold a still further evidentiary comparative hearing because of a change from one network to another where, as here, there is no prima facie showing that the change in networks will result in any substantial change in the balance of the proposed programs and the Commission, after considering the change, correctly concluded it was of no comparative significance.

It is clear that the Commission acted within its sound Section 405 discretion in refusing to order a still further hearing because of the change from CBS to ABC and that the Commission was correct in holding that this change had no effect on its decision to prefer WJR. Interstate Commerce Commission v. Jersey City, 322 U.S. 503 (1944); United States v. Pierce Auto Freight, 327 U.S. 515 (1946), and Colorado Radio Corp. v. FCC, 73 U.S. App. D.C. 225, 118 F.2d 24 (1941).

VII.

THE PROTEST RECORD SUPPORTS THE JULY 16, 1958 AFFIRMANCE OF THE APRIL 14, 1954 GRANT OF WJR's MODIFICATION APPLICATION.

Following the Commission's grant on April 14, 1955 of WJR's modification application three existing Michigan television stations (WKNX-TV, Saginaw[*]; WTOM-TV, Lansing and WWTV, Cadillac) filed Section 309 (c) protests and Trebit and Butterfield (as denied applicants who had appeals pending from the May 14, 1954 grant) filed a joint Section 405 pleading (J.A. 598-608) asking that the grant be set aside. The Trebit-Butterfield joint petition was dismissed for lack of standing but the 309 (c) "protests" were granted on June 10, 1955 (J A. 608-621).[**] Although the protest record was closed prior to this Court's May 24, 1956 Decision and oral argument was held June 19, 1956, the Commission, over the objection of WJR, did not decide the protest case until

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[*] Owned and operated by Appellant Lake Huron.

[**] Neither Trebit nor Butterfield sought entry into the protest hearing.

July of 1958, after it had reached a final decision in the comparative proceeding following the remand hearings ordered by this Court.

Lake Huron (licensee of WKNX-TV) is the sole protestant to appeal the July 16, 1958 Protest Final Decision (R. 12843-89) which reinstated the April 14, 1955 grant. Lake Huron's Brief, which is also addressed to the comparative proceeding, submits the following reasons in support of its assertion that the modification application should have been denied following the protest proceeding:

1. The "cut-off" rules and the Ashbacker doctrine.
2. The time at which WJR filed its modification application (i.e., WJR's alleged concealment of changes.")
3. The alleged impact of the WJR modified proposal on WKNX-TV, Saginaw's sole television station.

The first two of the above-noted arguments and that part of the third argument which asserts that the alleged impact of WKNX-TV was a relevant issue in the remand proceeding are invalid for the reasons set forth in Parts II, III and IV of the instant Brief. The remaining portions of the third argument (which are directed against the protest proceeding) are invalid for the reasons set forth below.

The only thing which Lake Huron attempted to prove with respect to economic injury at the protest proceeding was the allegation that if WJR operated at the Chesaning site as a CBS affiliate, WKNX-TV would be forced to "close down." However, the Commission concluded on the basis of the evidence before it that Lake Huron had failed to establish that it could not "effectively compete with the proposed WJR operation" (Conclusion 9 at R. 12,884).

In its Brief, Lake Huron admits that WKNX-TV has not been forced to suspend operation even though WJR has operated at Chesaning (as an ABC affiliate) since October 12, 1958 (Brief, page 42, footnote 2).

However, Lake Huron goes on to assert that it was erroneous for the Commission to fail to conclude that WJR operating from Chesaning (as a CBS affiliate) would have forced WKNX-TV to close down.* The only evidence relied upon by Lake Huron in support of this assertion consists of opinion testimony by its President (Mr. Edwards) and an economic consultant (Mr. Mowrey) that if WJR operated as a CBS affiliate from Chesaning, WKNX-TV would be forced to shut down even though it would not lose its CBS affiliation because, in their opinion, CBS advertisers would purchase time over WJR but not over WKNX-TV (R. 10,239, 10,134 and 10,273-74). One official of CBS testified that under such circumstances, it was his opinion that WKNX-TV "would lose a certain proportion of the accounts they were carrying on CBS now" and that a CBS advertiser would not buy both WJR and WKNX-TV (R. 10,829). However, another CBS official stated that in his opinion "it is not impossible" that an advertiser would buy both stations (R. 10,837).

It is obvious that the Commission was correct in concluding that the evidence relied upon by Lake Huron is too speculative and too insufficient to carry the protestant's "heavy burden" of proof to establish that the proposed WJR operation would, in fact, deprive Saginaw of its only television station. Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958). Moreover, the evidence offered by Lake Huron contained no showing whatsoever as to the ability of WKNX-TV to replace any CBS commercial programs that may have been lost because of WJR with commercial programs furnished by ABC, NBC or non-network sources. In short, as the Commission concluded, there is no record evidence to establish, and Lake Huron refers to none, that WJR's operation at Chesaning (whether as a CBS affiliate, NBC affiliate, ABC affiliate or an independent operation) would in fact force WKNX-TV off the air.*

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* Lake Huron did not allege or attempt to prove at the protest hearing that WKNX-TV would be injured if WJR operated from Chesaning as a non-CBS affiliate. Lake Huron's President did testify on cross-examination that if WJR operated at Chesaning as an NBC affiliate and WKNX-TV maintained its CBS affiliation (i.e., did not lose it to WNEM-TV, Bay City), he "had every reason to believe that we could continue our operation." (R. 10,253). As shown above, Lake Huron's Brief admits that operation of WJR as an ABC affiliate has not driven WKNX-TV off the air.

The only other argument advanced by Lake Huron regarding the protest decision is the assertion that it was allegedly erroneous to fail to recognize "that by denying WJR's request to shift to Chesaning as a CBS affiliate, both Flint and Saginaw would be assured television stations of their own" (Brief, page 8).** This argument is directed to that portion of the Commission's Decision which stated that even if it were assumed, contrary to the record, that the grant of WJR's modification application would in fact drive WKNX-TV off the air, it would still be in the public interest to grant WJR's modification application (Conclusions 9 and 13-16 at R. 12,884 & 12,885-87). The mere reading of the Commission's arguendo conclusions demonstrates their validity. In addition, the Lake Huron argument as to the invalidity of these conclusions need not be considered in view of the fact that the argument is premised on a fact contrary to the record — namely, that it had been proved that WKNX-TV would be forced off the air by the operation of WJR in Chesaning. As this Court stated in the Carroll case, "If the protestant fails to bear the burden of proving his point (and it is certainly a heavy burden), there may be an end to the matter."

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* It is noted in addition to the above that although the essence of Lake Huron's protest was an allegation that it would be driven off the air if the WJR modification grant were reinstated, Lake Huron's Brief (page 42, footnote 2) shows that this has not happened even though the grant to WJR was reinstated and WJR has been operating at Chesaning since October 12, 1958. Moreover, since the filing of its appeal, Lake Huron has filed applications for a new AM station at Houston, Texas (BP-13, 097 filed May 15, 1959) and for a new television station at Alpena, Michigan (BPCT-2661 filed July 8, 1959), stating under oath in the latter application that its existing Saginaw stations (WKNX and WKNX-TV) were being operated "at a substantial profit" (Exhibit 4).

** See Part IV of this Brief re the Lake Huron argument that an "economic injury" issue should have been included within the remand comparative hearing issues.

Accordingly, Lake Huron, which is the sole appellant to appeal the protest Final Decision of July 16, 1958, has failed to demonstrate any error whatsoever. It is clear that the Decision is supported by the record and must be affirmed.

VIII.

THE COMMISSION CORRECTLY RETURNED, AS NOT ACCEPTABLE FOR FILING UNDER ITS RULES, THE APPLICATION FOR CHANNEL 12 TENDERED FOR FILING ON OCTOBER 29, 1956 BY LAKE HURON.

By an Order adopted November 11, 1952, the Commission designated for a consolidated hearing the mutually-exclusive construction permit applications which had been filed for Channel 12 in Flint, Michigan by WJR, Trebit and Butterfield. Under the provisions of the then applicable cut-off rule (1.387 (b) (3)), no additional mutually-exlusive application was entitled to comparative consideration unless it was filed at least 20 days prior to the date set for hearing.* The date set for hearing was November 17, 1952 (R. 606). Accordingly, any application had to be filed on or before Friday, October 28, 1952 to be afforded comparative consideration.

In July of 1952, Lake Huron, which was aware of the pending applications for Channel 12 at Flint and which could have filed for Channel 12 at Flint, chose instead to file a construction permit application for Channel 57 at Saginaw (R. 10,171). The Lake Huron application was granted without a hearing in October of 1952 and WKNX-TV commenced a regular commercial operation on May 4, 1953 (R. 10,189 & 10,198). WKNX-TV made no attempt to intervene in the original hearing regarding the Flint Channel 12 proceeding even though the application of Trebit specified a site which was located 4.4 miles north of the nearest Flint boundary (in the direction of Saginaw) which would provide Saginaw with a City Grade signal (Findings 13 and 14 of May 14, 1954 Final Decision at J.A. 407, and Protest Exhibit 111 at R. 11,408).

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* The rule was amended between 1953 and 1955 so as to change the 20 day period first to 30 days and then to 60 days (18 F.R. 938, 19 F.R. 4443). In 1956, Rule 1.387 (b) (3) was amended so as to incorporate Rule 1.724 (b) which then provided a cut-off date of ten days prior to public notice of designation (20 F.R. 10161). The rules have since been further amended and renumbered.

Following the remand of the comparative proceeding by this Court on May 24, 1956 and following the Commission's release on October 19, 1956 of an Order calling for the further hearing ordered by the Court, Lake Huron on October 29, 1956 tendered for filing with the Commission an application to modify WKNX-TV's license so as to specify operation on Channel 12 in lieu of Channel 57 at a site relatively close to the Chesaning site proposed by WJR. The application also sought authority to change WKNX-TV's principal city from Saginaw to Flint.*

In its letter of transmittal accompanying its Flint Channel 12 application, Lake Huron argued that in spite of the fact that its application was filed more than four years too late under the cut-off rule, it was entitled to comparative consideration with Trebit and Butterfield as well as with WJR in view of the changes which had occurred respecting all three parties (R. 4761-64).** By action announced September 8, 1958, the Commission returned the application as not acceptable for filing under its rules (Lake Huron Brief, page A-4).

Lake Huron, in appealing this action, asserts that its Channel 12 application was entitled to comparative consideration on the premise that WJR's December 16, 1954 modification application amounted to a new application and

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* At the same time, Lake Huron was contending in the protest proceeding that operation of the Channel 12 station at Flint would deprive Saginaw of its sole television station and had pending before the Commission a rule making proposal designed to remove from Flint the very channel which its October 29, 1956 application requested.

** WJR, Trebit and Butterfield, filed letters on November 7, 1956, urging that the Lake Huron application be returned as not acceptable for filing under the cut-off rule.

> "if WJR was to be accorded comparative consideration on its new proposal, similar treatment should have been accorded Lake Huron's application * * *. To reject Lake Huron's application for Channel 12, without according it a hearing thereon * * *, is totally inconsistent with * * * [the Commission's] action allowing WJR to be heard on a new Channel 12 proposal long after Trebit and Butterfield obtained cut-off protection under then prevailing rules of the Commission." (Lake Huron Brief, pages 18 and 19).

Thus, in essence, Lake Huron is repeating the arguments of Trebit and Butterfield that the WJR modification application was an "amendment," was subject to the cut-off rules and violated the Ashbacker doctrine. The fallaciousness of these arguments is shown in Parts II and III of the instant Brief. The fact is that WJR's modification application was not barred by the cut-off rule (which was not applicable to it as the permittee of Flint Channel 12) whereas Lake Huron's Flint Channel 12 application was barred by the cut-off rule as it was not tendered for filing until October 29, 1956, four years after the cut-off date of October 28, 1952. Accordingly, the Commission's action of returning the Lake Huron application as not acceptable for filing under its rules was required by the rules and did not constitute error. In addition, the remand of the comparative proceeding by this Court's Decision of May 24, 1956, when read in conjunction with Section 402 (h) of the Act, prohibited the addition of new applicants to the Flint Channel 12 comparative proceeding.

IX

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the appellee's Brief, all of the instant appeals should be denied on the merits.

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August 6, 1959

SUPPLEMENT A

STATUTES AND RULES INVOLVED

I. Communications Act of 1934, 47 U.S.C. # 151, et seq.

Section 309(c) (as of June 10, 1955):

> "When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. * * * The hearing and determination of cases arising under this subsection shall *be expedited* by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made *shall be* postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing." (Emphasis added)

Section 402(c):

> "Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal."

Section 405:

> "After a decision, order or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. * * *"

II. Rules and Regulations of the Federal Communications Commission, Volume 1, Pike & Fischer R.R. § 51, et seq.

Rule 1.387(b) (3) (as of Nov. 11, 1952 to February 4, 1953):

> "(3) * * * Any application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the application in question is filed at least 20 days before the date on which the hearing on the prior application or applications is scheduled. * * *"

Rule 1.724(b) (as of January 1, 1956 to December 10, 1957):

> "* * * in broadcast matters a mutually exclusive application will be consolidated for hearing with such other application or applications only if the latter application has been filed not later than ten days after public notice has been given by the Commission of its order designating a prior application or applications for hearing. If the later application is filed after said ten days it will be dismissed * * *."

Rule 3.613(b):

> "(b) * * * The licensee or permittee of a television broadcast station shall not move his main studio outside the principal community in which it is located without first securing a modification of construction permit or license. Such licensee or permittee shall notify the Commission promptly of any change of the location of the main studio within the community. In any case where the main studio is located outside the principal community to be served, the licensee or permittee of a television broadcast station shall not move his main studio without first securing a modification of construction permit or license."

Rule 3.658(c):

"(c) Term of affiliation. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original terms, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than 2 years: provided, that a contract, arrangement, or understanding for a period up to 2 years may be entered into within 6 months prior to the commencement of such period."

Rule 3.685(a):

"Transmitter location and antenna system. - (a) The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum field intensity in decibels above one microvolt per meter (dbu) will be provided over the entire principal community to be served:

Channels 2-6	Channels 7-13	Channels 14-83
74 dbu	77 dbu	80 dbu"

Rule 3.685(b):

"(b) Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the intensity of the station's signals. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available. To provide the best degree of service to an area, it is usually preferable to use a high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path. The antenna must be constructed so that it is as clear as possible of surrounding buildings or objects that would cause shadow problems. It is recognized that topography, shape of the desired service area, and population distribution may make the choice of a transmitter location difficult. In such cases, consideration may be given to the use of a directional antenna system, although it is generally preferable to choose a site where a nondirectional antenna may be employed."

ANSWER OF WJR, THE GOODWILL STATION, INC.

TO PETITIONS FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
NOV 24 1959
Joseph W. Stewart
CLERK

Nos. 12527, 12752 and 14685

W. S. BUTTERFIELD THEATRES, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

Nos. 12528, 12753 and 14691

TREBIT CORPORATION, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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November 24, 1959

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

Nos. 12527, 12752 and 14685

W. S. BUTTERFIELD THEATRES, INC.,	Appellant,
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WJR, THE GOODWILL STATION, INC.,	Intervenor.

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APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

ANSWER OF WJR, THE GOODWILL STATION, INC.

WJR, The Goodwill Station, Inc. (WJR), intervenor herein, hereby submits its answer to the Petitions for Rehearing En Banc filed herein on November 20, 1959 by Appellants W. S. Butterfield Theatres, Inc. (Butterfield) and Trebit Corporation (Trebit).

The petitions for rehearing are directed against a Per Curiam decision of November 5, 1959 which affirmed the following orders of the Federal Communications Commission:

A. May 12, 1954 decision, following a comparative hearing, granting WJR's application for a new television station to operate on Channel 12 at Flint, Michigan and denying the mutually-exclusive applications of Trebit and Butterfield for the same facilities (Appeals 12527 and 12528).

B. April 14, 1955 non-hearing grant[*] of an application filed December 16, 1954 by WJR seeking authority to modify its May 12, 1954 construction permit (Appeals 12752 and 12753).

C. July 11, 1958 affirmance, following a further evidentiary hearing held pursuant to this Court's decision of May 24, 1956, of the May 12, 1954 grant to WJR in preference to Trebit and Butterfield (Appeals 14685 and 14691).

The Butterfield petition for rehearing is nothing more than a fifteen page summary of the arguments previously presented by Butterfield to this Court in briefs, motions and oral arguments held in connection with Appeals 12527, 12752 and 14685. No purpose would be served in again pointing out the fallaciousness of the Butterfield arguments.[**] All of the arguments have been (1) answered in the briefs and pleadings filed herein by WJR and the Commission and (2) considered and rejected unanimously on November 5, 1959 by the panel of Judges Bazelon, Danaher and Bastian, the same panel which on May 24, 1956, by a vote of two to one, ordered a further hearing in this proceeding.

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[*] This grant was the subject of a Section 309(c) "protest" hearing in which neither Trebit nor Butterfield sought entry. Following a protest hearing, the grant was reinstated on July 16, 1958 (R. 12843-89 and 12918-19). In a companion Per Curiam decision of November 5, 1959, this action of the Commission was affirmed. The protestant-appellant (Lake Huron Broadcasting Corporation) has not filed a petition for rehearing.

[**] It is believed pertinent to note that the Butterfield arguments concerning the Ashbacker case conveniently ignore the fact that this Court's decision of May 24, 1956, which ordered a further hearing, afforded complete Ashbacker protection to both appellants.

The same observations apply with equal force to Trebit's petition for rehearing which is based on the unfounded charges that the Court "overlooked" certain alleged "admissions" and was "confused" to the point that it made erroneous assumptions concerning the Commission's decision adopted July 11, 1958 insofar as it dealt with Appeals 14685 and 14691 (Page 4 of Trebit's petition).

In attempting to support its erroneous charge that the Court, in passing on Appeals 14685 and 14691, "overlooked" alleged "admissions" by the Commission, Trebit quotes portions of the Commission's August 6, 1959 Brief completely out of context (Pages 2 and 3). Appeals 14685 and 14691 raised the question of whether the Commission had complied with the requirements of the further hearing ordered by this Court in its May 24, 1956 decision. The portions of the Commission's brief quoted by Trebit relate not to this question but to the questions raised in (1) Appeals 12527 and 12528 (the validity of the May 12, 1954 grant based on the original hearing record) and (2) Appeals 12752 and 12753 (the validity of the April 14, 1955 grant). A reading of the relevant portions of the Commission's Brief* and the Commission's July 11, 1958 decision** makes it clear that the Commission did not make the "admissions" alleged by Trebit but instead demonstrated full compliance with this Court's decision of May 24, 1956. Accordingly, there were no "admissions" for the Court to "overlook" and there is no support for the Trebit charge that the panel which ordered the further hearing "overlooked", in its November 5, 1959 review of the further hearing held, alleged "admissions" by the Commission.

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* Pages 6-14, 25-33 and 41-46.

** R. 6367-6411, especially Findings 7-10 and Conclusions 1 and 25-28.

The Trebit charge that the Court was "confused" by the Commission's July 11, 1958 decision and therefore erroneously affirmed the Commission in Appeals 14685 and 14691 is refuted by a mere reading of the Commission's July 11, 1958 decision and the following holdings of this Court's November 5, 1959 Per Curiam decision (Slip Opinion, page 5):

> "We think that the hearing held by the Commission on remand properly complied with this court's order, which directed the Commission to conduct further hearings on the differences between WJR's original and its modified proposal, and to reconsider its grant to WJR in the light of the differences thus disclosed."
>
> "The Commission, reviewed at length, as was its obligation under the remand, the question of the differences between WJR's original and modified proposals, and reconsidered its grant to WJR in the light of the differences thus disclosed. * * *"
>
> * * * * *
>
> "We think that full and comparative hearings have now been afforded the respective parties. We find no basis for disturbing the Commission's decision. Accordingly, the orders in Nos. 12527, 12528, 12752, 12753, 14685 and 14691 must be affirmed."

WHEREFORE, it is respectfully submitted that the petitions for rehearing filed herein on November 20, 1959 by W. S. Butterfield Theatres, Inc. and Trebit Corporation should be speedily and summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of November, 1959, sent by regular United States mail, postage prepaid, copies of the foregoing "Answer of WJR, The Goodwill Station, Inc." to the following:

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United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 20 1959
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PETITION FOR REHEARING EN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

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Appellee,
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APPEALS FROM DECISIONS AND ORDERS OF THE
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November 20, 1959

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

IN THE UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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W. S. BUTTERFIELD THEATRES, INC.,
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FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR REHEARING EN BANC

Trebit Corporation (Trebit) hereby petitions the Court to rehear and reconsider en banc its per curiam opinion and judgment of November 5, 1959. The Court's disposition of Trebit's appeal disposes sub silentio of important questions raised in good faith by Trebit. One of these questions is of such importance in the administration of the Communications Act that Trebit believes it appropriate to request reconsideration of the matter before the Court en banc.

STATEMENT OF FACTS

On May 12, 1954 the Commission granted an application of WJR, The Goodwill Station, Inc. (WJR) and denied competing applications of Trebit and W. S. Butterfield Theatres, Inc. (Butterfield) for construction permit for a television station for Flint, Michigan. Petitions for rehearing of the Commission's May 12, 1954 grant to WJR were filed by Trebit and Butterfield and denied by the Commission. After the denial of these petitions for rehearing, Butterfield and Trebit filed a joint petition for rehearing of the May 12, 1954 decision based upon newly discovered evidence that the proposal on which WJR had been preferred in the May 12 decision would not be carried out. This petition was denied by the Commission without hearing. Appeals were taken to this Court from the foregoing actions. This Court in W. S. Butterfield Theatres, Inc. v. FCC, 99 U. S. App. D. C. 71; 237 F. 2d 552 (1956), reversed the Commission in the appeal taken from the denial of the petition for rehearing based upon newly discovered evidence and directed the Commission to reopen the record and hold a further hearing on the newly discovered evidence.[1]

The Court erred in holding in its November 5, 1959 per curiam opinion that the Commission had reconsidered its grant of May 12, 1954 to WJR in the light of the new evidence. The Commission conceded that its May 12, 1954 decision had not been reconsidered in the light of the further hearings held on remand. It admitted that such evidence was considered only as bearing upon its April 14, 1955 order granting a substitute WJR proposal, an order which was not involved in the appeal decided by this Court in its 1956 decision.

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[1] This Court by the same decision dismissed without prejudice appeals taken from the May 12, 1954 decision and from an April 14, 1955 order of the Commission granting WJR a modification of its construction permit.

The Commission's brief in this Court (page 37) states:

> "The question before this Court, both at the time appellant prosecuted its appeal and now, was whether the Commission's [May 12, 1954] decision, based upon the record available to the Commission at the time the decision was made, was reasonable."

On page 30, it states:

> "The Commission recognizes that the validity of its [May 12, 1954] grant must be judged on the quality of WJR's application at the time of its grant, as the facts then available to the Commission weighed on WJR's merits."

On page 34 it states:

> "The Commission did not attempt, in passing on this modification application [granted by its April 14, 1955 order], to strengthen, weaken or affect the validity of its action in making the basic grant. Pursuant to its regulatory powers over this permittee, it acted to determine whether post-grant modifications were in the public interest, while the [May 12, 1954] grant remained fully subject to judicial review based upon the conditions existing at the time of the grant."

To Trebit's contention that this Court's 1956 decision ordered the Commission to reconsider its May 12, 1954 grant to WJR in the light of the facts disclosed by the hearings on remand, it replies, on page 37 of its brief:

> "In urging its attack upon the grant to WJR, appellant Trebit assumes an 'I told you so' posture, arguing that its contentions that the WJR proposals were 'unworkable' have been proven by later events. However, its attempt thus to convince the Court that 'hindsight is better than foresight' needs no rebuttal. It is readily apparent that if hindsight were the criterion of 'reasonableness' then the action of any

> agency could not be expected to be either expeditious or forthright. However, the scope of judicial review as to the reasonableness of agency decisions is confined generally to the record before the agency at the time it acted."

QUESTION PRESENTED

The question presented is whether the Commission is free, after being directed by this Court to hold a hearing on a petition for reconsideration based on newly discovered evidence, to refuse to consider whether its decision to which the petition is addressed is in any wise affected by the newly discovered evidence.

The "grant to WJR" to which our 1954 joint petition for rehearing was addressed was the grant of May 12, 1954. This Court's 1956 decision held that the Commission had illegally denied that petition and remanded the case for reconsideration of the grant in the light of evidence adduced on further hearing, and could, therefore, have application only to the May 12, 1954 grant. The April 15, 1955 order granting WJR a modification of construction permit was not even in existence at the time our appeal was taken from the Commission's denial of the joint petition for rehearing. It is unthinkable that one who is held entitled to a hearing on a petition for reconsideration based on newly discovered evidence is not entitled to have the decision complained of reconsidered in the light of the new evidence. We are constrained to the view that the Court overlooked the forthright admissions in the Commission's brief, and, being pardonably confused by the Commission's diffuse and wordy decision, assumed that the Commission had somewhere in the process reconsidered its May 12, 1954 decision rather than its April 15, 1955 order.

CONCLUSION

It is respectfully submitted that the error is plain and its consequences grave.

WHEREFORE, Trebit respectfully prays:

1. That this Honorable Court reconsider its action of November 5, 1959; or

2. That a rehearing before the full Court, sitting *en banc*, be ordered; and

3. That the Court grant such other and further relief as it deems just and equitable.

Respectfully submitted,

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November 20, 1959

CERTIFICATION

I hereby certify that the foregoing Petition for Rehearing *En Banc* is filed in good faith and not for the purpose of delay.

WILLIAM J. DEMPSEY
Attorney for Appellant,
Trebit Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for a rehearing en banc in the above captioned appeal was served this 20th day of November, 1959 on the following counsel of record:

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ANSWER OF THE APPELLEE TO THE PETITIONS FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527; 12,752 and 14,685

W. S. BUTTERFIELD THEATRES, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WJR, THE GOODWILL STATION,
Intervenor

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 30 1959
Joseph W. Stewart
CLERK

Nos. 12,528, 12753 and 14,691

TREBIT CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION,
Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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November 30, 1959

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527, 12,752 and 14,685

W. S. BUTTERFIELD THEATRES, INC.,
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FEDERAL COMMUNICATIONS COMMISSION,
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FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

ANSWER OF THE APPELLEE TO THE PETITIONS FOR REHEARING EN BANC

The Federal Communications Commission, appellee, opposes the petitions of W. S.Butterfield Theatres, Inc. (Butterfield) and Trebit Corporation (Trebit) for _en banc_ rehearing of the Court's November 5, 1959 decision herein. In support thereof it submits the following:

The Butterfield petition merely renews contentions "thoroughly briefed and argued" (Butterfield Pet., p.2) to the Court and correctly rejected for the reasons stated in the decision of November 5, 1959 and in the brief of the Commission. Contrary to the contention of

Trebit, moreover, the Court's holding that the "hearing held by the Commission on remand properly complied with this court's order" of May 24, 1956 (Sl. Op.,p.5), is not vitiated by alleged "admissions" in the Commission's brief. Whatever inferences may be drawn from the isolated fragments quoted by Trebit, a reading of the entire brief makes clear the two-fold position of Commission counsel that the Commission's decision of May 14, 1954 was reasonable on the basis of the record then before it and that the grant to WJR remains proper in the light of the additional evidence adduced in the hearing on remand (see Commission's brief, pp. 37-46). Furthermore, even assuming arguendo that Trebit were correct as to the arguments of counsel, this would not suffice to make improper either the action of the Commission itself or the Court's affirmance of that action. The plain fact is, as demonstrated by the Commission's decision on remand (R. 6041-6367) and as found by the Court (Sl. Op.,p.5):

> The Commission reviewed at length, as was its obligation under the remand, the question of the differences between WJR's original and modified proposals, and reconsidered its grant to WJR in the light of the differences thus disclosed.

Accordingly, the petitions for rehearing _en_ _banc_ should be denied.

Respectfully submitted,

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Counsel

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November 30, 1959

Federal Communications Commission

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 20 1959

Joseph W. Stewart
CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12527, 12752 and 14685

W. S. BUTTERFIELD THEATRES, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

Nos. 12528, 12753 and 14691

TREBIT CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATION COMMISSION, *Appellee,*
WJR, THE GOODWILL STATION, INC., *Intervenor.*

PETITION OF W. S. BUTTERFIELD THEATRES, INC. FOR REHEARING EN BANC

W. S. Butterfield Theatres, Inc. (Butterfield) hereby petitions the Court to rehear and reconsider en banc its per curiam opinion and judgment of November 5, 1959. This action by the Court (Bazelon, Danaher and Bastian, Circuit Judges) affirmed a decision and order of the Federal Communications Commission dated July 9, 1958, which in turn involved the validity of two of the Commission's previous decisions and orders dated May 12, 1954 and April 14, 1955.

In its per curiam action of November 5 the Court failed to consider and deal with questions addressed to three distinct phases of the Commission's action, which were vital to Butterfield's case and which had been thoroughly briefed and argued. Moreover, certain questions which the Court treated appear to have been dealt with in a manner contrary to the law as established by other decisions of this Court, as well as being violative of the fundamental rule of the *Ashbacker* case.[1] Both the terms and purpose of Rule 26(a) of this Court require a critical examination of this November 5 action.

STATEMENT OF FACTS

After a comparative hearing on the mutually exclusive applications of Butterfield, Trebit Corporation (Trebit), and WJR, The Goodwill Station, Inc. (WJR), the Commission, on May 12, 1954, granted the application of WJR and denied those of Butterfield and Trebit. (J.A. 400-91.)[2] On December 2, 1954, the Commission affirmed this action by denying petitions for rehearing by Butterfield and Trebit. (J.A. 491-503.) The validity of this action is challenged by Butterfield in Case No. 12527.

On December 16, 1954—only fourteen days after the reaffirmance of the May 12 grant to it—WJR filed a new application with the Commission requesting substantial changes in the authority conferred. Among other things it sought: (1) to change the network proposed from DuMont to CBS—resulting in a radical alteration of its original program proposals (see J.A. 436-37); (2) to move its transmitter some 44 miles—from a location southeast of Flint to one northwest of the city (see J.A. 525, 533-35); and (3) to substitute a $125,000 secondhand studio building for the elaborate new $750,000 structure relied upon at the hearing. (See J.A. 251-55, 409-10, 526-31.) A joint petition by Butterfield and Trebit requesting reopening of the record and rehearing because of these changes was denied by the Commission on March 31, 1955. (J. A. 540-48.) The validity of this action was challenged by Butterfield in Case No. 12666.

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[1] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[2] The relevant portions of the record cited herein as "J.A." are contained in the original joint appendix, printed when Cases No. 12527, 12666 and 12752 were previously before this Court. The references to the Supplemental Joint Appendix accompanying the present appeals are cited "Supp. J.A."

On April 14, 1955, the Commission granted the second or December 16, 1954 application of WJR, thus authorizing WJR to radically change the proposals which had served as the basis for the Commission's original grant. This action was taken without notice or hearing, notwithstanding the fact that Case No. 12527 involving the validity of the Commission's original grant to WJR was then pending in this Court, and notwithstanding the fact that both sections 1.365(a) and 1.387(b)(3) of the Commission's Rules and Regulations[3] precluded such action. The validity of this action is challenged by Butterfield in Case No. 12752.

After briefing and argument in Cases No. 12527, 12666, and 12752, the Court rendered its decision on May 24, 1956.[4] The Court reversed in Case No. 12666 for the Commission's refusal to reopen the record in view of the radically changed proposals contained in WJR's second application. It did not reach the questions in Cases No. 12527 and 12752; they were dismissed without prejudice.

In its opinion, the Court rejected the Commission's assertion that Butterfield and Trebit had lost their status as applicants by virtue of the original grant to WJR. It declared that the new proposal "goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants and 'the proceedings lose their comparative character.' "[5] The Court declined to rescind the Commission's April 14, 1955 grant of WJR's second application but stated:

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[3] These rules have since been redesignated sections 1.311 and 1.106(b)(1) of the Commission's rules, 47 C.F.R. §§ 1.311, 1.106(b)(1), 22 Fed. Reg. 10996, 10988 (1957). They are quoted in the supplement to appellant Butterfield's brief.

[4] W. S. Butterfield Theatres, Inc. v. FCC, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956).

> "Appellants' rights are completely protected by our disposition of the two appeals relating to reopening of the record. The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed."[6]

By order of October 17, 1956, the Commission fixed issues to be dealt with at the hearings on remand which appeared to Butterfield and Trebit to be inadequate. (Supp. J.A. 654-55.) Repeated efforts to secure enlargement or clarification of these issues were unsuccessful. The Commission refused to vacate its April 14, 1955 *ex parte* grant of WJR's second application despite the fact that the Court's reversal reinstated the comparative proceeding at a point prior to the later grant. It also refused to consider the applicability of sections 1.365(a) and 1.387(b)(3) of its rules to WJR's second application. (Supp. J.A. 974-75.) To the contrary, it stated that "WJR was, at that time, more than a mere applicant and was not to be treated under the Rules relating to applications * * *." (Supp. J.A. 974.)

Hearings on the prescribed issues were followed by an examiner's supplemental initial decision on September 12, 1957. (Supp. J.A. 807-22.) It recommended that the April 14, 1955 grant of WJR's second application be affirmed. After exceptions and argument the Commission, on July 9, 1958, adopted its decision directing that the Commission's May 12, 1954 grant of WJR's original application, as modified by its second application and by the Commission's action of April 14, 1955, be affirmed. (Supp. J.A. 823-82.)

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[5] 99 U.S. App. D.C. at 75, 237 F.2d at 556.

[6] 99 U.S. App. D.C. at 79, 237 F.2d at 560.

As feared, neither the examiner's initial decision, nor the Commission's decision which followed, made comparative findings or determinations concerning the evidentiary showings made by Butterfield and Trebit vis-a-vis either the original or the modified proposals of WJR. Rather, the findings amounted to no more than an attempted demonstration that WJR, in abandoning its original proposal and advancing a new one under the circumstances disclosed, had not defeated the preferences given it in the Commission's original decision. The examiner stated that his supplemental decision "does not start from scratch, but with the Commission's particular findings and conclusions on matters not subsumed in the categories specifically mentioned by the Court accepted as the 'law of the case * * *'." (Supp. J.A. 811-12.) The Commission's decision disclosed similar reasoning. The case was described by it as not being a "comparative proceeding *ab initio*" but one to receive evidence concerning the matters dealt with in the joint petition relating to the filing of the second WJR application. (Supp. J.A. 865.)

Petitions for rehearing addressed to the Commission's July 9, 1958 decision were denied on September 8. (Supp. J.A. 891-98.) The validity of this action is challenged by Butterfield in Case No. 14685. On motion this Court reinstated Cases No. 12527 and 12752 and consolidated them with Case No. 14685 for briefing and argument here, together with Cases No. 12528, 12753 and 14691, the latter being companion appeals of Trebit from the same actions challenged by Butterfield.

QUESTIONS PRESENTED

Pursuant to Rule 17(c)(1) of this Court, the following statement of questions presented for decision appears in Butterfield's brief:[7]

1. Whether, under the circumstances of this case, WJR could validly file and the Commission could, by *ex parte* action, validly grant WJR's December 16, 1954 application.

2. Whether either the Commission's decision and order of May 12, 1954, or its April 14, 1955 *ex parte* grant of WJR's December 16, 1954 application could confer rights upon, or change the status of, WJR to the detriment of appellants as mutually exclusive applicants for the same facilities.

3. Whether the Commission's decision and order of July 9, 1958, was the result of a comparative hearing as required by law.

4. Whether the proceedings had and the action subsequently taken by the Commission complied with the mandate of this Court issued pursuant to its May 24, 1956 opinion.

THE FIRST QUESTION PRESENTED

Except for noting that Butterfield and Trebit requested the inclusion of issues relating to sections 1.365(a) and 1.387(b)(3) of the Rules of the Commission,[8] no attention was given this subject by the Court. These rules were brought to the attention not only of the Commission both before and after remand, but of the Court in Case No. 12666, and in Case No. 14685. The meaning and application of these rules are vital not only to WJR's standing as an applicant, but to Butterfield's and Trebit's position as competitors in the proceeding involving mutually exclusive claims for the same facility.

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[7] Question 5 as stated in Butterfield's brief amounts to a corollary of Question 3 and is not here repeated.

[8] W. S. Butterfield Theatres, Inc. v. FCC, U.S. Ct. of App. for D.C. Cir., Cases No. 12527, *et al.*, Slip Op. p. 5 (November 5, 1959).

The background of these rules and their use and construction by the Commission throughout the years are dealt with fully in Butterfield's brief on appeal.[9] We stated there, and we again repeat, that exhaustive research has failed to establish any case, other than the present, in which the Commission has permitted or condoned the type of action taken by WJR in the filing of its second application when either of these rules was asserted as a bar to such action. The first of these rules prevented the filing of WJR's second, or December 16, 1954, application as an amendment to its original proposal because, as such, it was not timely. The second prevented its filing as an original application, because it was mutually exclusive with other applications for the same facilities which had been dealt with in the hearing antedating the Commission's May 12, 1954 decision. It is submitted that no clearer case for the application of these rules to a comparative proceeding can be imagined.

We are at a loss to understand why the Commission refused to apply these rules in this case when directed to by their clear purpose and meaning. It seeks to avoid such application by declaring that WJR, after the May 12, 1954 grant, was a "permittee," *i.e.*, the holder of an outstanding construction permit, as distinguished from an applicant. But the Court's action to which this petition is addressed does not even make such a statement. Notwithstanding the fact that a recent decision of this Court (Edgerton, Fahy and Bastian, Circuit Judges) in the *Sangamon Valley* case (decided May 8, 1959) specifically declared that "agency action that substantially and prejudicially violates the agency's rules cannot stand,"[10] no attention was given to this question here.

We do not believe that it is the intention of this Court to establish a procedure governing cases remanded by it by which lower tribunals are at liberty to select a posture suited to their particular convenience. This is particularly applicable where overriding *Ashbacker* considerations make such a practice even more offensive as in cases of this type. We cannot believe that the mere lapse of time erases an error such as the Commission's failure to apply its admittedly valid procedural rules to this case. Nor can we believe that such error is cured, or the Court excused from declaring it to be error, merely because the party who profited from it has been permitted to construct and place in operation the station applied for. WJR's claim to the facility here in question had its genesis in an unlawful act and it should be so declared.

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[9] Pp. 22-26.

[10] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959).

But there are additional reasons why WJR could not validly file and the Commission, by *ex parte* action, could not validly grant WJR's December 16, 1954 application. Such actions are clearly violative of the letter, as well as the spirit, of the *Ashbacker* case and are offensive to the proper relationship of administrative and judicial functions in cases such as this.

No extended comment need be made concerning the application of the *Ashbacker* rule to this case. Here, as in that case, mutually exclusive applications are involved; here, as in that case, no evidence had been taken on the application of WJR which ultimately was granted; and here, as there, the grant of one application without action on others imposed a burden on the non-grantees which the law does not sanction.

Moreover, the division of authority and responsibility between the Commission and this Court in such cases as this is manifestly clear. When WJR's second application was granted on April 14, 1955, Case No. 12527 challenging the Commission's grant of WJR's original application was then pending in this Court, having been filed on January 5, 1955. Under the provisions of section 402(c) of the Communications Act,[11] jurisdiction in this contest for the use of channel 12 in Flint was then vested in this Court pending final determination of such appeal. The Commission was not at liberty to act as if this fact had not occurred.

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[11] Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 66 STAT. 718, 47 U.S.C. § 402(c).

In the second *McClatchy* case,[12] this Court (Miller, Fahy and Bastian, Circuit Judges) dealt with a similar—but much less aggravated—situation. It was there pointed out that if, while an appeal is pending from a grant, the Commission desires without hearing to modify that grant so drastically as to make it a different permit from that which was then before the Court, it should notify the Court of such action so that such appeal could be dealt with as moot. While the Court did not in terms refer to those provisions of section 402(c) of the Act which place jurisdiction exclusively in this Court in such cases, it is clear that this language does have that effect. It is difficult to imagine more legally irregular action than the Commission's *ex parte* grant of WJR's second application.

THE SECOND QUESTION PRESENTED

There are at least two reasons why the answer to the second question must be negative and why neither the Commission's May 12, 1954 action nor its April 14, 1955 *ex parte* grant to WJR could confer rights upon, or change the status of, WJR to the detriment of appellants as mutually exclusive applicants for the same facility.

In the first place, the original authority conferred by the May 12, 1954 grant to WJR was never accepted by it. On the contrary, it was abandoned. Only fourteen days after the Commission reaffirmed its original grant, WJR filed its second application proposing such basic and radical changes that this Court in its May 24, 1956 opinion declared that the new proposal "goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants and 'the proceedings lose their comparative character.' "[13] At the hearings after remand much of the evidence offered by WJR was devoted to its inability, as well as its unwillingness, to exercise the authority conferred upon it by the original grant.

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[12] McClatchy Broadcasting Co. v. FCC, 99 U.S. App. D.C. 199, 239 F.2d 19 (1956), *cert. denied*, 353 U.S. 918 (1957).

In the second place, we believe that this Court's action of May 24, 1956, in reversing in Case No. 12666 ordering further comparative hearings in the light of WJR's new proposals, amounted legally to setting aside the Commission's original grant. While the Court denied appellants' "all writs" petition requesting that the Commission's April 14, 1955 grant of WJR's second application be specifically rescinded, the action taken by it must have the same effect. The Court stated that "appellants' rights are completely protected," and its direction to reconsider the grant to WJR in the light of the changes in its proposal cannot, in the light of the many other decisions of this Court, be considered as authority for the proposition that WJR was to remain a "permittee" with substantial advantages over its competitors during the reopened proceedings. Such an interpretation not only contradicts the *Ashbacker* doctrine but, as noted *supra,* violates the basic relationship between appellate and lower tribunals. That is, a remanded proceeding must be reopened at the point of error; any other conclusion flaunts the whole purpose of appellate review.

The second *McClatchy* case makes it manifestly clear that a comparative hearing means just that—that a new proposal requires a new hearing and a new comparison with others, whether that new proposal is presented as an amendment or otherwise.

If, as the Supreme Court declared in the *Ashbacker* case, the right to hearing conferred by section 309(a) of the Act[14] means that hearings on mutually exclusive applications must proceed with all parties being on an equal basis, the "permittee" concept is entirely fallacious. One applicant cannot be regarded as a newcomer with the burden of displacing another to whom a grant has been made. As will be later shown, more than a label is involved. The hearing conducted and the decision rendered unlawfully favored WJR to the detriment of its competitors because of the grants to it which preceded remand.

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[13] 99 U.S. App. D.C. at 75, 237 F.2d at 556.

[14] 47 U.S.C. § 309(a).

THE THIRD QUESTION PRESENTED

An examination of both the examiner's supplemental initial decision (Supp. J.A. 807-22) and the Commission's final decision subsequent to remand (Supp. J.A. 823-82) discloses clearly that the Commission's decision of July 9, 1958 was not the result of a comparative hearing as required by law. It is difficult to characterize what happened, but both the examiner and the Commission made it clear that the comparisons made did not involve the total cases of the respective applicants. Rather, parts of the WJR case were selected and compared with an assumed standard previously arrived at. The contestants, as they appeared on the date of decision, were not compared.

The *Johnston* case,[15] decided by this Court in 1949 (Clark, Prettyman and Proctor, Circuit Judges), fixed the requirements of comparative proceedings. There, in discussing the two final steps in comparative determinations—the finding of ultimate facts from basic facts and the application of the statutory standard to the ultimate facts—the Court said:

> "* * * The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which

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[15] Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

> indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases * * * ." 85 U.S. App. D.C. at 46, 175 F.2d at 357.

It is believed unnecessary now to review all, or substantially all, of the cases which subsequently have adopted and applied the rule of the *Johnston* case. They are extensively dealt with in Butterfield's brief on appeal [16] and show no substantial dissimilarity. One of the most recent and significant here is the second *Enterprise* case.[17] There the Court (Bazelon, Fahy and Danaher, Circuit Judges) said that the important question, when there has been a post grant change in the proposal of the successful party, is whether the change *"upon new comparison of the parties"* [18] should dictate a different result. The Court's May 24, 1956 opinion in this case was cited as authority for this proposition.

Time after time both the examiner and the Commission stated the question presented for decision in the hearing on remand was whether or not an award made earlier to WJR should be withdrawn. It was never stated that the case involved a new comparison of the total cases of the parties, but rather a comparison of WJR's late proposal with the one made earlier, and an attempted rationalization of the Commission's *ex parte* April 14, 1955 conclusions to the effect that the changes made by WJR were unimportant from a comparative standpoint.

To say, as the Commission did, that WJR's two proposals, although basically different, are of the same value and superior to those advanced by WJR's competitors, is difficult in any case. But to arrive at such a conclusion without comparing WJR's new proposal with those advanced earlier by its adversaries, would appear to be impossible. We cannot believe that the decisions of this Court since the *Johnston* case can be squared with such conduct. Nor do we believe that a holding such as this establishes a proper rule of conduct for agency action in the difficult area of comparative determination. Regardless of decisions reached on other questions, we submit that the Commission's decision of September 8, 1958 must be rejected as a final determination here.

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[16] Pp. 34-38.

[17] Enterprise Co. v. FCC, 105 U.S. App. D.C. 119, 265 F.2d 103 (1959).

[18] 105 U.S. App. D.C. at 121, 265 F.2d at 105. (Emphasis added.)

THE FOURTH QUESTION PRESENTED

In dealing with WJR as a "permittee" rather than an applicant and in applying different procedural and substantive standards to it, the Commission failed entirely to comply with the mandate of this Court issued pursuant to its May 24, 1956 opinion. A few illustrations will suffice.

In the taking of evidence, the examiner not only construed the mandate of this Court as limiting a consideration of the facts to those relating to the changes made in WJR's proposal (Supp. J.A. 1142-65) but apparently regarded the Commission's particular findings and conclusions on matters not specifically dealt with by the Court as the law of the case and therefore inviolate. (Supp. J.A. 811-12.) He concluded by stating that the ultimate question to be decided was whether the changes proposed by WJR in its modified proposal and its late revelation of those changes so affected the decisional basis of the Commission's preference for WJR that the public interest would be better served by a grant to Butterfield or Trebit. (Supp. J.A. 820.) After reviewing the changes which WJR made and the preferences which vanished with those changes, he seemed to base his ultimate conclusion on the single fact "that a ruling adverse to WJR, because of timing of its original proposal, in the light of all the evidence is not warranted." (Supp. J.A. 820-21.)

The Commission itself in its very first conclusion stated that the proceeding subsequent to remand "was not a comparative proceeding *ab initio.*" (Supp. J.A. 865.) It stated that the changes in the WJR proposal requiring rehearing were limited by the Court's order to "programming, studio building and transmitter site." (Supp. J.A. 865.) The Commission's action here was in fact basically similar to that declared to be both illegal and unfair in the *Ashbacker* case. After remand Butterfield and Trebit, as applicants, were placed in the role of newcomers while WJR as a "permittee" was immune not only from procedural regulations but from having its total case compared with that of its adversaries.

When recognition is had of the fact that Butterfield and Trebit were not only required to assume basically different burdens as a result of the earlier grants to WJR on May 12, 1954 and April 14, 1955, but were effectively prevented from questioning the validity of such grants, it is difficult to accept the Court's present statement "that full and comparative hearings have been afforded the respective parties."[19]

CONCLUSION

It certainly cannot be the intention of this Court to permit lower tribunals subject to its appellate jurisdiction to select for procedural convenience whatever posture they may choose in remanded cases. Yet this Court's approval of the Commission's procedure on remand in this case accomplishes this astonishing and far-reaching result. A remand of any case necessarily requires its return to the posture at point of error to be governed by procedures there obtaining. We do not believe that the Court's action of November 5 either properly disposes of these cases or establishes proper precedent for other cases of like character. On the contrary, second guessing and nonconformance with established rules of procedure seems to have been rewarded to the detriment of those who pursued an opposite course.

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[19] W. S. Butterfield Theatres, Inc. v. FCC, U.S. Ct. of App. for D.C. Cir., Cases No. 12527, *et al.*, Slip Op. p. 5 (November 5, 1959).

WHEREFORE, it is respectfully prayed:

1. That this Honorable Court reconsider its action of November 5, 1959; or

2. That a rehearing before the full Court, sitting en banc, be ordered; and

3. That the Court grant such other and further relief as it deems just and equitable.

Respectfully submitted,

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November 20, 1959

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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W. S. BUTTERFIELD THEATRES, INC.,
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v.
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Nos. 12,528, 12,753 and 14,6

TREBIT CORPORATION,
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FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

No. 14,717

LAKE HURON BROADCASTING CORPORATION,
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FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
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APPEALS FROM DECISIONS AND ORDERS OF THE
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Vol. I of 2 vols.

United States Court of Appeals
For the District of Columbia Circuit
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Washington, D. C. ROBERT I. THIEL EX 3-0625

UNITED STATES COURT OF APPEALS
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Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

W. S. Butterfield Theatres, Inc., Appellant, v. Federal Communications Commission, Appellee, WJR, The Goodwill Station, Inc., Intervenor.	Case No. 14,685
Trebit Corporation, Appellant, v. Federal Communications Commission, Appellee, WJR, The Goodwill Station, Inc., Intervenor.	Case No. 14,691
Lake Huron Broadcasting Corporation, Appellant, v. Federal Communications Commission, Appellee, WJR, The Goodwill Station, Inc., Intervenor.	Case No. 14,717

STIPULATION

Counsel for the parties herein stipulate:

1. Appellant W. S. Butterfield Theatres, Inc. believes the questions presented by its appeal to be as follows:

1. Whether, under the circumstances of this case, WJR could validly file and the Commission could, by *ex parte* action, validly grant WJR's December 16, 1954 application.

2. Whether either the Commission's decision and order of May 14, 1954, or its April 14, 1955 ex parte grant of WJR's December 16, 1954 application could confer rights upon, or change the status of, WJR to the detriment of appellants as mutually exclusive applicants for the same facilities.

3. Whether the Commission's decision and order of July 9, 1958, was the result of a comparative hearing as required by law.

4. Whether the proceedings had and the action subsequently taken by the Commission complied with the mandate of this court issued pursuant to its May 24, 1956 opinion.

5. Whether, in the proceedings subsequent to remand, the Commission properly made findings and conclusions based on substantial evidence as to all relevant and significant points of difference between the parties, and properly evaluated the record and these points of difference in reaching its decision.

2. Appellant Trebit Corporation summarizes the questions presented by its appeal as follows:

1. Whether the Commission erred in permitting WJR, after the comparative hearing was concluded, to substitute a feasible television proposal for the unworkable WJR television proposal which had been the subject of the comparative hearing.

2. Whether the Commission erred in failing to find that the post-grant changes in the WJR television proposal (a) deprived WJR of any right to further comparative consideration of its application and (b) required a dismissal of the WJR application.

3. Whether the Commission's preference of the WJR application over Trebit's application on the record of the original comparative hearing is shown to have been erroneous by the evidence adduced at the further hearing pursuant to the Court's mandate.

4. Whether the Commission erred in making only a partial comparison of WJR's post-grant proposal and in failing to reconsider the original grant to WJR in the light of the subsequent changes in its proposal.

5. Whether the evidence of concealment and misrepresentation by WJR required a finding of lack of qualifications and a denial of the WJR application on a non-comparative basis.

6. Whether the Commission erred in treating the evidence of concealment and misrepresentation by WJR as bearing exclusively on the absolute qualifications of WJR, and in failing to treat this evidence as also bearing upon the comparative qualifications of WJR and Trebit.

7. Whether, in the proceedings subsequent to remand, the Commission properly made findings and conclusions based on substantial evidence as to all relevant and significant points of difference between the parties, and properly evaluated the record and these points of difference in reaching its decision.

8. Whether the Commission erred in denying Trebit's petition to reopen the record and hold a further hearing as a result of WJR's post-second-grant change in network affiliation.

3. Appellant Lake Huron Broadcasting Corporation summarizes the questions presented by its appeal as follows:

1. Whether the Commission, in treating WJR as a "permittee" rather than as an "applicant," in according WJR comparative consideration on a changed proposal which (in appellant's view) was tantamount to a "new application," in dismissing a "new application" for Channel 12 tendered by appellant, and in disregarding proffered evidence in the comparative proceeding regarding the impact on Saginaw's only television facility of a grant of WJR's modified application vis-a-vis a grant of the Trebit or Butterfield applications or a reaffirmance of WJR's original grant, misconstrued this Court's prior mandate, the requirements of Sections 307(b), 308, 309, 402(h) and 409(c) of the Communications Act, applicable Commission rules, and pertinent administrative and judicial precedents.

2. Whether data adduced and proffered in the protest and comparative proceedings tending to show that a grant to WJR at

Chesaning (in the immediate vicinity of Saginaw) needlessly jeopardized Saginaw's only television facility, whereas a grant to WJR at Clarkston or a grant to Trebit or Butterfield would assure both Flint and Saginaw a station of their own, was pertinent to a proper "public interest" determination under Sections 307(b), 308, and 309 of the Communications Act, and if so whether the Commission gave appropriate consideration to such data and to other significant points of difference in the actions here appealed from.

4. Appellee Federal Communications Commission and Intervenor WJR, The Goodwill Station, Inc., in signing this stipulation, do not concede the correctness of any legal or factual premises implicit in the questions stated by the Appellants and further reserve the right to argue that some of the questions stated by the Appellants are not properly before the Court.

5. Appellants will serve and file their briefs on or before April 9, 1959. Appellee and Intervenor will serve and file their briefs on or before May 25, 1959. Appellants' replies, if any, will be served and filed on or before June 24, 1959. A printed Supplemental Joint Appendix will be served and filed on or before July 24, 1959.

6. In the event the parties rely upon briefs previously filed in Cases No. 12,527, 12,528, 12,752 and 12,753, the new briefs shall specify the extent to which they incorporate by reference material in the briefs previously filed and further specify as deleted the pages in earlier briefs dealing with issues no longer pertinent.

7. Only such parts of the Notice of Appeal as may be designated by any party shall be printed in the Supplemental Joint Appendix.

8. The procedure to govern the preparation and filing of the Joint Appendix shall be as follows:

(a) Reference may be made by the parties to such portions of the record in the instant appeals as have been printed in the Joint Appendix in Cases No. 12,527, 12,528, 12,752 and 12,753. To the extent possible, the original pagination of said Joint Appendix shall be retained. In case there is a difference in pagination of the record in Cases No. 12, 527, 12, 528, 12, 752 and 12, 753 and the record on appeal, references in said Joint Appendix will be corrected to conform to the record on appeal.

(b) After the filing of the briefs in this case, there will be printed and filed an additional joint appendix, which shall be referred to as the "Supplemental Joint Appendix" relating to the proceedings in the instant appeal which have not previously been printed in the Joint Appendix. Such Supplemental Joint Appendix will contain double pagination. The first series will be chronological, commencing with the page number which follows the last page of the Joint Appendix in the appeals in Cases No. 12, 527, 12, 528, 12, 752 and 12, 753, and the other pagination will be a page reference to the record filed herein.

(c) References to the record which has been printed in the Joint Appendix in Cases No. 12, 527, 12, 528, 12, 752 and 12, 753 will be to the page numbers of such Joint Appendix and shall be cited as J. A. ___; and references to such portions of the record as will be printed in the Supplemental Joint Appendix shall be cited as R. ___.

Respectfully submitted,

/s/ Jerry M. Hamovit
Counsel for Appellee
Federal Communications Commission

/s/ Lester Cohen
Counsel for Appellant
W. S. Butterfield Theatres, Inc.

/s/ William J. Dempsey
Counsel for Appellant
Trebit Corporation

/s/ Vernon L. Wilkinson
Counsel for Appellant
Lake Huron Broadcasting Corporation

/s/ Reed T. Rollo
Counsel for Intervenor
WJR, The Goodwill Station, Inc.

February 16, 1959

[Filed Feb. 18, 1959]

Before: Bastian, Circuit Judge

PREHEARING ORDER

Counsel for the parties in the above-entitled cases having appeared before Circuit Judge Bastian for preharing conference pursuant to Rule 38(k), of the General Rules of this Court, and counsel having submitted their stipulation dated February 16, 1959, and the stipulation having been considered, the stipulation of the parties is hereby approved, and it is

ORDERED that the parties proceed according to the stipulation and that this order and the stipulation dated February 16, 1959, be printed in the joint appendix.

Dated: February 18, 1959

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PRE-HEARING CONFERENCE
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
(Television)

Washington, D. C.
October 31, 1952

- x

In the Matter of :
WJR, The Goodwill Station, Inc. : Docket No. 10268
Flint, Michigan :

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Trebit Corporation : Docket No. 10269
Flint, Michigan :
Call Letters: New. :

Present:
Butterfield Theatres, Inc.

- x

The above-entitled matter came on for hearing at 9:30 o'clock a.m., pursuant to notice, in Room 2704 Temporary "T" Building, Washington, D. C., before Benito Gaguine (The Presiding Officer).

* * * * *

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* * * * *

The Presiding Officer: I am not asking for any binding commitments today. I am just trying to raise all the problems which I have seen in this case.

One thing I would like to have the parties develop either for themselves or against themselves, as they see fit, is I would like to have some information in the record as to what commitments have been made in the past by applicants who are licensees to the Commission regarding programming and I would like to know how those commitments have kept.

* * * * *

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In re applications of	
WJR, THE GOODWILL STATION, INC. Flint, Michigan	Docket No. 10268 File No. BPCT-967
TREBIT CORPORATION Flint, Michigan	Docket No. 10269 File No. BPCT-968
W. S. BUTTERFIELD THEATRES, INC. Flint, Michigan	Docket No. 10270 File No. BPCT-953
For Construction Permits for new Television Stations	

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 5th day of November, 1952;

The Commission, having under consideration the above-entitled application of W. S. Butterfield Theatres, Inc. requesting a construction permit for a new television broadcast station to operate on Channel 12 in Flint, Michigan; and

IT APPEARING, That the said application is mutually exclusive with the above-entitled applications of WJR, the Goodwill Station, Inc. and Trebit Corporation, both of which also request construction permits for television stations to operate on Channel 12 in Flint, Michigan; and

IT FURTHER APPEARING, That the applicant W. S. Butterfield Theatres, Inc. was advised on October 30, 1952 that its proposal was mutually exclusive with those of the other above-entitled applications and was requested to file any reply within five days, and that this time has now expired and the said conflict has not been resolved;

IT IS ORDERED, That, pursuant to Section 309(b) of the Communications Act of 1934, as amended, the above-entitled application of W. S. Butterfield Theatres, Inc. be designated for hearing in the same consolidated proceeding with the other above-entitled applications to commence at 10:00 A.M. on November 17, 1952 in Washington, D. C. upon the following issues:

1. To determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations.

2. To determine the type and character of the program services proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours.
3. To determine whether the construction and operation of the proposed stations would be in compliance with the Commission's Rules and Regulations governing television broadcast stations.
4. To determine whether the installation and operation of any of the stations proposed in the above-entitled applications would constitute a hazard to air navigation.

5. To determine on a comparative basis which, if any, of the above-entitled applications should be granted.

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]
/s/ T. J. Slowie
Secretary

Nov. 10, 1952

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January 28, 1953

* * * * *

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* * * * *

Mr. Dempsey: If the Examiner please, in the two days we have had to examine the exhibits, I have been through it as carefully as I can, and I am willing to say now that with respect to some 39 exhibits I am perfectly willing to stipulate Mr. Rollo can offer them, and that they be accepted for the record without any need for testimony, and I will waive any cross-examination with respect to them. I can list them by number. I thought it might be helpful to state that in advance.

I have only three of the exhibits that I would object to, and the objection would be based on hearsay. The exhibits contain letters.

With respect to the other exhibits that relate to the proposed programming, I have no objection to offer at this time, but I would like to reserve the right to ask qualifying questions. I think it might considerably expedite the proceedings.

The Presiding Officer: I think that your offer would expedite the proceedings. On the other hand, it would have to be joined in by Butterfield and by Commission counsel, and I don't know whether they have had an opportunity to examine the terms of your offer and the exhibits to the ex-

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tent that you have.

Mr. Hancock: I think we would probably join. I was trying to count up the ones, Mr. Examiner.

Mr. Dempsey: I could go through the list, on or off the record. It might be convenient off the record.

The Presiding Officer: Let me make this suggestion, then, that we have a 15-minute recess, during which time counsel for Trebit and Butterfield and Commission counsel may perhaps be able to agree to what exhibits they will interpose no objection, and that way we might save time on the record.

Mr. Stanley Cohen: Wouldn't we proceed just as quickly if counsel for WJR should offer the exhibits numerically, and if there was no objection and no cross-examination, we then admitted it and proceeded right on to the next, rather than taking the whole offer?

Mr. Rollo: I am inclined to think that would be just as quick a procedure. I don't want to be precluded from asking amplifying questions concerning some of the exhibits.

Mr. Dempsey: I have no intention to limit your testimony in any way, simply to avoid the necessity of identifying, describing and making a formal offer.

* * * * *

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January 30, 1953

* * * * *

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* * * * *

FRANKLIN C. MITCHELL,

called as a witness on behalf of Station WJR, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Eagen:

* * * * *

Mr. Eagan: Pursuant to our agreement, I offer in evidence WJR Exhibit 44, which is a biographical sketch of Mr. Mitchell.

The Presiding Officer: Admitted.

(WJR EXHIBIT NO. 44 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Pursuant to the same agreement, I offer WJR Exhibit 45, which is a listing of the programs over WJR during the Commission's 1952 composite week.

The Presiding Officer: No objection. Admitted.

(WJR EXHIBIT NO. 45 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, I offer Exhibit 46, which is an

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analysis of that composite week schedule by types of programs.

The Presiding Officer: By types of programs, you mean you break them down pursuant to the rules and instructions of the Commission?

Mr. Eagan: Yes, sir, as set forth in Form 301, for example.

The Presiding Officer: Any objection? Admitted.

(WJR EXHIBIT NO. 46 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, I offer Exhibit 47, which is an analysis of the same composite week by classes of programs within the Commission's definitions.

The Presiding Officer: No objections: admitted.

(WJR EXHIBIT NO. 47 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, I offer WJR Exhibit 48, which is an analysis of the spot announcements appearing in that composite week and conforming with the Commission's regulations.

The Presiding Officer: Any objections? Admitted.

(WJR EXHIBIT NO. 48 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, I offer WJR Exhibit 49, which is a comparison of WJR proposals and actual performances by types of programs as disclosed by renewal applications and the analysis of the 1952 composite week.

The Presiding Officer: Any objections to this exhibit? Apparently none. Admitted.

(WJR EXHIBIT NO. 49 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, Exhibit 50, which is a similar

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analysis only by classes of programs rather than by types.

The Presiding Officer: Also admitted.

(WJR EXHIBIT NO. 50 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, Exhibit 51, which is a list of outstanding programs proposed by WJR during the period October 1951 to October 1952.

Mr. Hancock: The only comment I have with respect to that is I assume that you will state for the record that the "outstanding" is your own characterization.

The Presiding Officer: If he didn't I would assume that that was what he meant.

Mr. Eagan: We might take a moment on that and have the witness briefly explain the basis for compiling this exhibit. That is Exhibit 51, which I understand has been received.

The Presiding Officer: It will be received with the understanding that the "outstanding" characterization is your own opinion, or rather the opinion of WJR.

(WJR EXHIBIT NO. 51 WAS RECEIVED IN EVIDENCE.)

The Witness: The list of programs was prepared purporting to show those programs which, in our opinion, were representative of our best efforts. They include public service programs, special broadcasts, that the station arranged, initiated and broadcast. They also include some sustaining programs, I believe, that were taken from a cross-section. These are not all of the programs but are a representative list.

[1327]

Mr. Eagan: I likewise offer WJR Exhibit 52, which is a similar list of programs, only it deals with program series rather than individual programs.

Mr. Hancock: Same comment with respect to "outstanding."

The Presiding Officer: Subject to the same qualification, admitted.

(WJR EXHIBIT NO. 52 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: I might note for the record that that concludes all the exhibits that relate to WJR's past programming, and the future exhibits relating to the television proposals which we will proceed to deal with in the customary manner, will be presented.

* * * * *

[1803]

February 10, 1953

* * * * *

[1903-1904]

* * * * *

ELMER A. KNOPF

called as a witness on behalf of Trebit Corporation, having been first duly sworn, was examined and testified as follows:

* * * * *

[1933]

CROSS EXAMINATION

By Mr. Eagan:

* * * * *

[1938]

Q. However, isn't it true that in the application filed with the Commission, instead of specifying the network commercial programs by name you just specified them by network commercial? A. In the

The Presiding Officer: Any objections to this exhibit? Apparently none. Admitted.

(WJR EXHIBIT NO. 49 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, Exhibit 50, which is a similar

[1326]

analysis only by classes of programs rather than by types.

The Presiding Officer: Also admitted.

(WJR EXHIBIT NO. 50 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: Likewise, Exhibit 51, which is a list of outstanding programs proposed by WJR during the period October 1951 to October 1952.

Mr. Hancock: The only comment I have with respect to that is I assume that you will state for the record that the "outstanding" is your own characterization.

The Presiding Officer: If he didn't I would assume that that was what he meant.

Mr. Eagan: We might take a moment on that and have the witness briefly explain the basis for compiling this exhibit. That is Exhibit 51, which I understand has been received.

The Presiding Officer: It will be received with the understanding that the "outstanding" characterization is your own opinion, or rather the opinion of WJR.

(WJR EXHIBIT NO. 51 WAS RECEIVED IN EVIDENCE.)

The Witness: The list of programs was prepared purporting to show those programs which, in our opinion, were representative of our best efforts. They include public service programs, special broadcasts, that the station arranged, initiated and broadcast. They also include some sustaining programs, I believe, that were taken from a cross-section. These are not all of the programs but are a representative list.

[1327]

Mr. Eagan: I likewise offer WJR Exhibit 52, which is a similar list of programs, only it deals with program series rather than individual programs.

Mr. Hancock: Same comment with respect to "outstanding."

The Presiding Officer: Subject to the same qualification, admitted.

(WJR EXHIBIT NO. 52 WAS RECEIVED IN EVIDENCE.)

Mr. Eagan: I might note for the record that that concludes all the exhibits that relate to WJR's past programming, and the future exhibits relating to the television proposals which we will proceed to deal with in the customary manner, will be presented.

* * * * *

[1803]

February 10, 1953

* * * * *

[1903-1904]

* * * * *

ELMER A. KNOPF

called as a witness on behalf of Trebit Corporation, having been first duly sworn, was examined and testified as follows:

* * * * *

[1933]

CROSS EXAMINATION

By Mr. Eagan:

* * * * *

[1938]

Q. However, isn't it true that in the application filed with the Commission, instead of specifying the network commercial programs by name you just specified them by network commercial? A. In the

[1938]

typical week illustration?

Q. Yes, 7-I. A. Frankly, we used some network names as window dressing, you might say. We are submitting a typical week on the basis of proposing possibly an NBC affiliation. So we have utilized some of the titles of programs currently on the National Broadcasting Company, or if not currently, those that appeared earlier this year.

Q. In the application filed with the Commission with respect to several of these programs you just placed network commercial and then in this exhibit you filled in program titles in those places? A. That is right.

* * * * *

[2649]

Docket No. 10268, et al.

Exhibit No. Stipulation, etc.
WJR, et al.

Date 2/20/53

STIPULATION

* * * * *

[2677]

* * * * *

IV

OTHER MATTERS

1. It is hereby stipulated and agreed by and between counsel for the respective applicants herein, subject to approval and acceptance by the Hearing Examiner, that W. S. Butterfield Theatres, Inc. is not now and never has been a party to any action relating to alleged antitrust matters brought by any state or the federal government, that Butterfield has been or is one of several defendants in seven private civil suits in which allegations concerning competitive practices have been made, that further proof with respect to these actions is not required in order to

satisfy the issues in this proceeding, that no consideration will be given to these actions, and that said actions will not be urged as a disqualifying factor. In connection with the above, the Broadcast Bureau reserves the right to inquire into these matters upon giving adequate notice of its intention to do so.

2. It is hereby stipulated and agreed by and between counsel for the respective applicants herein, and counsel for the Commission's Broadcast Bureau, subject to approval and acceptance by the Hearing Examiner, that the matters referred to in the issues in the proceeding involving the applications

[2678]

of KMPC, The Station of the Stars, Inc. (KMPC), Los Angeles, California, et al, Docket No. 9468, etc. directed against the alleged acts of G. A. Richards, deceased are not relevant to the instant case and that no inquiry will be made into said matters nor will they be urged as a disqualifying factor of WJR.

3. It is further stipulated and agreed that the stipulation of the matters set forth in this Stipulation in no way limits the introduction of further or additional evidence by each applicant to support its application herein and to meet the issues specified.

4. This Stipulation is not intended to preclude inquiry into changed circumstances or newly discovered matters.

/s/ R. Russell Eagan
Counsel for WJR, The Goodwill Station, Inc.

/s/ William J. Dempsey
Counsel for Trebit Corporation

/s/ Parker D. Hancock
Counsel for W. S. Butterfield Theatres, Inc.

/s/ Stanley B. Cohen
Counsel for the Commission's Broadcast Bureau

[4110]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON BEHALF OF WJR, THE GOODWILL STATION, INC.

* * * * *

[4198]

* * * * *

H. PAST RECORDS

13. The past record of WJR in the operation of its broadcast station WJR in Detroit has been outstanding. It has an extensive staff of experienced personnel, various incentive plans for better employer-employee relationships and excellent technical and studio facilities. It has a remarkable record of program performance in accord with previous program promises and its programming has been unusually meritorious. An exhaustive showing of its past programming and non-broadcast public service activities was presented

[4199]

as discussed in Paragraphs 30-35 of the Findings. Trebit limited its evidence with respect to its past record, to its public service programming and its record of cooperation with civic groups, including its non-broadcast public service activities. It failed to present any evidence comparing its past promises with its performance and also failed to make a showing concerning the complete program schedule of WFDF or any analyses thereof. The extent of Trebit's showing of its past record is discussed in Paragraphs 73-83 of the Findings. Butterfield has had no past experience in the broadcasting field and accordingly limited its evidence concerning its past record to its operation of motion picture theatres including its operating policies and public service activities. No showing was made as to the operations of the broadcast facilities operated by the University of Michigan. From the state of the record it must be concluded that WJR has rendered an outstanding broadcasting service in the past, has carried out its commitments and can be fully relied upon to carry out its commitments made in this proceeding. While the public service rendered by Trebit and its cooperation with local civic organizations appear to be fair, its showing was much less complete than the WJR showing and covered a much shorter period of time. On the basis of the showings made, WJR is to be preferred over Trebit and Butterfield.

* * * * *

[4563]

[Received June 14, 1954, FCC]

WINEGARDEN AND BOOTH
Attorneys at Law
401 Citizens Bank Bldg.
Flint 3, Michigan

June 12, 1954

Federal Communications Commission
New Post Office Building
Washington 25, D. C.

Gentlemen:

Re: WJR, The Goodwill Station, Inc.
Docket No. 10268, File No BPCT 967
Trebit Corporation
Docket No. 10269, File No BPCT-968
W. S. Butterfield Theatres, Inc.
Docket No. 10270, File No BPCT-953

Please find enclosed for filing an executed original of Motion for Intervention and rehearing, and alternate motion for appointment of Amicus Curiae, together with an affidavit and exhibits in support thereof. Please also find enclosed sixteen copies of the same, one of which has been executed.

In view of the unusual nature of the party making this application and of the application itself, it occurrs to us that possibly the Commission would see fit to grant the members of this Committee an informal interview. In the event such procedure is possible, I am informed that most of the members of the Committee would be glad to attend such an interview in the Commission's offices at such date as would be convenient to the Commission.

I would be obliged to you for your comments on this subject.

Very truly yours,
Winegarden and Booth
/s/ Myron Winegarden
Myron Winegarden

MW:jm
enc. 16

[4564]

[Received June 14, 1954-FCC]

UNITED STATES OF AMERICA

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25 DC

In re Applications of	
WJR, THE GOODWILL STATION, INC. Flint, Michigan	DOCKET NO 10268 File BPCT-967
TREBIT CORPORATION Flint, Michigan	DOCKET NO 10269 File No BPCT-968
W. S. BUTTERFIELD THEATRES, INC. Flint, Michigan	DOCKET NO 10270 File No BPCT-953
For Construction Permits for New Commercial Television Stations.	

Motion by Citizens Committee for a VHF Television Station for Flint for permission to intervene as a party in interest. Motion for a rehearing. Alternative Motion for permission to file a brief Amicus Curiae.

Now comes the Citizens Committee for a VHF Television Station for Flint by C. S. Harding Mott, its President, and A. William Bishop, its secretary and respectfully shows unto the Commission as follows:

1. That a group of Flint citizens, on the 20th day of May A. D.

1954, met together as representatives of various Flint civic organizations and formed a voluntary organization to be known as the CITIZENS COMMITTEE FOR A VHF TELEVISION STATION FOR FLINT which is hereinafter termed the Committee.

2. That the following members of the organization were appointed to a steering committee:

C. W. Harding Mott (Pres.) 1709 Woodburne Drive, Flint, Michigan
A. William Bishop (Sec.) 2750 Parkside Drive, Flint, Michigan
J. Palmer Crawford 926 Maxine Ave., Flint, Michigan
Durfee L. Day 2801 Westwood Parkway, Flint, Michigan
Matthew Davison, Jr. 3602 Hawthorne Drive, Flint, Michigan
James F. Smith 3501 Hawthorne Drive, Flint, Michigan
Arthur E. Summerfield Jr. 1701 Durand St., Flint, Michigan

which is hereinafter termed the Steering Committee.

[4565]

3. That none of the members of said Committee or of the said Steering Committee have any interest, direct or indirect, financial or otherwise, in any of the parties to this hearing.

4. That the members of the Committee unanimously voted to direct the Steering Committee to take such action as to it seemed most proper and effective to present the views of the Committee to the Commission.

5. That the Steering Committee has prepared and executed a joint affidavit setting forth those views and supporting this motion which is attached hereto and made a part hereof.

6. Your petitioner believes that the Commission erred in its conclusions reached in paragraphs 27 through 35, both inclusive in its decision dated May 12, 1954 upon the following general grounds:

(a) That the Commission reached its conclusion that WJR would operate a "Flint Station" substantially upon WJR's representations of its intentions in that regard. But the Commission, in reaching such conclusion, ignored the plain fact that however good are

WJR's present intentions, it will be subjected to enormous pressures resulting from the fact that it will be serving equally a metropolitan area of two million persons and the Flint area of approximately two hundred thousand persons.

(b) That this proceeding is an effort to select the applicant which would best serve the public interest; but that the selection by the Commission has so aroused the citizens of Flint, that the unanimity of their opinions concerning the decision and the spontaneity of their protests, indicate that the Commission incorrectly gauged the true best public interest.

7. That as a consequence thereof, the Commission erred in its orders contained in paragraphs 37 and 39 of said decision.

WHEREFORE your petitioner prays as follows:

1. That the Commission enter an order permitting it to intervene as a party in interest in this proceeding.

2. That the Commission enter an order granting a rehearing of this matter before the Commission at which rehearing your petitioner would be permitted as an intervener to aduce proofs of its foregoing allegations; viz., that the citizens of Flint with overwhelming unanimity believe that their best interest requires a Flint station which would be unable to concurrently serve Detroit with a signal of equal intensity.

[4566]

3. As an alternative to the two foregoing prayers, and in the event the same are denied, and in the event that Trebit Corporation files a petition for a rehearing, that the attorney for your petitioner be permitted to file a brief Amicus Curiae on behalf of your petitioner.

4. And that your petitioner have such other and further relief as the Commission shall deem proper and required in the circumstances.

Citizens Committee for VHF Television
Station for Flint

by /s/ C. S. Harding Mott
Its President

by /s/ A. William Bishop
Its Secretary

June 11, 1954
Flint, Michigan

STATE OF MICHIGAN)
) SS
COUNTY OF GENESEE)

On this 11th day of June A. D. 1954, before me personally appeared C. S. Harding Mott and A. William Bishop who being duly sworn, say that they are respectively the President and the Secretary of Petitioner, and that they executed the foregoing petition as President and Secretary and by authority of a resolution duly passed at a meeting of petitioner and further that they know the contents of the said petition and that the same is true of their own knowledge, except as to the matters therein stated to be upon their information and belief, and as to those matters they believe them to be true.

/s/ Helen J. Stipes
Helen J. Stipes, Notary Public
Genesee County, State of Michigan
My commission expires, March 4, 1955

[SEAL]

Winegarden and Booth
Attorneys at Law
401 Citizens Bank Bldg.,
Flint, Michigan

[4567]

[Rec'd June 14, 1954-FCC]

Affidavit in support of Motion to intervene, for a rehearing, and in the alternative, for permission to file a brief Amicus Curiae on behalf of the Citizens Committee for a VHF Television Station for Flint.

STATE OF MICHIGAN)
SS
COUNTY OF GENESEE)

C. S. Harding Mott, A. William Bishop, J. Palmer Crawford, Durfee L. Day, Matthew Davison, Jr., James F. Smith, and Arthur E. Summerfield, Jr., being duly sworn depose and say:

1. That they constitute the Steering Committee of the Citizens Committee for a VHF Television Station for Flint and that C. S. Harding Mott is chairman and A. William Bishop is secretary of the said committee.

2. That the said Citizens Committee for a VHF Television Station for Flint is composed of Flint civic organizations.

3. That attached to the original hereof and hereby made a part hereof are the originals of letters addressed to the Commission executed by various officers in behalf of the several Flint civic organizations which joined together to form this committee. That attached to the copies of this affidavit, marked Exhibit A, is a single copy of the said letters.

4. That the following list consists of the names of the organizations which executed the said letters and whose representatives compose the Committee, together with the names and office of the persons who executed the same:

Organization	Officer	Office
Exchange Club of Flint	Dale C. Kimmel	President
Genesee Chapter, American Red Cross	E. C. Black	President
Flint Office of Civil Defense	Harold C. Chirgwin	Director
Charles Stewart Mott Foundation	C. S. Harding Mott	President
Genesee County Board of Education	Daisy E. Howard	Secretary
Quota Club of Flint	Eva Peterson	Secretary
Radio Television Technicians Assn.	Douglas Morris	President
Flint Chamber of Commerce	R. B. Thomas	Secretary
Retail Merchants Division, Flint Chamber of Commerce	Durfee L. Day	President
Temple Beth El Sisterhood	Mrs. Harry J. Mills	President
Flint Junior Chamber of Commerce	Stanley A. Moyle	President
Interclub Council	Charles R. Hayek	President
Flint P. T. A. Council	Mrs. H. Maxwell Golden	President

Zimmerman Jr. High School P. T. A.	Russell G. Berryman	President
Flint Kiwanis Club	Alton A. Miller	President
Flint Shriners Club	George I Detlor	President
Commercial Property Owners Assn.	John L. Pierce	Secretary
Flint Lions Club	Gordon L. Birnie	President
Kiwanis Club of West Flint	Dan R. Hamady	President
Flint Business & Professional Women's Club	Emma Toomey	President
Genesee County Organizational Council	S. H. LaTourette	Secretary
Rotary Club of Flint	William C. Stevens	President
Flint Federation of Labor	M. J. Burke	President
Manufacturers Assn. of Flint, Michigan	C. E. Hoehn	President
Civic Research Council of Flint	Haywood H. Johnson	President
Flint Council of Churches	Ralph D. Kearns	President
Flint Civitan Club	C. H. Mahan	President
Potter School P. T. A.	Mrs. Roz. Harwood	President
Whittier Junior High School P. T. A.	Mrs. David I. Barton	President
Roosevelt School P. T. A.	Russell D. Keyes	President
Freeman School P. T. A.	John P. Culver	President
Oak Street School P. T. A.	Mrs. J. K. Decker	President
Dort School P. T. A.	Mrs. Dan Spencer	President
Kearsley School P. T. A.	Robert McCreedy	President
McKinley School P. T. A.	Charles L. David	President
Doyle School P. T. A.	Mrs. Sam Vejnovich Jr	President

[4569]

Pierce School P. T. A.	Ken Morrish	President
Washington School P. T. A.	Thaddeus S. Pollard	President
Lincoln School P. T. A.	Harley Topham	President
Jefferson School P. T. A.	Mrs. Granville Alley	President
Clark School P. T. A.	Charles Williams	President
Walker School P. T. A.	Henry Kupiec	President
Stevenson School P. T. A.	Mrs. Wm. Nazark	President
Durant School P. T. A.	George B. Smith	President
Civic Park School P. T. A.	M. C. Link	President
Homedale P. T. A.	Mrs. J. E. Shaw	President
Cody School P. T. A.	S. A. Wharram Jr.	President
Longfellow School P. T. A.	Gordon E. Elder	President
Lewis School P. T. A.	Floyd Parry	President
C. I. O. UAW, Region 1 C	Robert A. Carter,	Regional Director
Altrusa Club of Flint	Solveig Lorentzen	President

Board of Education of the School District of the City of Flint	Everett A. Cummings	President
Flint Bakers Club	C. H. McMahan	President

5. That twenty-four of the organizations constituting this committee are Parent Teachers Associations, representing thousands of Flint citizens interested in its school system.

6. That among its members are the School Board of the City of Flint, and the School Board of the County of Genesee.

7. That of the said organizations, the Flint Chamber of Commerce, Retail Merchants Division, Flint Automobile Dealers Association, Flint Junior Chamber of Commerce, Civic Research Council of Flint, and Manufacturers Association of Flint represent hundreds of Flint Business and Industrial organizations.

8. That of the constituent organizations of this committee, the Flint Federation of Labor and the Regional Council of C. I. O. UAW represent upwards of seventy thousand workers in the City of Flint.

9. That the Flint Council of Churches represents forty churches in the City of Flint.

10. That the Interclub Council of Flint, The Flint Kiwanis Club, Flint Shriners Club, Flint Lions Club, Kiwanis Club of West Flint, Flint Business and Professional Women's Club, Rotary Club of Flint and Flint Civitan Club are service clubs representing thousands of Flint business and professional men and women.

[4570]

11. That your deponents also attach to the original hereof, a certified copy of a resolution of the City Commission of the City of Flint unanimously adopted at its meeting of May 24, 1954. Copies of that resolution are attached to the copies hereof and marked Exhibit B.

12. That your deponents have presented the material contained in paragraphs 4 to 11 (both inclusive) of this affidavit to show the unanimity of the citizens of the City of Flint in the opinions expressed by this affidavit in relation to the matter of TV channel 12.

13. That the position universally held and expressed by the Citizens of Flint is, concisely, as follows:

THAT THE COMMISSION WAS ORIGINALLY CORRECT IN ITS DECISION THAT THE CITY OF FLINT IS LARGE ENOUGH AND IMPORTANT ENOUGH TO REQUIRE THE ALLOCATION OF ONE VHF TV CHANNEL. THAT THE DECISION OF THE COMMISSION TO AWARD THAT CHANNEL TO WJR, IN EFFECT, DEPRIVES FLINT OF A VHF TV STATION.

14. That the Committee charged your deponents with the duty to present these opinions and views to the Commission.

15. That your deponents believe that the Commission erred in granting Flint's Channel 12 to WJR in that such grant not only does not best serve the public interest of the People of the City of Flint, but actually is detrimental to such best interest.

16. That your deponents believe that upon a rehearing they would be able to prove that the citizens of, and civic organizations of, the City of Flint universally hold the opinions hereinabove attributed to them.

Further your deponents sayeth not.

/s/ C. S. Harding Mott
/s/ J. Palmer Crawford
/s/ Matthew Davison Jr.
/s/ Arthur E. Summerfield, Jr.

/s/ A. William Bishop
/s/ Durfee L. Day
/s/ James F. Smith

[JURAT dated June 10, 1954]

[4571]

EXHIBIT A [Received June 14, 1954 - FCC]

Federal Communications Commission
New Post Office Building
Washington 25, D. C.

Gentlemen:

We, the undersigned organization, wish to hereby go on record as objecting strenuously to the decision of the Federal Communications Commission, reversing their Examiner and denying a grant to operate a television station on VHF Channel 12 to the Trebit Corporation, owners of Station WFDF, and instead, granting it to WJR, the Goodwill Station, Detroit. We feel that Trebit and WFDF should have been granted the channel as the Examiner proposed.

We feel that this channel had been allocated by the Federal Communications Commission to Flint; that this city, the third largest city in Michigan, and growing rapidly, is entitled to have a VHF television station which would be primarily devoted to the interests of Flint and its immediate area. We feel that the Federal Communications Act makes it mandatory that WJR serve Detroit since that city falls within its Grade A service area as well as Flint, thereby it gives WJR no choice but to serve both the large City of Detoit, with its population of approximately two million, as well as our own City of Flint, with its population of approximately two hundred thousand. Such a diversity of population will not permit WJR to serve Flint as well as WFDF could since WFDF has no obligation to serve Detroit. Because of this situation, the Commission's grant to WJR, in effect, places every Flint civic, public service agency, and business organization in competition with Detroit civic, public service agency, and business organizations for television time on Channel 12.

This feeling is confirmed by our own experience over a period of many years with WJR's radio station which has also covered both Detroit and Flint and on which Flint civic, public service and business organizations have rarely been represented.

We hereby agree to designate as our legally qualified representative in any actions to be taken before the Federal Communications Commission, or any Federal or other courts, Mr. Myron Winegarden, of Flint, Michigan, an attorney, whom we hereby authorize as our representative to speak for us and we instruct him to prepare the necessary statements so that he can most effectively protect the interests of the people of the City of Flint and Genesee County in this matter. The organization which he will represent and which we hereby join will be known as the "Citizens Committee For a VHF Television Station For Flint."

Respectfully submitted,
Organization ______________________
____
Signed by______________________
Date______________________

[4572]

EXHIBIT B

WHEREAS, we, the Commission of the City of Flint, Legislative body thereof, wish to go on record as objecting strenuously to the decision of the Federal Communications Commission reversing their examiner and denying a grant to operate a television station on VHF channel 12 to the Trebit Corporation, owners of station WFDF, and instead granting it to station WJR, the Goodwill Station, Detroit, it being our belief that Trebit and WFDF should have been granted the channel as the examiner proposed, and

WHEREAS, we feel that this channel had been allocated by the Federal Communications Commission to Flint; that this City, the third largest in Michigan and growing rapidly, is entitled to have a VHF television station which would be primarily devoted to the interests of Flint and its immediate area; further, it is our belief that the Federal Communications Act makes it mandatory that WJR serve Detroit since that City falls within its grade A service as well as Flint, thereby giving WJR no choice but to serve the large City of Detroit, with its population of approximately two million, as well as our own City of Flint, with its population of approximately 200,000; and that such a diversity of population will not permit WJR to serve Flint as well as WFDF could since WFDF has no obligation to serve Detroit; and because of this situation, the commission's grant to WJR, in effect, places every Flint civic, public service agency, and business organization in competition with Detroit civic, public service agency and business organizations for television time on channel 12, and

WHEREAS, our feeling as above set forth, is confirmed by our own experience over a period of many years with WJR's radio station which has also covered both Detroit and Flint and on which Flint civic, public service, and business organizations have rarely been represented, and

WHEREAS, WFDF has served the City of Flint for 32 years without censure or citation by the FCC.

THEREFORE, be it RESOLVED that this body go on record as favoring the award of VHF channel 12 to the Trebit Corporation, owner of radio station WFDF, and be it further resolved that a certified copy of this resolution be immediately forwarded to the Federal Communications Commission and that a copy also be furnished the "Citizens Committee for a VHF Television Station For Flint."

On Motion adopted by the following vote:

Yeas: Commissioners Butler, Darby, Delling, Riegle, Taylor, Schultz, Algoe, Cranston and Carter.

Nays: None.

[4573]

[Certificate of Service]

[JURAT dated June 12, 1954]

[4574-4629]

[The reference pages consist of 56 letters identical in text to Exhibit A Attached to Affidavit in Support of Motion to Intervene, etc., which appears herein at R. 4571, Supplemental J.A. page 636-638, with the exceptions of R. 4579 and R. 4596, which follow. Signatories to subject letters are the same organizations and individuals listed on R. 4568-4569, Supplemental J.A. pages 633-635]

[4579]

DAISY E. HOWARD
County Superintendent of Schools
Genesee County 208 Court House
Flint 3, Michigan

June 7, 1954

Citizens Committee for Flint Television
423 1/2 Detroit Street
Flint, Michigan

Gentlemen:

Members of the Genesee County Board of Education were very much in favor of WFDF being granted Channel 12. A Flint station would very definitely consider the needs of children and parents in Genesee County. WFDF had also promised that the schools would have definite assignment of time for television programs. We deem that is important when we consider that there are more than thirty-four thousand children in the county outside of Flint.

Enclosed is a copy of a formal resolution which I have signed after having been authorized by the County Board of Education at their meeting held on May 25.

Very truly yours,

/s/ Daisy E. Howard
Daisy E. Howard, Secretary
Genesee County Board of Education

[4596]

Co-Operative Extension Work
IN
AGRICULTURE AND HOME ECONOMICS
State of Michigan
COURT HOUSE
Flint 3, Michigan

May 27, 1954

Mr. Rosel H. Hyde
Federal Communications Commission
New Post Office Building
Washington 25, D. C.

Dear Sir:

The Agricultural Extension Office of Genesee County is well acquainted with and seeks to serve the farmers in this area;--and in cooperation with the other county extension offices in this area, the same goes for the farmers in the whole Thumb of Michigan. This Thumb area is recognized as one of the major agricultural production areas in the State.

For a number of years past radio station WFDF with our cooperation has instituted programs of agricultural information and news particularly adapted to the needs of these farmers with whom we are so well acquainted. Speaking frankly and with as little bias as possible I would like to state that over this period no Detroit radio station has met these particular agricultural needs with similar programs either in quality or extent. It is to be anticipated that WFDF with the increased advantage of television will continue this high type of agricultural service.

Speaking for the farmers of this area, and I feel that I am in a position to do so, it would be of great disservice to our best agricultural interest to grant this channel 12 to WJR.

Respectfully yours,
/s/ S. H. LaTourette,
S. H. LaTourette,
Associate Agricultural Agent

SHL:gj

[4630]

[This reference page is a certified copy of a Resolution which appears herein as Exhibit B attached to Affidavit in Support of Motion to Intervene, etc., at Supplemental J.A. pages 638-639, R. 4572.]

[4631]

[Received June 14, 1954-FCC]

WINEGARDEN AND BOOTH
Attorneys at Law
401 Citizens Bank Bldg.
Flint 3, Michigan

June 11, 1954

Mr. Frederick W. Ford and
Mr. Stanley B. Cohen
Broadcast Bureau
Federal Communications Commission
New Post Office Building
Washington 25, D. C.

Re: WJR, The Goodwill Station, Inc. Flint, Michigan	Docket No. 10268 File No. BPCT-967
Trebit Corporation Flint, Michigan	Docket No. 10269 File No. BPCT-968
W. S. Butterfield Theatres, Inc. Flint, Michigan	Docket No. 10270 File No. BPCT-953

Motion to intervene, for a rehearing, and in the alternative, for permission to file a brief Amicus Curiae on behalf of the Citizens Committee for a VHF Television Station for Flint, and affidavit in support thereof.

Gentlemen:

Please find enclosed a copy of the above which we herewith serve upon you as attorneys for Broadcast Bureau of FCC.

Very truly yours,

Winegarden and Booth

/s/ Myron Winegarden

Myron Winegarden

MW:dmh

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of	
WJR, THE GOODWILL STATION, INC. Flint, Michigan	DOCKET NO. 10268 File No. BPCT-967
TREBIT CORPORATION Flint, Michigan	DOCKET NO. 10269 File No. BPCT-968
W. S. BUTTERFIELD THEATRES, INC. Flint, Michigan	DOCKET NO. 10270 File No. BPCT-953
For Construction Permits for New Television Stations	

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 17th day of October, 1956;

The Commission having under consideration the opinion of the United States Court of Appeals for the District of Columbia made May 24, 1956 in the case of W. S. Butterfield Theatres, Inc., et al. v. Federal Communications Commission, and the Court's action of July 9, 1956, when it denied the Commission's Petition for Rehearing;

IT APPEARING, That in its opinion the Court of Appeals reversed and remanded this case to the Commission for further proceedings to determine the differences in transmitter site, programming and studio building proposals brought about by WJR's modification of its construction permit and to reconsider the grant to WJR in the light of the differences disclosed;

IT FURTHER APPEARING, That the court stated that one of the questions to be dealt with in the reconsideration is whether WJR's late revelation of its changed situation reflects upon its character and fitness as a licensee;

IT IS ORDERED, That the record herein is reopened and remanded for further hearing before an Examiner to be designated by the Chief Hearing Examiner and for the preparation of a supplemental

Initial Decision in which, in light of the evidence adduced under the issues hereinafter specified, the grant of WJR's application will be reconsidered on a comparative basis with the applications of Trebit and of Butterfield;

[4737]

IT IS FURTHER ORDERED, That the hearing be upon the following issues:

1. To determine the differences between the proposals advanced by WJR, The Goodwill Station, Inc., in its original application and those proposals advanced by it in its application for modification of its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.

2. To determine, in light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee.

IT IS FURTHER ORDERED, in the interest of expediting this proceeding, That the hearing ordered herein shall be held at the offices of the Commission in Washington, D. C. commencing no later than November 16, 1956.

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]

/s/ Mary Jane Morris
Secretary

Released: October 19, 1956

[Received Nov. 8, 1956 -FCC] [4778]

OPPOSITION TO PETITION TO INTERVENE

Comes now WJR, The Goodwill Station, Inc. (hereinafter referred to as WJR), permittee of television station WJRT, Flint, Michigan, by its attorneys, and submits its opposition to the Petition to Intervene in the further hearing of the above-captioned cause, filed October 29, 1956 by Lake Huron Broadcasting Corporation (hereinafter referred to as

Lake Huron). In support of its opposition, WJR states as follows:

I. Introductory

1. This case involves the mutually exclusive applications of WJR, Trebit Corporation (Trebit), and W. S. Butterfield Theatres, Inc. (Butterfield) for Channel 12 at Flint, Michigan. By orders entered July 11 and November 5, 1952, the Commission designated the applications for a consolidated comparative hearing, which was subsequently held before an Examiner of the Commission on and after November 17, 1952. By final decision released May 14, 1954, the Commission granted the application of WJR and denied the applications of Trebit and Butterfield (*WJR, The Goodwill Station, Inc*., 9 R.R. 227). By Memorandum Opinion and Order, released December 6, 1954 (9 R.R. 260u), the Commission denied petitions for reconsideration filed by Trebit and Butterfield and reaffirmed its grant to WJR. By further Memorandum Opinion released April 1, 1955 (11 R.R. 1321) the Commission denied a joint petition filed December 28, 1954 by Trebit and Butterfield. Trebit and Butterfield sought review in the Court of Appeals of the Commission's April 1, 1955 refusal to reopen the comparative hearing record and that Court, on May 24, 1956, held that the Commission's failure to do so constituted an abuse of discretion and remanded the proceeding for further hearing. *W. S. Butterfield Theatres, Inc*. v. *F.C.C.*, 13 R.R. 2175. Pursuant to the mandate of the Court, the Commission on October 19, 1956 ordered that the record in the comparative proceeding be reopened and "remanded for further hearing before an Examiner" to commence on or before November 16, 1956.

2. Lake Huron is owner and operator of television station WKNX-TV at Saginaw, Michigan. Its application for this station was filed August 27, 1952 and granted October 1, 1952. WKNX-TV has been operating pursuant to a Special Temporary Authorization since May 1,

1953. Prior to the present Petition to Intervene, Lake Huron made no attempt to

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intervene in the instant proceeding. It now claims the right of intervention on three grounds: (1) as an existing permittee which would suffer economic injury as a result of the licensing of Channel 12 at Flint; (2) as an applicant for Channel 12 at Flint, by virtue of an application tendered for filing on October 27, 1956;* and (3) finally, as a petitioner for rule-making proceedings to change the allocation of Channel 12 from Flint to the hyphenated communities of Flint-Saginaw-Bay City.**

3. It is respectfully submitted that none of the three grounds on which Lake Huron seeks to intervene in this proceeding is valid, and that its petition must be denied.

II. Lake Huron May Not Intervene at This Stage of This Proceeding as Operator of an Existing Station in the Area

4. The first ground of intervention advanced by Lake Huron stems from its status as a potential competitor with Channel 12 at Flint. This status has been previously recognized by the Commission in a protest proceeding filed pursuant to Section 309(c) of the Act (WJR, The Goodwill Station, Inc., 12 R.R. 440, 444). Lake Huron relies, as grounds for its intervention herein, on the recent decision of the Court of Appeals in Elm City Broadcasting Company v. U. S. (13 R.R. 2199) and the Commission's above-noted recognition of its standing to file a timely protest to the

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* Lake Huron's application for Channel 12 was accompanied by a letter from its attorney purporting to show that the application is consistent with the Commission's Rules and Regulations or in the alternative requesting a waiver of any Rules with which the Commission may deem it inconsistent. WJR is today filing a response to this letter, a copy of which is attached hereto.

** Lake Huron's rule-making proposal was filed August 30, 1956 and opposed by WJR September 13, 1956. It is now pending before the Commission.

Commission's April 14, 1955 grant of WJR's December 16, 1954 modification application.

5. Neither the Elm City case nor the Commission's previous recognition of Lake Huron's standing to protest under Section 309(c) in another proceeding are dispositive of its right to intervene at this time in the instant comparative proceeding. Even for parties in interest, the intervention must be timely requested. Elm City v. U. S., supra. Here there can be no question but that Lake Huron's petition comes four years too late.

6. As noted above, Lake Huron's application for a television station at Saginaw was granted October 1, 1952, approximately six weeks before the hearing in this comparative proceeding commenced. It could have filed a petition to intervene at any time up until ten days prior to the commencement of the hearing on November 17, 1952, but failed to do so. Lake Huron attempts to justify this failure by a wholly disingenuous argument to the effect that WJR's original proposal was for a transmitter site south rather than northwest of Flint and hence did not pose as serious a competitive threat to Lake Huron's operation at Saginaw as it did after the filing of the modification application. This argument overlooks the fact that Lake Huron's station was threatened from the outset of this hearing with additional competition comparable to that which will be provided by WJRT. This is so because the application of Trebit, which was designated

for hearing on July 11, 1952, specified a transmitter site north of Flint from which a Grade A signal would encompass all of Saginaw and even Bay City, Michigan. Thus, Lake Huron could have filed a petition to intervene as provided by Section 309(b) of the Communications Act not less than ten days prior to November 17, 1952 and its right to participate as a party in interest would have been identical with the right now asserted by it four years later. In view of its failure to file a timely petition to intervene in 1952, its petition to do so now must be denied.

7. Moreover, wholly independent of the timeliness requirement of Section 309(b) of the Communications Act (a statutory requirement which cannot be waived), the present advanced posture of this proceeding is such that the Commission has no authority to add new parties such as Lake Huron to the limited further hearing about to be held. Section 402(h) of the Communications Act expressly limits the Commission's authority, in giving effect to the mandate of the Court of Appeals, to the original record from which the appeal was taken. Without an express authorization from the Court of Appeals, the Commission is without power to add new parties to this proceeding at this time. It is true, of course, as Lake Huron alleges, that the Commission has continuing jurisdiction over this proceeding; but this jurisdiction is limited to the terms of the mandate from the Court of Appeals, and could not be enlarged by the Commission in the manner requested by Lake Huron.

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8. In addition to the fact that the requested intervention is barred by Sections 309(b) and 402(h) of the Communications Act, no public interest considerations can be found to favor the intervention of Lake Huron. On the contrary, the equities as well as the law stand in the way of the requested intervention. Lake Huron has availed itself to the full of its rights under Section 309(c) of the Act in order to advance its contentions that a grant of the WJR modification application would not be in the public interest. Pursuant to Lake Huron's protest, a lengthy hearing has been held and an Initial Decision rendered (Docket No. 11412). The precise matters which Lake Huron would attempt to raise if allowed to intervene in this proceeding are now before the Commission for final decision in the protest case. With its rights thus fully protected, there is no conceivable basis (and Lake Huron alleges none) for allowing it to cover the same ground once again in this proceeding.

III. Lake Huron Is Not Entitled To Participate In This Proceeding as a New Applicant

9. The second ground of attempted intervention advanced by Lake Huron is likewise entirely unjustified. In contending that it is entitled to participation as a new applicant in this proceeding on remand from the Court of Appeals, Lake Huron ignores the express provisions of the Communications Act, recent decisions by this Commission, and pertinent Court cases.

10. It is clear at the outset that Section 402(h) of the Communications Act, referred to above, is dispositive of Lake Huron's claim

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to comparative consideration at this stage of the proceeding. Section 402(h), limiting the Commission's consideration on remand in comparative cases to the record and the parties originally before it in the absence of directions otherwise from the Court, was expressly designed to overrule the doctrine of the Pottsville case (309 U.S. 134) and to encourage finality in comparative cases, to the salutory end that needed broadcast services might not be delayed interminably by new applications filed following successful litigation attacking errors of law in previously held and completed administrative proceedings.

11. Even if the Commission's authority in this case were not circumscribed by the mandate of the reviewing Court, the Commission's normal licensing and adjudicatory procedures would bar comparative consideration at this late date of the new application which has been tendered by Lake Huron. At the very time when WJR, Trebit and Butterfield committed themselves to the hazards and expenses of a lengthy comparative hearing for Channel 12 in 1952, Lake Huron was preparing its own application for the uncontested frequency which it promptly obtained and on which it is now profitably operating. The Commission's Rules, then and now, have been designed, pursuant to the suggestion of the Supreme Court in Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327, to fulfill "the very important function of providing for the

proper dispatch of the Commission's business by preventing comparative hearings from being disrupted

by the insertion of applications filed during the course of the hearing" Telecasting, Inc., 12 R.R. 876. In the recent case just cited, the Commission denied by Memorandum Opinion and Order an application by an existing UHF station at Pittsburgh to intervene and obtain comparative consideration in a further hearing held by the Commission to investigate certain aspects of a merger agreement between two competing applicants for Channel 11 at Pittsburgh. The identical arguments advanced here by Lake Huron were there made by the UHF station in question and rejected by the Commission. Thus, the Commission's decision in that case would dispose of the second of Lake Huron's three alleged grounds of intervention, even if its participation as a party applicant were not independently foreclosed by Section 402(h) of the Communications Act.

12. Nor is Lake Huron entitled to any preliminary or "threshold" hearing on its request for a waiver of the Commission's processing regulations, as its petition appears to suggest (p. 10). The Supreme Court of the United States, in U. S. v. Storer, decided May 21, 1956 subsequent to the Commission's opinion in Telecasting, Inc., supra, unequivocally upheld the Commission's right to reject applications in obvious non-conformity with its Rules even though they are accompanied by perfunctory requests for waiver, where the Commission's examination of the application and the waiver request does not "set out adequate reasons why the Rules should be waived or amended" U.S. v. Storer, 13 R.R. 2161, 2170. No

adequate reasons have been or could be advanced by Lake Huron for its failure to make timely application for Channel 12 at Flint in the first instance rather than waiting until the tag end of a lengthy and involved administrative proceeding.

IV. Finally, Lake Huron Cannot Intervene in This Proceeding Merely Because of its Pending Rule-Making Petition To Reallocate Channel 12

13. As a final, and desperate, ground for its requested intervention, Lake Huron contends that its interests in its pending rule-making proceeding to reallocate Channel 12 from Flint are such as to confer standing upon it to intervene in this adjudicatory licensing procedure. It is scarcely believable that Lake Huron could see fit to advance such a contention in view of the Commission's recent and repeated actions refusing to allow precisely this kind of mingling of rule-making with adjudicatory matters, and the action of the Court of Appeals upholding its decisions not to allow similar interventions in comparative proceedings by parties such as Lake Huron. In the so-called Coastal Bend cases, recently decided by the Court of Appeals (13 R.R. 2189), the Commission had been asked by interested UHF stations for leave to intervene in comparative licensing proceedings looking toward the grant and initiation of new VHF channels in the areas served by the UHF petitioners, on the ground that grant of the adjudicatory proceedings would prejudice pending "deintermixture" rule-making petitions. The Commission consistently refused to allow the

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requested interventions, noting that, as in this case, they were untimely and also that they constituted an improper attempt to confuse matters essentially legislative in character with the comparative questions involved in the adjudicatory comparative hearings.

14. The Coastal Bend decision applies with equal force here. Untimely intervention in this proceeding by Lake Huron, for the sole purpose of arguing the merits of its rule-making proposal requesting the deletion of Channel 12 from Flint, would confuse and delay the resolution of the comparative questions at issue in this proceeding, even if the Commission had authority to authorize such intervention on remand from the Court of Appeals. Lake Huron's asserted "right" to request the

removal of Channel 12 from Flint can be in no way prejudiced by decision in this case. The Commission always has authority to reallocate existing broadcast frequencies, subject to the procedures specified in the Communications and Administrative Procedure Acts, where, as in this case, the frequencies have actually been awarded to licensees or permittees. By requesting intervention herein on the basis of its rulemaking petition, Lake Huron merely seeks a second, and inappropriate, forum in which to argue its proposal. Such an abuse of the Commission's orderly processes should not be countenanced.

V. Conclusion

15. For the foregoing reasons, none of the grounds alleged by Lake Huron constitutes a valid basis for its intervention in this proceeding at this late date. Accordingly, its petition should be denied.

Respectfully submitted,

WJR, THE GOODWILL STATION, INC.

By /s/ Reed T. Rollo

/s/ R. Russell Eagan

/s/ Aloysius B. McCabe

of

Kirkland, Fleming, Green, Martin & Ellis
800 World Center Building
Washington 6, D. C.

November 7, 1956

Its Attorneys

[4789]

(COPY)

November 7, 1956

Federal Communications Commission
Washington 25, D. C.

Re: Application of Lake Huron Broadcasting Corporation for Channel 12 at Flint, Michigan

Gentlemen:

On October 27, 1956, Lake Huron Broadcasting Corporation, permittee of television station WKNX-TV, Saginaw, Michigan, tendered for filing an application for a construction permit for a new commercial television station on Channel 12 at Flint, Michigan. The application was accompanied by a letter from Lake Huron's attorney purporting to show that its filing at this time is consistent with the Commission's Rules, and, in the alternative, requesting a waiver of any rules with which it might be deemed inconsistent.

It is assumed that the Commission will dismiss this application without hearing. In the event that it should not do so, WJR, The Goodwill Station, Inc., permittee of television station WJRT, hereby requests an opportunity, prior to any formal consideration by the Commission of the merits of the Lake Huron application, to submit in writing the legal basis on which it must be dismissed. The following comments are not intended as a full exposition of the matter, since WJR assumes that none is necessary. Instead, they are designed merely to illuminate the several independent legal objections to Commission consideration of the application.

In the first place, WJR respectfully directs the Commission's attention to the fact that Section 402(h) of the Communications Act effectively precludes it from considering at this time a new application for Channel 12 at Flint. As the Commission knows, the further hearing ordered on the mutually exclusive applications of WJR and two other applicants for this channel (Dockets 10268, *et al*) is limited, by the cited section of the Act, to the record and the parties before the Commission at time of its original decision--except for such additional facts as must be considered in executing the mandate of the Court.

Even if the Commission had *authority* to consider the tendered application on its merits, however, its own rules would require that it be

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dismissed without hearing. Section 1.724(b) of the Commission's Rules provides that applications for new stations will be entitled to comparative consideration with pending mutually exclusive applications only if filed within ten days after public notice has been given by the Commission of its order designating the prior applications for hearing. In this case, such notice was given by the Commission more than four years ago, on July 11, 1952, at a time when Lake Huron was preparing to file its own application for the facilities now authorized to it. Thus, the present application comes four years too late and is in obvious non-compliance with the cited rule. Accordingly, it should be dismissed pursuant to Rule 1.724(b).

It is assumed that the Commission will not be misled by Lake Huron's untenable argument that the pending applications of WJR and its two opponents have become in effect new applications since they were considered by the Commission prior to the Court proceedings ordering the further hearing. Such a contention was made to the Commission, in a very similar situation, and emphatically rejected in the case of Telecasting, Inc., 12 R.R. 876 (1955).

Moreover, since the applicant is clearly not entitled to a comparative hearing, and since the letter accompanying the application totally fails to set out adequate reasons which would justify a waiver of the Commission's processing regulations if the Commission had authority to grant such a waiver, it is also clear that no preliminary or "threshold" hearing of any kind is required by Rule 1.361(c), by Section 309 or by any other rule or statutory provision. The Commission's authority to dismiss applications clearly inconsistent with its Rules without hearing of any kind has recently been recognized and upheld by the Supreme Court. U. S. v. Storer Broadcasting Corp., 13 R.R. 2161; and see Telecasting, Inc., supra.

Finally, WJR notes the applicant's representation that it has shown itself by its UHF operation "to be eminently qualified to be a licensee" before this Commission. In this connection, WJR calls the Commission's attention to the fact that at the present time Lake Huron is operator of an existing station at Saginaw; is attempting to obtain a VHF frequency at Flint and representing to the Commission that if it is successful in doing so it will abandon its Saginaw station and surrender its construction permit; and, finally, that it has pending before the Com-

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mission a rule-making proposal designed to remove from Flint the very channel for which its presently tendered application is designed. Lake Huron applied

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for and obtained its present authorization with the customary representations to the Commission that it seriously intended to serve the city of Saginaw. Its operation at present is profitable. In view of these facts, WJR believes that the Commission may wish to consider the effect of the presently tendered application on Lake Huron's fitness as a licensee and the serious question of trafficking in television frequencies which may be involved.

Respectfully submitted,
WJR, THE GOODWILL STATION, INC.
By______________________________
Reed T. Rollo

____
R. Russell Eagan

____
Aloysius B. McCabe
of
Kirkland, Fleming, Green, Martin & Ellis
Its Attorneys

[4792]

[Certificate of Service]

[4793]

[Received Nov. 8 - F.C.C.]

OPPOSITION TO PETITION TO INTERVENE

On October 29, 1956, Lake Huron Broadcasting Corporation (hereinafter "Petitioner") permittee of television broadcast Station WKNX-TV, and licensee of standard broadcast Station WKNX, Saginaw, Michigan, filed a Petition to Intervene in the above-captioned proceeding.

Petitioner's standing as a "party in interest" within the meaning of Section 309(b) of the Communications Act of 1934, as amended, is predicated upon three grounds, i.e., (1) as the operator of Station WKNX-TV, Channel 57, Saginaw, Michigan (2) as an applicant for Channel 12, Flint, Michigan,[1] and (3) as a petitioner for rule making proceedings to change the allocation of Channel 12 from Flint, Michigan to Flint-Saginaw-Bay City, Michigan. For the reasons set forth herein, the Chief, Broadcast Bureau submits that Petitioner is not entitled to intervene and respectfully opposes the subject petition.

1. A brief statement as to the history of the above-captioned proceeding and the circumstances giving rise to the filing of the subject petition might be helpful. The above-captioned applicants each filed

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[1] This application was tendered for filing on October 29, 1956. To date the application has not been accepted for filing.

mutually exclusive applications requesting a construction permit for a television broadcast station to operate on Channel 12, allocated to Flint, Michigan. After a somewhat lengthy comparative hearing, the issuance of an Initial Decision and Exceptions thereto the Commission on May 14, 1954, released its Final Decision (9RR 227) wherein it concluded (Commissioners Webster and Lee not participating; Commissioner Hennock dissenting) that the public interest would best be served by a grant of the application of WJR, The Goodwill Station, Inc. (hereinafter "WJR"). It accordingly granted the WJR application and denied the applications of Trebit Corporation (hereinafter "Trebit") and W. S. Butterfield Theatres, Inc. (hereinafter "Butterfield"). Butterfield and Trebit filed petitions for rehearing on June 11 and 14, 1956, respectively, which were opposed by WJR; Trebit also filed a reply to the WJR opposition. The Commission denied the petitions for rehearing in a Memorandum Opinion and Order of December 2, 1954, released December 6, 1954.

2. On December 28, 1954, Trebit and Butterfield filed a Joint

Petition For a Stay, Rehearing and Reopening of the Record. The primary basis of this pleading was that WJR, in filing an application on December 16, 1954, for modification of its outstanding construction permit had so changed its original proposals that a further hearing should be held.[2] WJR opposed this pleading and the Commission on March 31, 1955, adopted a Memorandum Opinion and Order (11 RR 1321), released April 1, 1955, in which it denied the joint petition.[3] Trebit and Butterfield appealed the denial of the joint petition and the United States Court of Appeals for the District of Columbia reversed and remanded the case to the Commission for further proceedings "on the question of differences between WJR's original and modified proposals" and to "reconsider its grant to WJR in the light of the differences disclosed." (*W. S. Butterfield Theatres, Inc., et al.* v. *F.C.C.*, May 24, 1956; 13 RR 2175). The Commission on October 19, 1956, released its order reopening the record and remanding the proceeding for further hearing before an Examiner for the preparation of a supplemental Initial Decision in which, in light of the evidence adduced under the issues specified, the grant of WJR's application is to be reconsidered on a comparative basis with the applications of Trebit and Butterfield. The hearing is presently scheduled to commence on November 16, 1956.

3. Petitioner's argument in support of its statutory right to intervene is premised upon the erroneous contention that the WJR application for modification of permit (BMPCT-2689) is the subject of the further

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[2] Petitioners contended that newly discovered material altered the position of WJR in such an extent that each of the hearing issues was "substantially affected, rendering the Commission's previous conclusions thereon meaningless and hollow." Trebit and Butterfield on December 8 and 10, 1954, respectively had filed petitions for reargument, which petitions were denied in the Commission's Memorandum Opinion and Order of March 31, 1955 (11RR 1321)

hearing ordered by the Commission on October 19, 1956 (see page 5 of "Petition To Intervene"). It must be stated at the outset that such is not the case and that this contention cannot be the basis for arguing that the instant petition is filed timely.

4. Addressing ourselves to the first point advanced by Petitioner in support of its petition, namely, that as an operator of Station WKNX-TV,

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3/ The WJR application for modification of its construction permit (BMPCT-2689) was granted on April 14, 1955. However, on June 8, 1955, the Commission adopted an order, released June 10, 1955, granting protests addressed to the grant. An Initial Decision was released January 17, 1956, after hearing, reaffirming and reinstating the grant. Final Decision has not to date been issued. (Docket 11412)

Saginaw, it is entitled to intervention, we submit that Petitioner's request is not timely filed. The hearing in this case commenced in November 1952 and it is not until this late date that Petitioner has sought to participate as a party-intervenor. As stated supra, the application for modification of construction permit has not been designated for hearing in this comparative hearing and hence there is no basis on which Petitioner is entitled to intervene in this hearing which commenced in 1952. Petitioner's position with respect to the question of timeliness is stated in page 11 of the Petition - "If, as Petitioner submits, the modification application of WJR is regarded as a new application, the "Petition To Intervene" is filed within the time prescribed in Section 309(b) for the filing of such petition." We repeat that the modification application has not been designated for hearing and is not before the Commission as a new application. Petitioner's position is difficult to understand for it has clearly availed itself of the protest provisions of Section 309(c) with respect to the modification application. There has been a full hearing on the Protest to the grand of the modification application and the parties are awaiting a Final Decision (see note 2, page 2, supra). The

Commission has not set aside its grand of the modification application to date and it is erroneous to argue that the application is a part of the instant proceeding.

5. The filing of an application for Channel 12 on October 29, 1956 does not bestow upon Petitioner any rights to participate as an intervenor.

The McClatchy case (McClatchy Broadcasting Company v. F.C.C., U.S. App. D.C. No. 12470, 12637, October 18, 1956) does not, as urged by Petitioner, confer any right to intervene, for Petitioner is not an applicant for Channel 12 directly affected by the resolution of the question present in this proceeding. If and when Petitioner's application is accepted for filing - and not until then - will the Commission be presented with the question of the right to intervene based on Petitioner's status as an applicant.[4/]

6. Petitioner's contention that it is a "party in interest" within the meaning of Section 309(b) because of its pending petition for rule making is wholly without merit. The Commission has held on numerous occasions, and has been sustained by the Court of Appeals, that rule making matters, which are of general applicability, are improper for consideration in adjudicatory proceedings (Evansville Television, Inc., 13 RR 369, 373; Gulf Coast Broadcasting Co., 13 RR 223; Radio Wisconsin, Inc., 13 RR 349; and Coastal Bend Television Co. v. F.C.C., 234 F2d 686). We urge the fact that Petitioner has instituted rule making proceedings does not confer upon it any rights to intervene in the instant proceeding.

7. Lastly, Petitioner urges, in an obvious attempt to qualify under Section 1.388 of the Rules with respect to intervention, that its participation, in the hearing will "contribute affirmatively" to the development of essential data and cites its participation in the protest proceedings with respect to the modification application (Docket No. 11412). The reasons

set forth above

4/ Whether Petitioner's application, in the event of acceptance by the Commission, is entitled to comparative consideration need not be discussed herein.

[4798]

are equally applicable with respect to intervention under Section 1.388. Additionally Petitioner has failed to state the nature of the facts it proposes to develop at the hearing or how it would help protect the public interest in its role of intervenor.

For the foregoing reasons it is respectfully submitted that the instant "Petitioner to Intervene" should be denied.

Respectfully submitted,

/s/ Edward F. Kenehan
Chief, Broadcast Bureau

/s/ Thomas B. Fitzpatrick
Attorney
Federal Communications Commission

November 7, 1956

[4799]

[Certificate of Service]

[4898]

[Received Nov. 23, 1956 - F.C.C.]

OPPOSITION TO "JOINT PETITION FOR VACATION OF THE COMMISSION'S ORDER OF OCTOBER 17, 1956, AND FOR OTHER RELIEF AND REQUEST FOR ORAL ARGUMENT"

Comes now WJR, The Goodwill Station, Inc. (WJR), permittee of television station WJRT, Flint, Michigan, by its attorneys, and submits its opposition to the joint petition, filed November 2, 1956 by Trebit Corporation (Trebit) and W. S. Butterfield Theatres, Inc. (Butterfield) requesting that the Commission either withdraw its outstanding order

Commission has not set aside its grand of the modification application to date and it is erroneous to argue that the application is a part of the instant proceeding.

5. The filing of an application for Channel 12 on October 29, 1956 does not bestow upon Petitioner any rights to participate as an intervenor.

The McClatchy case (McClatchy Broadcasting Company v. F.C.C., U.S. App. D.C. No. 12470, 12637, October 18, 1956) does not, as urged by Petitioner, confer any right to intervene, for Petitioner is not an applicant for Channel 12 directly affected by the resolution of the question present in this proceeding. If and when Petitioner's application is accepted for filing - and not until then - will the Commission be presented with the question of the right to intervene based on Petitioner's status as an applicant.[4]

6. Petitioner's contention that it is a "party in interest" within the meaning of Section 309(b) because of its pending petition for rule making is wholly without merit. The Commission has held on numerous occasions, and has been sustained by the Court of Appeals, that rule making matters, which are of general applicability, are improper for consideration in adjudicatory proceedings (Evansville Television, Inc., 13 RR 369, 373; Gulf Coast Broadcasting Co., 13 RR 223; Radio Wisconsin, Inc., 13 RR 349; and Coastal Bend Television Co. v. F.C.C., 234 F2d 686). We urge the fact that Petitioner has instituted rule making proceedings does not confer upon it any rights to intervene in the instant proceeding.

7. Lastly, Petitioner urges, in an obvious attempt to qualify under Section 1.388 of the Rules with respect to intervention, that its participation, in the hearing will "contribute affirmatively" to the development of essential data and cites its participation in the protest proceedings with respect to the modification application (Docket No. 11412). The reasons

set forth above

4/ Whether Petitioner's application, in the event of acceptance by the Commission, is entitled to comparative consideration need not be discussed herein.

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are equally applicable with respect to intervention under Section 1.388. Additionally Petitioner has failed to state the nature of the facts it proposes to develop at the hearing or how it would help protect the public interest in its role of intervenor.

For the foregoing reasons it is respectfully submitted that the instant "Petitioner to Intervene" should be denied.

Respectfully submitted,

/s/ Edward F. Kenehan
Chief, Broadcast Bureau

/s/ Thomas B. Fitzpatrick
Attorney
Federal Communications Commission

November 7, 1956

[4799]

[Certificate of Service]

[4898]

[Received Nov. 23, 1956 - F.C.C.]

OPPOSITION TO "JOINT PETITION FOR VACATION OF THE COMMISSION'S ORDER OF OCTOBER 17, 1956, AND FOR OTHER RELIEF AND REQUEST FOR ORAL ARGUMENT"

Comes now WJR, The Goodwill Station, Inc. (WJR), permittee of television station WJRT, Flint, Michigan, by its attorneys, and submits its opposition to the joint petition, filed November 2, 1956 by Trebit Corporation (Trebit) and W. S. Butterfield Theatres, Inc. (Butterfield) requesting that the Commission either withdraw its outstanding order designating the further hearing to be held in this case on remand from the Court of Appeals, or modify that order to accord with stated contentions of Trebit and Butterfield concerning the present status of this case. In support of this opposition WJR states as follows:

[4899]

Preliminary Statement

In order fully to appreciate the import of petitioners' joint request it is necessary to place their petition in its proper chronological setting. On May 24, 1956, the Court of Appeals handed down its decision in W. S. Butterfield Theatres, Inc. v. FCC, 13 R.R. 2175, setting aside, as an abuse of the discretion conferred on the Commission by Section 405 of the Communications Act, its failure to give evidentiary consideration on a hearing record to some of the allegations contained in a petition for rehearing filed by Trebit and Butterfield on December 28, 1954 and denied by the Commission in a Memorandum Opinion and Order released April 1, 1955. Applications to the Court for rehearing by WJR and the Commission were denied on July 3 and July 9, 1956, respectively. More than three months later, by order released October 19, 1956, the Commission, pursuant to the Court's opinion, directed that the record be reopened and remanded to a Hearing Examiner for further proceedings on two specified issues, to commence not later than November 16, 1956.*

The joint petition thus filed months after the Court's mandate to the Commission and only days before the further proceeding scheduled pursuant to that mandate is a hodgepodge of highly argumentative and conclusionary allegations, all of which have previously been presented not only to the Commission but to the Court by Trebit and Butterfield in earlier attempts to attack the Commission's grants to WJR. Briefly stated, petitioners appear to make two general arguments, both of which relate to the Commission's alleged failure to comply with the mandate of the Court of Appeals in its order of October 17, 1956. The first of the contentions is to the effect that WJR is no longer entitled to participate as a comparative applicant in this proceeding because, on the one hand, it has "abandoned" its original application and, on the other, its modification application is not properly entitled to consideration by the Commission in the rehearing proceeding. The petitioners' second general contention, which is apparently offered alternatively, appears to be that, if the further hearing on the three mutually exclusive applications is held, it should be held upon issues framed by Trebit and Butterfield rather than by the Commission, and in accordance with the prayers for relief contained in their joint petition of December 28, 1954 rather than the opinion and mandate of the reviewing Court.

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* By order of November 14, 1956 the Commission granted a petition for continuance of the further hearing by Butterfield and Trebit to the limited extent of continuing the hearing date from November 16, 1956 to December 17, 1956, and denied the petition in all other respects.

Neither of the two general contentions withstands analysis. Moreover, any favorable action on the joint petition which the Commission might otherwise be disposed to give is effectively precluded by the terms of the Court decision which must govern the nature and scope of the further proceedings on remand in this case.

Argument

I. The Commission's Order Scheduling Further Hearings in This Case Is in Complete and Literal Compliance with the Terms of the Remand

The first, and central, question posed by the joint petition is

whether or not the Commission, in ordering further hearings on two stated issues in this proceeding, has complied with the mandate of the Court of Appeals. Under familiar principles, the Commission's conduct of the proceedings on remand must be in conformity with that mandate. This was so even before the recent enactment of Section 402(h) to the Communications Act, which was designed "to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal . . ." Senate Report on 1952 Amendments, 1 R.R. 10:285.

In its October 17 order, the Commission directed that the further proceedings in this case be held upon the following two issues:

> "1. To determine the differences between the proposals advanced by WJR, The Goodwill Station, Inc. in its original application and those proposals advanced by it in its application for modification of its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.
>
> "2. To determine, in light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee."

A comparison of the above issues with the opinion of the Court of Appeals can leave no doubt that the Commission's order of designation is in meticulous compliance with the terms of the Court's mandate. The Court held that the Commission should have accorded an evidentiary hearing to allegations in the December 28, 1954 joint petition pertinent to three areas of comparison which the Court deemed "significant" enough to require disposition on a hearing record rather than merely on

the written pleadings of the parties. These three areas "related to transmitter site, programming, and studio building" Butterfield v. FCC, supra, at p. 2180. As to these three areas of comparison, the Court ordered the Commission to "conduct further hearings on the question of differences between WJR's original and modified proposals and . . . reconsider its grant to WJR in the light of the differences thus disclosed." It is apparent that the first issue set for hearing by the Commission is in exact conformity with this instruction.

The only other question raised by the Court's mandate is embodied in the second issue set for hearing by the Commission. That question arose as a result of allegations that WJR, in not filing its modification application until after Commission denial of the requests for reconsideration of its original grant, acted in such a manner as to reflect adversely upon its character and fitness as a licensee. The Court did not express any opinion as to the merits of this allegation, but held that it was of sufficient importance so that the Commission should have inquired into it in an evidentiary hearing, and consequently made it "one of the questions to be dealt with by the Commission upon a consideration of all the evidence in the reopened hearing we order herewith" Butterfield v. FCC, supra at 2178-9. The second issue specified in the Commission's October 17, 1956 order is addressed to this part of the Court's opinion.

Nowhere in the joint petition have Trebit and Butterfield indicated the precise respect in which the Commission's order does not

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comply with the terms of the Court decision. The only specific reference which might be construed as such an allegation is petitioners' argument (p. 2) that the Commission has failed to carry out an alleged "commitment" contained in its brief to the effect that, if the Court reversed its order denying the joint petition of December 28, 1954, the Commission would vacate both the original construction permit granted to WJR and the modification thereof before undertaking a comparative reconsideration on remand. The Commission did make such a representation in its brief, but the representation was confined, as the quoted language in the joint petition shows, to the assumption that such action would be "in accordance with the Court's instructions." The fact is that the Court's instructions not only did not direct the Commission to vacate its two grants, but specifically denied a petition by Trebit and Butterfield asking the Court to order the Commission to vacate its grant of WJR's modification application. Thus the Court's decision clearly implies that there is no necessity on the further proceedings herein to vacate WJR's outstanding construction permit or modification thereof. In the absence of such instructions from the Court, it would be clearly improper for the Commission to take such action.

Except for the foregoing wholly unmeritorious contention, the joint petition does not specify any particular in which the Commission's order on remand is not in full compliance with the Court's decision, which must govern these further proceedings. Rather, it appears to be the intent of petitioners not so much to change the terms of the order as to rewrite

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it in conclusionary language favorable to their ultimate position that the application of WJR should be denied. For instance, the prayer for relief in the joint petition contains a general reference to the need to modify the Commission's hearing order so as "to conform to petitioners' December 28 1954 joint petition." Reference to this petition, however, discloses that it contained no specifically framed hearing issues, but only an argumentative and conclusionary request that the Commission in its rehearing order inquire "among other pertinent matters [into] all relevant and material facts concerning the abandonment by WJR . . . of its proposal . . . and the good faith and conduct of WJR or its principals . . .." For the Commission to incorporate such language into a hearing order would be to prejudge the outcome conclusively in favor of petitioners.

II. Petitioners' Attack on WJR's Comparative Status is Wholly Without Merit

The other main thesis of the joint petition stems from arguments previously advanced on numerous occasions by Trebit and Butterfield to the effect that WJR's alleged "abandonment" of its original application has the legal effect of removing it from further comparative consideration. This argument is based on several equally fallacious grounds. One is that the grant of WJR's modification application of December 16, 1954 was in some way "prohibited" by the Commission's Rules governing the processing and amendment of applications (Rules 1.365, 1.387, 1.724).

This identical

[4905]

argument was made by Trebit and Butterfield to the Court, and was apparently rejected, sub silentio, in the Court's decision refusing to order rescission of the Commission's grant of the modification application. It is clear, in any event, that the cited sections of the Commission's Rules have no applicability whatsoever to the WJR modification application, since they apply only to factual situations arising prior to final grant of an application by the Commission.

Another, and equally fallacious argument advanced by Trebit and Butterfield is that the WJR modification application, being filed after grant, is "totally without meaning or standing in the comparative proceeding here involved." This contention, however, plainly misconstrues the Court's decision. In one sense, it is true that the Commission on these further proceedings will not give direct comparative consideration to WJR's modified proposal as against Butterfield's and Trebit's original proposals. The Court's decision does not require this. Rather, the comparison on rehearing must be a two-fold one. First, the Commission is required to compare WJR's original proposal with the specified changes contained in its modification application; only after such a comparison has been made must the Commission then reappraise WJR's original application, as modified in the areas enumerated by the Court, with the original proposals of the other two applicants. Although the joint petitioners appear to experience considerable difficulty in understanding this process, it is in fact a very simple one, since it merely requires an evaluation on the

[4906]

record of the effect which subsequent events may or may not have had on the Commission's original comparative consideration.

The joint petitioners' companion argument that the changes in WJR's original proposal have been so significant as to amount to an "abandonment" of that proposal and to preclude further comparative consideration of WJR with Butterfield and Trebit is untenable for at least two reasons: First, to adopt the argument the Commission would have to prejudge the very matters set for hearing. Second, and perhaps most convincing, the language of the Court decision itself precludes adoption by the Commission of the procedure suggested by the joint petitioners. In discussing the Commission's refusal to reopen the record in response to the joint petition of December 28, 1954, the Court was careful to take into account the possible results of such a rehearing, and recognized that such a hearing could end either in "affirmance of WJR's [original] grant" or in a finding that WJR's application would have to be denied in view of the changes reflected in the modification proposal. Butterfield v. FCC, supra at p. 2179. Thus, the Court itself clearly recognized that the further hearing it ordered might result in the Commission's reaching the same conclusion it reached in its Memorandum Opinion and Order of April 1, 1955, namely, that the changes embodied in WJR's modification proposal, and the circumstances surrounding its filing, had no significant effect on the Commission's original determination to prefer WJR to Trebit and Butterfield.

In this very connection, at least one of the joint petitioners--Butterfield--assumed a position before the Court basically inconsistent with that now taken in the joint petition. In its response, filed in the Court of Appeals June 18, 1956, to the petitions for rehearing by WJR and the Commission, Butterfield explicitly recognized that in the further proceedings in this case WJR would be given comparative consideration with the other two applicants. In its response, Butterfield interpreted the Court's opinion to require "further hearings of a comparative nature" before the agency, and asked that the Court revise its opinion so as to allow consideration of other changes in the applicant's proposals, not enumerated in the opinion, which might be "appropriate to the comparative determination of which party would best serve the public interest." (Emphasis supplied)

III. It Would Be Plainly Contrary to the Public Interest to Stay the Remand Proceedings Pending Consideration of the Joint Petition

As a part of their amorphous "prayer for relief," Trebit and Butterfield request that the Commission stay the further hearing pending disposition of their joint petition. In view of the chronology recited at the outset of this opposition, WJR submits that any such stay would be arbitrarily contrary to the public interest and should not be imposed. The further proceedings now about to be held were requested by Butterfield and Trebit almost two years ago. Almost six months have already elapsed since the

[4908]

decision of the Court of Appeals remanding the case to the Commission. During all of this time, Flint has been without television service. The joint petitioners could easily have suggested issues to be framed on remand at an early date and, indeed, should have done so promptly after the Court's decision if such was their intention. Rather, they have waited until the eleventh hour and now seek a still further stay of the protracted proceeding. WJR is fully prepared to comply with the present hearing schedule, and submits that the same requirement should be imposed on Trebit and Butterfield.

Similarly, there would appear to be no occasion for the Commission's scheduling oral argument on the joint petition as requested, in view of its obvious lack of merit and the pressing need for a prompt compliance with the mandate of the Court. If oral argument should be deemed necessary, however, WJR reserves the right to participate therein.

WHEREFORE, the premises considered, it is respectfully submitted that the joint petition of Trebit and Butterfield should be denied, and that the further hearing ordered by the Commission October 17, 1956 should go forward at the earliest possible date.

Respectfully submitted,

WJR, THE GOODWILL STATION INC.

By /s/ Reed T. Rollo
/s/ R. Russell Eagan
Aloysius B. McCabe

* * *

Its Attorneys

November 21, 1956
[Certificate of Service]

[4909]

[4951]

[Received Dec. 18, 1956-FCC]

PETITION TO VACATE MODIFICATION OF CONSTRUCTION PERMIT AND FOR OTHER RELIEF

Come now W. S. Butterfield Theatres, Inc. and Trebit Corporation and request the Commission vacate and set aside its order of April 14, 1955, granting WJR a modification of construction permit. In support whereof, it is shown:

1. The Commission, by order released December 17, 1956, construed the further hearing scheduled in the above-entitled matters as involving in part a comparative consideration of WJR's application for modification of construction permit and Petitioners' applications for construction permit.[1]

2. Setting aside of the modification of construction permit granted by the Commission on April 14, 1955 is required under Ashbacker v. Federal Communications Commission, 326 US 327. The Court there said (page 333):

> "We only hold that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress choose to give him."

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[1] Petitioners except to said order of the Commission and reserve all rights to contest it and proceedings under it.

It is clear that Petitioners will be deprived of their statutory right to a fair comparative hearing with WJR if WJR goes to the hearing as a permittee rather than as an applicant for the authorization involved.

WHEREFORE, Petitioners request the Commission, unless it set aside its hearing order herein or modify it so as to preclude WJR from obtaining a comparative consideration of its application for modification of construction permit and Petitioners' applications for construction permit, to forthwith vacate and set aside its action granting WJR modification of construction permit and that it forthwith and immediately stay any further hearing proceedings until this petition is acted upon.

Respectfully submitted,

W.S.BUTTERFIELD THEATRES,INC.

By /s/ D. M. Patrick
/s/ Lester Cohen
/s/ Parker D. Hancock

Hogan and Hartson
810 Colorado Building
Washington 5, D. C.
Its Attorneys

TREBIT CORPORATION

By /s/ William J. Dempsey
/s/ Harry J. Ockershausen

Dempsey and Koplovitz
938 Bowen Building
Washington 5, D. C.
Its Attorneys

December 18, 1956

[4955]

MEMORANDUM OPINION AND ORDER

By the Commission: Chairman McConnaughey dissenting in part and issuing a statement; Commissioner Craven abstaining from participating.

1. We have for consideration a joint petition, filed by Trebit and Butterfield on November 2, 1956 together with oppositions to the joint petition filed by WJR, Lake Huron, and the Broadcast Bureau to vacate our order of October 17, 1956. In that order the Commission directed that pursuant to the order of the Court of Appeals of the District of Columbia further hearings in this matter be conducted.

2. The basis of the argument presented to us by the joint petition is that WJR, in effect, abandoned its original application and is attempting to proceed on its modified application which, it is alleged, is no more than an amended application which, under our Rules, was not timely filed. This argument is without merit. Petitioners mistake the status of WJR at the time it filed its modified application. WJR was, at that time, more

than a mere applicant and was not to be treated under the Rules relating to applications, but rather under the Rules relating to modification of construction permits, by which Rules its conduct was procedurally proper.

3. It should also be noted that the additional hearing to be held in this proceeding was ordered pursuant to a remand from the United States Court of Appeals for the District of Columbia. That remand contemplates a further hearing on precisely the issues set forth in our Order of October 17, 1956. On the basis of the Court's Order we are, pursuant to the provision of Section 402(h) of the Communications Act, without power to eliminate WJR as a party to the proceeding.

4. On November 16, 1956, Lake Huron Broadcasting Corporation filed an appeal from the order of the Chief Hearing Examiner denying its petition to intervene in this proceeding. Oppositions to this appeal were filed by WJR and, by joint pleading, Trebit and Butterfield.

[4956]

5. Section 309(b) of the Communications Act provides for the intervention of "parties in interest" to a proceeding by the filing of a petition not less than 10 days prior to the date of a hearing. At the time of the initial hearings in this proceeding Lake Huron did not establish itself as a party in interest. It was not until WJR elected to move its proposed transmitter site a distance of 44 miles in the general direction of the Lake Huron transmitter, subsequent to Lake Huron's becoming a licensee thereby the facts in this case became such as to make Lake Huron a "party in interest" pursuant to Section 309(b) of the Act. The hearing contemplated by our Order of October 17, 1956 is the first hearing in this proceeding since Lake Huron has petitioned to intervene as a "party in interest" pursuant to Section 309(b) of the Act. Because this hearing requires a decision with respect to certain significant changes as stated by the court, in its remand, from those involved in the earlier hearing in this proceeding, we regard this as a hearing in such a

changed format as to confer upon Lake Huron a right of intervention under Section 309(b) of the Communications Act.

6. Section 402(h) of the Communications Act provides that it shall be the duty of the Commission to give effect to the orders of the Court of Appeals "and unless otherwise ordered by the Court, to do so on the basis of the proceedings already had." As hereinbefore set forth, we regard this Section as limiting our authority to add or delete issues in our proceedings ordered pursuant to remand. However, we do not regard this Section as denying a party in interest the right of intervention granted him by Section 309(b) of the Act in a case where such intervention will not affect the issues to be heard.

7. ACCORDINGLY, IT IS ORDERED, That the Joint Petition of Trebit and Butterfield to Vacate the Commission Order of October 17, 1956, IS DENIED.

8. IT IS FURTHER ORDERED, That the petition of Lake Huron Broadcasting Company to intervene IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION*

[SEAL]

/s/ Mary Jane Morris
Secretary

Adopted: December 14, 1956
Released: December 17, 1956

*STATEMENT OF CHAIRMAN McCONNAUGHEY

I dissent as to the petition of Lake Huron Broadcasting Corporation to intervene and approve the denial of the joint petition of Trebit and Butterfield to vacate the Commission's order of October 17, 1956.

[4957]

ERRATA

1. On December 17, 1956 the Commission released its Memorandum Opinion and Order in the above-entitled proceeding (Mimeo 39244; FCC 56-1249).

2. The Opinion and Order is hereby corrected in the following respect: Page 2, par. 5, line 8, eliminate "thereby" and substitute "that";

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page 2, par. 6, line 4, eliminate "as hereinbefore set forth."

FEDERAL COMMUNICATIONS COMMISSION

[SEAL] /s/ Mary Jane Morris
Secretary

Released: December 19, 1956

[4962]

[Received Dec. 21, 1956 - FCC]

OPPOSITION TO PETITION TO VACATE MODIFICATION OF CONSTRUCTION PERMIT AND FOR OTHER RELIEF

WJR, The Goodwill Station, Inc., by its attorneys, hereby files its opposition to the above-described petition filed jointly herein on December 18, 1956 by W. S. Butterfield Theatres, Inc. and Trebit Corporation. In support thereof it is stated as follows:

1. In the Opinion decided May 24, 1956, the United States Court of Appeals for the District of Columbia Circuit stated: "The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its [May 14, 1954] grant to WJR in the light of the differences thus disclosed." (Slip Opinion, pages 13 and 14.)

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2. By its Memorandum Opinion and Order released herein on December 17, 1956 (P.N. 39244), the Commission stated as follows: "It should also be noted that the additional hearing to be held in this proceeding was ordered pursuant to a remand from the United States Court of Appeals for the District of Columbia. That remand contemplates a further hearing on precisely the issues set forth in our Order of October 17, 1956."

3. Thus, it is clear that the Commission has meticulously complied with the Court's May 24, 1956 Opinion. In spite of this, petitioners again request the Commission to vacate and set aside its Order of April 14, 1955 which granted WJR's modified application. As set forth below,

the Court and the Commission have refused in the past to take such action and the Commission should promptly deny the present request. In the joint petition of December 28, 1954 petitioners requested the Commission to vacate and set aside its April 14, 1955 grant. The Commission's decision of April 1, 1955 denied the request. Petitioners then requested the Court of Appeals to order the Commission to vacate and set aside its order of April 14, 1955 (see May 5, 1955 Joint Petition filed with the Court; Trebit's brief, p. 8 and Butterfield's brief, pp. 17 through 37). The Court expressly refused to order the Commission to rescind its Order of April 14, 1955 (Slip Opinion, p. 13).

4. Petitioners are in error in asserting that in the further hearing ordered by the Court WJR's modification application is to be compared with their original applications. Rather, the hearing is to be heard on the issues specified by the Commission and in light of the evidence adduced under these issues, the Examiner is directed to prepare a supplemental initial decision reconsidering the May 14, 1954 decision as reaffirmed December 6, 1954. The question whether WJR's modification application should be granted or denied is not an issue in this proceeding, and therefore there is no violation of the Ashbacker rule. Petitioners ignore the fact that this proceeding is a further hearing and not an original hearing.

5. In connection with petitioners' request that the further hearings be stayed pending a decision by the Commission on the instant petition, the Commission's attention is respectfully directed to the fact that although the Commission ordered that the further hearing commence no later than November 16, 1956 (which date was later changed by the Commission to December 17, 1956), the hearing did not commence until December 18, 1956 at which time the Examiner refused to allow WJR to present testimony and over the objection of WJR recessed the hearing until January 7, 1957. There is no basis whatsoever to further delay this proceeding. The Commission and the Court have

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previously denied the relief now again requested by petitioners. It is respectfully requested that the Commission not only refuse to delay further these proceedings but also deny the instant petition prior to January 7, 1956 and direct the Examiner to expedite the instant proceeding.

[4965]

WHEREFORE, the premises considered, it is respectfully requested that the Commission deny the "Petition to Vacate Modification of Construction Permit and For Other Relief" filed herein on December 18, 1956.

Respectfully submitted,
WJR, THE GOODWILL STATION, INC.
By /s/ Reed T. Rollo
/s/ R. Russell Eagan
of
Kirkland, Fleming, Green, Martin and Ellis
800 World Center Building
Washington 6, D. C.

December 20, 1956

Its Attorneys

[4966]

[Certificate of Service]

[4967]

[Rec'd Dec. 31, 1956-FCC]

OPPOSITION TO PETITION TO VACATE MODIFICATION OF CONSTRUCTION PERMIT (BMPCT-2689)

On December 18, 1956, W. S. Butterfield Theatres, Inc. and Trebit Corporation (hereinafter Butterfield and Trebit and/or Petitioners), applicants in the above-captioned proceeding, filed a "Petition to Vacate Modification of Construction Permit and For Other Relief". For the reasons set forth herein, we believe that the subject petition should be denied.

1. Petitioners contend that the vacation of the grant of WJR's application for modification of construction permit (BMPCT-2689) is

required under *Ashbacker* v. *Federal Communications Commission* 326 US 327. They urge that they will be deprived of their "statutory right to a fair comparative hearing with WJR if WJR goes to the hearing" as a permittee rather than as an applicant.

2. The lengthy history of the above-entitled applications has been set forth in detail in pleadings previously filed with the Commission and need not be repeated here.[1] It is appropriate, however, to note that the present hearing in this proceeding was ordered by the Commission pursuant to a remand from the United States Court of Appeals for the District of Columbia.[2] The Court of Appeals ruled that the Commission, in refusing to reopen the record as requested by Trebit and Butterfield in its "Joint Petition for Stay, Rehearing and Reopening of the Record," abused its discretion. Accordingly, the court ordered the Commission to "conduct further hearings on the question of differences between WJR's original and modified proposals" and to "reconsider its grant to WJR in the light of the differences thus disclosed".

3. Petitioners' contention that the Ashbacker case requires vacation of the grant of WJR's modification application is erroneous.[3] In the instant case the Court of Appeals ruled that the Commission abused its discretion when it made an *ex parte* determination as to the question of the differences between WJR's original and modified proposals. The Court held that Trebit and Butterfield should have been afforded an evidentiary hearing on the question raised in the Joint Petition for Stay, Rehearing and Reopening of the Record,[4] The proceeding now being held is in compliance

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[1] See Partial Opposition to Petition to Consolidate or To Defer Action filed by Chief, Broadcast Bureau on December 6, 1956.

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[2] *W. S. Butterfield Theatres, Inc., et al.* v. *F.C.C.*, 13 RR 2175.

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[3] The WJR application (BMPCT-2689) for modification of its construction permit (BMPCT-2689) was granted on April 14, 1955. However, on June 8, 1955, the Commission adopted an order, released June 10, 1955, granting protests addressed to the grant. An Initial Decision was released January 17, 1956, after hearing, reaffirming and reinstating the grant. Final Decision has not to date been issued (Docket 11412).

[4] The Court's opinion cited as applicable to the present case its earlier opinion in Enterprise Co. v. F.C.C., 97 U.S. App. D.C. 374, 231 F2d 708. There the Court ruled that the "new matters" required that the record be reopened "for reception of evidence of the new developments and to complete comparative consideration in light of those developments". The Court also ruled that the holding of such an evidentiary hearing did not require that the grant of permit be set aside since the determination whether it should be vacated and grant made to the losing applicant must be made after studying the evidence and "reappraising the comparative qualifications" of the applicants.

with the Court's mandate. The separate appeals from the Commission's Final Decision granting WJR's application and denying the mutually exclusive applications of Trebit and Butterfield were dismissed without prejudice. Trebit and Butterfield still have the right to challenge the soundness of the reasons advanced by the Commission in reaching its Final Decision.

4. This is not a comparative hearing involving WJR's modification application and Trebit and Butterfield's proposal. The question to be decided in the evidentiary hearing is not whether WJR's proposal contained in its modification application is better than the proposal of Trebit or Butterfield. We do not believe that the changes proposed by WJR in its modification application which would improve its original proposal can be considered by the Commission as a basis for sustaining the original grant to WJR.[5]

5. The sole purpose of the evidentiary hearing is to decide whether the changes proposed by WJR in its modification application, filed after grant of the construction permit, worsen WJR's original

proposal to the extent that it would be more in the public interest to grant the proposal of either Trebit or Butterfield.[6] Stated simply, the question is whether the

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[5] A permittee, however, who has received a grant after a comparative hearing should not, in the absence of a showing of bad faith with respect to its original proposal, be penalized for making changes required by changed circumstances.

[6] Additionally, evidence is to be adduced (Issue No. 2) with respect to the question of whether WJR misrepresented and concealed the changes proposed in its modification application.

[4970]

changes affect the decisional basis of the Final Decision. The further hearing ordered by the Commission in compliance with the mandate of the Court of Appeals is solely an evidentiary hearing to determine facts to aid in evaluating the merits of the matters raised in the petition for rehearing.

6. We believe that there is no reason to vacate the grant of WJR's modification application unless and until the Commission holds that the proposal of WJR by reason of the new changes is no longer to be preferred.

Respectfully submitted,

/s/ Edward F. Kenehan
Chief, Broadcast Bureau

/s/ Thomas A. Fitzpatrick
Attorney
Federal Communications Commission

December 28, 1956

[4971]

[Certificate of Service]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley not participating: Commissioners Mack and Craven abstaining from voting.

1. Three sets of pleadings relating to this comparative proceeding are now pending before the Commission. The first group relates to Lake Huron's petition to consolidate this and the protest proceeding,[1] the second involves Lake Huron's petition to enlarge and clarify issues,[2] and the third pertains to Butterfield and Trebit's motion to vacate the modification of construction permit now held by WJR.[3] In a separate document also adopted today we have discussed and disposed of a petition by WJR requesting an immediate final decision in the protest case as well as the alternative portion of Lake Huron's petition to consolidate in which deferral of further action on the protest case is requested.

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[1] Petition to consolidate comparative proceeding and protest proceeding or to defer action in protest proceeding pending decision in comparative proceeding, filed by Lake Huron on November 26, 1956; opposition to petition to consolidate, filed by WJR, The Goodwill Station, Inc., on December 3, 1956; partial opposition to petition to consolidate, filed by Broadcast Bureau on December 6, 1956; opposition to petition to consolidate, filed jointly by W. S. Butterfield Theatres, Inc. and Trebit Corporation on December 6, 1956; response to oppositions to consolidate filed by Lake Huron on December 13, 1956.

[2] Petition to enlarge and clarify issues filed by Lake Huron on November 8, 1956; opposition to petition to enlarge and clarify issues filed by WJR on December 20, 1956; joint opposition to petition to enlarge issues filed by Trebit and Butterfield on December 31, 1956.

[3] Petition to vacate modification of construction permit and for other relief filed jointly by Butterfield and Trebit on December 18, 1956; opposition to petition to vacate filed by WJR on December 20, 1956; and opposition to petition to vacate filedby the Broadcast Bureau on December 28, 1956.

Lake Huron's Petition to Consolidate

2. Lake Huron, at the time the petition to consolidate was filed, was a party to the protest proceeding but not to the instant comparative matter. Petitioner operates television station WKNX-TV on Channel 57 at Saginaw, Michigan, and it is claimed that a grant to WJR on the basis of its modified proposal would deprive Lake Huron of its CBS network affiliation and would force WKNX-TV to cease operations. The petitioner asserts that the issues in both cases require, in part, a determination of the differences between the original WJR proposals and the modified WJR proposals and a determination whether the circumstances under which WJR tardily advised the Commission of its changed plans affect the qualifications of WJR to receive a grant of its Channel 12 application. Lake Huron points out that as a protestant it had the burden of proof in the protest proceeding whereas, had the modified proposal of WJR originally been designated for hearing, as it now has been, the burden with respect to any questions raised about WJR's proposal would have been upon that applicant. Lake Huron asserts that consolidation of the two proceedings is not only appropriate but would accord with fundamental considerations of orderly administrative procedure because both cases would be disposed of simultaneously, the most effective use of the evidentiary material compiled in the protest case would be possible, the rights of WJR, Trebit and Butterfield in accordance with the court's decision, would be fully protected, as would the rights of Lake Huron. Petitioner insists that it has a right as a party in interest to have the ultimate decision with respect to Channel 12 made in a comparative contest, with the burden of proof on the applicant and with Lake Huron permitted to participate as a party in interest.

3. Consolidation, according to Lake Huron, is a long recognized procedure for the orderly handling of matters before administrative agencies and the courts and is one which the Commission has followed repeatedly. Lake Huron contends that Rule 42 of the Federal Rules of Civil Procedure expressly provides for the consolidation of such matters,

and that there is a strong policy against piece-meal disposition of matters having substantial common questions of fact or law.

4. Opposing the petition for consolidation, WJR asserts that Lake Huron's reliance on the Federal Rules of Civil Procedure is without merit inasmuch as Rule 42 relates to the discretion given to the courts to consolidate pending separate actions for a joint hearing or trial if such consolidation will avoid unnecessary costs or delay. WJR insists that the rationale of that rule has no applicability here inasmuch as the hearing on the protest case has been completed and no unnecessary delay or reduction in costs would be avoided by the consolidation.

5. Butterfield and Trebit, in a joint opposition, contend that Lake Huron has misunderstood the status of the proceeding inasmuch as that for the purpose of the comparative proceeding between WJR, Butterfield and

Trebit the only significance of the modification application is the manner in which it mirrored intentions of WJR and revealed abandonment by that applicant of the proposal on which it was preferred. Butterfield and Trebit contend that the objections of Lake Huron and others to a proposal by WJR that it operate a television station near Saginaw is totally without relationship to the three pending applications neither one of which in lawful concept proposes such an operation. It is argued that under these circumstances the Commission should not require consolidation of the protest case with the proceeding presently before the Commission because in the comparative proceeding WJR cannot be authorized to operate a station markedly different from that which was granted to it in the comparative proceeding. Trebit and Butterfield assert that no useful purpose can be served and much mischief can be caused by co-mingling the various proceedings and requiring respondents to deal with parties who are utterly without interest or right in their respective applications. They also contend that as a matter of due process they cannot be saddled with the record in the protest proceeding because the applicants have the right to be free of the obligation to encounter or deal with strangers and unrelated issues to their proceedings and are entitled as of right to be free of the proffered participation of protestants, whether advanced under the guise of intervention or consolidation.[4/]

6. The petition to consolidate is also opposed by the Broadcast Bureau whose principal assertion is that Lake Huron's arguments in favor of consolidation are without merit because, although the issues in the two cases are basically the same and call for the production of the same type of evidence, the ultimate questions are different. According to the Bureau the question in the protest proceeding is whether, in light of the evidence adduced under the issues, the public interest would be served by a grant of the modification application and whether WJR is qualified to receive such grant, whereas the ultimate question in the further comparative hearing is whether the changes proposed by WJR in its modification application and the misrepresentation or concealment, if any, by WJR require a reversal of the Commission's original decision favoring WJR over Trebit and Butterfield. It is also pointed out that the protest proceeding is being held pursuant to Section 309(c) of the Act which imposes the burden of proof upon the protestant whereas the further hearing to be conducted in the comparative case is pursuant to Section 309(b) which places the burden of proof upon WJR, the applicant. The Bureau argues that consolidation at this particular juncture of the two cases would not serve the interests of expedition or contribute to orderly administrative procedure because such consolidation would only further complicate an already complicated proceeding.

4/ Butterfield and Trebit also argue that Lake Huron cannot be allowed to achieve through consolidation what it had been refused through a denial of its petition to intervene. However, since the opposition was filed, the Commission has reversed the ruling of the Examiner and allowed Lake Huron to intervene in this proceeding. See footnote 5/, *infra*.

7. Answering WJR's opposition, Lake Huron insists that there are common issues of fact and that it is incorrect to state that these factual issues cannot be determined in one proceeding without affecting a determination in the other because some of the ultimate questions in the two cases may be different. Answering Trebit and Butterfield's argument that Lake Huron does not have standing to request consolidation, Lake Huron points out that it is a party to the protest proceeding and as such clearly has standing to submit the petition in question. Lake Huron also states that it has on file an application for a new station using Channel 12 in Flint and that under these circumstances it is obvious that Lake Huron has a most direct interest in the comparative proceedings. Its interest in the comparative proceeding allegedly also stems from the fact that through this proceeding a determination will be made which will determine the extent to which Lake Huron as the operator of a UHF station in Saginaw, Michigan would suffer from Channel 12 if WJR, Trebit or Butterfield receives a grant. Thus, according to Lake Huron, the selection of a grantee is a matter of direct importance to it since the actual competitive effect of such a selection will depend upon which applicant is selected. Lake Huron opposes Trebit's and Butterfield's arguments that consolidation would deprive them of procedural rights, since making appropriate use of the already completed protest record to expedite and facilitate completion of the comparative proceeding would be far from meaningless. The petitioner insists that that aspect of its proposal, that those who were not a party to the protest proceeding be afforded full opportunity to make further inquiry concerning matters covered by the record in the protest, would, if adopted, fully protect the procedural rights of Trebit and Butterfield.

8. The Commission believes that consolidation of the two proceedings as requested by Lake Huron is neither a desirable nor proper solution to the problems which exist as a result of the fact that both cases are now pending in different stages of completion. While it is perhaps not altogether clear that in this case consolidation of the two pro-

ceedings, if done for limited purposes, would run counter to the restrictions imposed upon the method of handling remanded cases by Section 402(h) of the Act, the intermisture of the two--in which the burden of proof, and, indeed, the very statutory basis is different--would likely lead to confusion and misunderstanding inimical to an orderly disposition of both cases. An attempt to use in the comparative hearing evidence introduced in the protest hearing, even with the safeguards proposed by Lake Huron, is viewed by the Commission as a procedure out of which confusion and delay rather than expedition may be expected to grow

9. Consolidation is not necessary for protection of the rights of Lake Huron. After the instant petition to consolidate was filed, the Commission, on petition to review the Chief Hearing Examiner's denial of Lake Huron's petition to intervene, reversed the denial and allowed intervention.[5] As an intervenor under Section 309(b) of the Act, Lake Huron

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5/ Memorandum Opinion and Order dated December 14, 1956 and released December 17, 1956 (Chairman McConnaughey dissenting to the allowance of intervention) FCC 56-1249.

will have ample opportunity to assist in compiling a complete hearing record without incurring the danger of misunderstanding and confusion or taking the risk of jeopardizing the proceeding to a subsequent determination that through consolidation the issues and basis of the remanded case have been altered contrary to the restrictions of 402(h).[6]

Lake Huron's Petition to Enlarge and Clarify Issues

10. On November 8, 1956 Lake Huron petitioned to enlarge the issues in the comparative proceeding.[7] It seeks to have included issues to determine the nature and proposals of all the applicants both before and after the closing of the record together with the reasons for any changes disclosed, whether any of the applicants abandoned or amended

their proposals or so changed their nature as to destroy the basis for the Commission's decision, whether WJR abdicated to another its responsibility to determine the nature of its operation, the availability of television service to the area, the suitability of services proposed by the applicants, whether other applications for the facility have been filed and, if so, whether the Commission can properly consider them, the effect of a grant of any of the applications on existing television service, and a comparative finding of which, if any, of the applicants should be preferred. In support of this petition, Lake Huron argues that these issues are necessary to fully accomplish the purpose of the hearing order released October 19, 1956. WJR opposes the petition on the ground that Section 402(h) of the Act provides that, on proceedings conducted pursuant to remand, the Commission shall, unless otherwise ordered by the Court, give effect to the order of the Court on the basis of the existing proceedings. Trebit and Butterfield argue that Lake Huron is permitted to intervene only to the extent specified in the order granting its intervention, and that in the order released December 17, 1956, the Commission limited the intervention to the issues already designated. In its reply to the oppositions, Lake Huron argues extensively that Section 402(h) of the Act and the Court's decision are no bar to the enlargement requested. However, for the reasons hereinafter indicated, these arguments need not be set out in detail.

6/ In this connection, the Commission recalls that when it petitioned the Court of Appeals for rehearing to allow the Commission general authority to consider in the remanded proceedings other significant changes which have taken place in any of the other applicants since the close of the original hearing record, this request was denied.

7/ This petition was filed prior to the Commission order of December 14, 1956 which permitted Lake Huron to intervene in the comparative proceeding. By Commission order, the time in which to file replies to the petition to enlarge issues was extended to 15 days after the final Commission action on the petition to intervene.

11. The Commission has heretofore expressed its views regarding enlargement of the hearing issues in the comparative proceeding. We stated in our December 14 order allowing Lake Huron to intervene that we regard Section 402(h) "as limiting our authority to add or delete issues" in the remand proceeding. See also footnote 6/, supra. In the circumstances, no further consideration of Lake Huron's request is necessary.

Butterfield and Trebit Petition to Vacate Modification of Construction Permit and for Other Relief

12. Butterfield and Trebit have jointly petitioned the Commission to vacate the modification of construction permit granted to WJR on April 14, 1955 contending that such action is necessary under Ashbacker v. Federal Communications Commission, 326 U. S. 327. Petitioners rely on that portion of the Court's decision which at page 333 reads as follows:

> "We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing on both deprives the loser of the opportunity which Congress chose to give him."

On the basis of this, petitioners declare that they will be deprived of their statutory right to a fair comparative hearing with WJR if WJR goes to the hearing as a permittee rather than as an applicant for the authorization involved.

13. WJR in opposition notes that the Court of Appeals in remanding for further hearing expressly refused to order the Commission to rescind the modification of construction permit. Additionally, WJR asserts that the comparative hearing does not involve the question whether WJR's modification application should be granted or dismissed, and thus there is no violation of the Ashbacker rule. The Broadcast Bureau opposition emphasizes that a comparative hearing on WJR's modification proposal is not involved, the sole purpose of the evidentiary

hearing being to decide "whether the changes proposed by WJR in its modification application, filed after grant of the construction permit, worsen WJR's original proposal to the extent that it would be more in the public interest to grant the proposal of either Trebit or Butterfield." The Bureau asserts that, stated simply, the question is "whether the changes affect the decisional basis of the final decision."

14. The Ashbacker doctrine is not applicable in the instant case, for what is at issue in the hearing on remand is whether the original television construction permit awarded to WJR should be affirmed or withdrawn and given to another, not whether the modification of construction permit should stand. Further hearings are being held not to decide whether the modification should be granted but to determine whether certain changes, and the manner of making those changes, by the winning applicant destroy the basis of the preferences which led to the award to it. It is to be noted further that the Court of Appeals specifically refused to order a vacation of WJR's modified permit commenting that Trebit and Butterfield's rights were completely protected by the procedure ordered in the remand.

[5030]

Accordingly, IT IS ORDERED, This 23rd day of January, 1957, that Lake Huron's petition to consolidate this proceeding and the protest proceeding in Docket No. 11412 IS DENIED, that Lake Huron's petition to enlarge and clarify issues IS DENIED, and that the joint petition of Trebit and Butterfield to vacate the modification of WJR's construction permit and for other relief IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]
/s/ Mary Jane Morris
Secretary

Released: January 24, 1957

[5123]

WJR Exhibit No. 87

DESCRIPTION OF WJR NON-NETWORK PROGRAMS*

* * * * *

[5127]

8. Symphony at Work. No change except that the classification has been changed from recorded to live in view of the Commission's definition that "a recorded program which is a local live program produced by the station and recorded for later broadcasting by the station shall be considered a local live program." It is contemplated that films of orchestra rehearsals will be shown for a substantial part of the thirty-minute period and that the remaining time will be utilized for live commentary and explanation by qualified guests.

* * * * *

[5131]

WJR Exhibit 88

CHANGES IN WJR NON-NETWORK PROGRAMS*

* * * * *

[5132]

7. Sports Arena (Original - Wednesday, 10:30 - 11:00 PM, E-RC; Modified - 10:45 - 11:00 PM, T-LC). The program was reduced in time and changed in classification in view of the fact that the original program was proposed as a syndicated filmed sports show whereas the program proposed in the modification application will be presented as a live talk program to follow the network Pabst Blue Ribbon Fights which vary in length from week to week.

[5154]

WJR EXHIBIT 91

DOCKETS 10268, ET AL.

Engineering Exhibit

December 17, 1956

Vandivere, Cohen and Wearn
Consulting Electronic Engineers
Washington, D. C.

[5155]

Vandivere, Cohen and Wearn
Consulting Electronic Engineers
Washington, D. C.

WJR Exhibit 91
Dockets 10268, et al.

Engineering Exhibit

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COMPARISON OF TRANSMITTER SITES

	Subject	Clarkston	Chesaning	Trebit	Butterfield
1.	Miles from nearest Flint boundary	~~16.8~~ 17.0	~~20.6~~ 20.0	4.4	~~19.~~ 14.4
2.	Miles from farthest Flint boundary	~~25.~~ 24.7	~~25.7~~ 26.8	11.1	~~22.~~ 21.8
3.	DBU at farthest Flint boundary	86	~~85.~~ 84.5	99	88. 88.5
4.	Height of site above mean sea level	1100'	600'	810'	1103'
5.	Height of antenna above average terrain	1000'	940'	1000'	1011'
6.	Grade A area	6,320	5,985	6,320	6,514
7.	Grade A population	3,620,660	865,387	929,100	3,612,602
8.	Grade B area	10,800	11,180	11,640	11,340
9.	Grade B population	4,302,550	1,325,545	3,779,480	4,319,956

COMPARISON OF OTHER SERVICES AVAILABLE TO POPULATIONS WITHIN PROPOSED GRADE A CONTOURS

	WJRT Clarkston		WJRT Chesaning		Trebit		Butterfield	
	Population	%	Population	%	Population	%	Population	%
No other Grade A Service	40,948	(1.1)	33,618	(3.9)	43,796	(4.7)	39,800	(1.1)
One other Grade A Service	248,745	(6.9)	318,800	(36.8)	307,057	(33.0)	249,000	(6.9)
Two other Grade A Services	150,655	(4.2)	479,074	(55.4)	343,933	(37.1)	151,500	(4.2)
Three other Grade A Services	2,678,317	(73.9)	30,900	(3.6)	225,552	(24.3)	2,671,302	(73.9)
Four or more other Grade A Services	501,995	(13.9)	2,995	(0.3)	8,762	(0.9)	501,000	(13.9)
TOTAL	3,620,660*	(100)*	865,387	(100)	929,100	(100)	3,612,602*	(100)*

* Of which 2,652,818 (73.3%) reside within the Detroit urbanized area.

COMPARISON OF OTHER SERVICES AVAILABLE TO AREAS WITHIN PROPOSED GRADE A CONTOURS

	WJRT Clarkston		WJRT Chesaning		Trebit		Butterfield	
	SqMi	%	SqMi	%	SqMi	%	SqMi	%
No other Grade A Service	758	(12.0)	296	(4.9)	878	(13.9)	782	(12.0)
One other Grade A Service	806	(12.8)	2188	(36.6)	1586	(25.1)	834	(12.8)
Two other Grade A Services	2298	(36.4)	3075	(51.4)	3019	(47.7)	2370	(36.4)
Three other Grade A Services	1632	(25.8)	359	(6.0)	662	(10.5)	1680	(25.8)
Four or more other Grade A Services	826	(13.0)	67	(1.1)	175	(2.8)	848	(13.0)
TOTAL	6320	(100)	5985	(100)	6320	(100)	6514	(100)

[5159]

COMPARISON OF OTHER SERVICES AVAILABLE TO POPULATIONS WITHIN PROPOSED GRADE B CONTOURS

	WJRT Clarkston		WJRT Chesaning		Trebit		Butterfield	
	Population	%	Population	%	Population	%	Population	%
No other Grade B Service	0	(0)	0	(0)	0	(0)	0	(0)
One other Grade B Service	10,649	(0.2)	21,624	(1.6)	42,618	(1.1)	8,650	(0.2)
Two other Grade B Services	50,833	(1.2)	40,307	(3.0)	60,821	(1.6)	51,900	(1.2)
Three other Grade B Services	352,561	(8.2)	238,388	(18.0)	320,592	(8.5)	354,500	(8.2)
Four other Grade B Services	324,441	(7.5)	147,331	(11.1)	352,520	(9.3)	324,000	(7.5)
Five or more other Grade B Services	3,564,066	(82.9)	877,895	(66.3)	3,002,929	(79.5)	3,580,906	(82.9)
Total	4,302,550*	(100)*	1,325,545	(100)	3,779,480**	(100)**	4,319,956*	(100)*

* Of which, 2,659,398 (62%) reside within the Detroit urbanized area

** Of which, 2,314,749 (61%) reside within the Detroit urbanized area

COMPARISON OF OTHER SERVICES AVAILABLE TO AREAS WITHIN PROPOSED GRADE B CONTOURS

	WJRT Clarkston		WJRT Chesaning		Trebit		Butterfield	
	Sq. Mi.	%	Sq. Mi.	%	Sq. Mi.	%	Sq. Mi.	%
No other Grade B Service	0	(0)	0	(0)	0	(0)	0	(0)
One other Grade B Service	367	(3.4)	586	(5.2)	1,144	(9.8)	386	(3.4)
Two other Grade B Services	408	(3.8)	1,289	(11.5)	806	(6.9)	431	(3.8)
Three other Grade B Services	1,856	(17.2)	1,631	(14.6)	2,071	(17.8)	1,951	(17.2)
Four other Grade B Services	1,020	(9.5)	1,969	(17.6)	1,569	(13.5)	1,078	(9.5)
Five or more other Grade B Services	7,149	(66.1)	5,705	(51.1)	6,050	(52.0)	7,494	(66.1)
	10,800	(100)	11,180	(100)	11,640	(100)	11,340	(100)

[5161]

COMPARISON OF CHESANING SITE TO CLARKSTON SITE*

A. Population within Chesaning Grade A Contour but not within Clarkston Grade A contour:

1. Population receiving no other Grade A service -	17,970	(3.9%)
2. Population receiving one other Grade A service -	73,400	(16.0%)
3. Population receiving two other Grade A services -	361,519	(78.4%)
4. Population receiving three other Grade A services -	7,890	(1.7%)
5. Population receiving four or more Grade A services -	0	(0.0%)
Total	460,779	(100%)

B. Population within Clarkston Grade A Contour but not within Chesaning Grade A contour:

1. Population receiving no other Grade A service -	25,300	(0.8%)
2. Population receiving one other Grade A service -	3,345	(0.1%)
3. Population receiving two other Grade A services -	33,100	(1.0%)
4. Population receiving three other Grade A services -	2,655,307	(82.5%)
5. Population receiving four or more Grade A services -	499,000	(15.6%)
Total	3,216,052**	(100%)**

---

* The figures for the Butterfield site are substantially the same as those given herein for the Clarkston site.

** Of which 2,652,818 (82.4%) reside within the Detroit urbanized area.

Comparison of Chesaning Site to Clarkston Site (cont.)

C. Population within Chesaning Grade B contour but not within Clarkston Grade B contour:

1.	Population receiving no other Grade B service -	0	(0.0%)
2.	Population receiving one other Grade B service -	13,174	(6.1%)
3.	Population receiving two other Grade B services -	24,457	(11.3%)
4.	Population receiving three other Grade B services -	15,888	(7.3%)
5.	Population receiving four other Grade B services -	102,931	(47.3%)
6.	Population receiving five or more other Grade B services -	61,085	(28.0%)
	Total	217,535	(100%)

D. Population within Clarkston Grade B contour but not within Chesaning Grade B contour:

1.	Population receiving no other Grade B service -	0	(0.0%)
2.	Population receiving one other Grade B service -	2,199	(0.1%)
3.	Population receiving two other Grade B Services -	34,983	(1.1%)
4.	Population receiving three other Grade B services -	130,061	(4.1%)
5.	Population receiving four other Grade B services -	280,041	(8.8%)
6.	Population receiving five or more other Grade B services -	2,747,256	(85.9%)
	Total	3,194,540*	(100%)*

---

* Of which 2,659,398 (83.3%) reside within the Detroit urbanized area.

[5161]

COMPARISON OF CHESANING SITE TO CLARKSTON SITE*

A. Population within Chesaning Grade A Contour but not within Clarkston Grade A contour:

1. Population receiving no other Grade A service –	17,970	(3.9%)
2. Population receiving one other Grade A service –	73,400	(16.0%)
3. Population receiving two other Grade A services –	361,519	(78.4%)
4. Population receiving three other Grade A services –	7,890	(1.7%)
5. Population receiving four or more Grade A services –	0	(0.0%)
Total	460,779	(100%)

B. Population within Clarkston Grade A Contour but not within Chesaning Grade A contour:

1. Population receiving no other Grade A service –	25,300	(0.8%)
2. Population receiving one other Grade A service –	3,345	(0.1%)
3. Population receiving two other Grade A services –	33,100	(1.0%)
4. Population receiving three other Grade A services –	2,655,307	(82.5%)
5. Population receiving four or more Grade A services –	499,000	(15.6%)
Total	3,216,052**	(100%)**

---

* The figures for the Butterfield site are substantially the same as those given herein for the Clarkston site.

** Of which 2,652,818 (82.4%) reside within the Detroit urbanized area.

Comparison of Chesaning Site to Clarkston Site (cont.)

C. Population within Chesaning Grade B contour but not within Clarkston Grade B contour:

1. Population receiving no other Grade B service -	0	(0.0%)
2. Population receiving one other Grade B service -	13,174	(6.1%)
3. Population receiving two other Grade B services -	24,457	(11.3%)
4. Population receiving three other Grade B services -	15,888	(7.3%)
5. Population receiving four other Grade B services -	102,931	(47.3%)
6. Population receiving five or more other Grade B services -	61,085	(28.0%)
Total	217,535	(100%)

D. Population within Clarkston Grade B contour but not within Chesaning Grade B contour:

1. Population receiving no other Grade B service -	0	(0.0%)
2. Population receiving one other Grade B service -	2,199	(0.1%)
3. Population receiving two other Grade B Services -	34,983	(1.1%)
4. Population receiving three other Grade B services -	130,061	(4.1%)
5. Population receiving four other Grade B services -	280,041	(8.8%)
6. Population receiving five or more other Grade B services -	2,747,256	(85.9%)
Total	3,194,540*	(100%)*

---

* Of which 2,659,398 (83.3%) reside within the Detroit urbanized area.

[5163]

COMPARISON OF CHESANING SITE TO TREBIT SITE

A. Population within Chesaning Grade A contour but not within Trebit Grade A contour:

1. Population receiving no other Grade A service -	17,422	(8.2%)
2. Population receiving one other Grade A service -	34,593	(16.2%)
3. Population receiving two other Grade A services -	151,341	(70.9%)
4. Population receiving three other Grade A services -	9,512	(4.5%)
5. Population receiving four or more Grade A services -	533	(0.2%)
Total	213,401	(100%)

B. Population within Trebit Grade A contour but not within Chesaning Grade A contour:

1. Population receiving no other Grade A service -	27,600	(10.0%)
2. Population receiving one other Grade A service -	22,850	(8.3%)
3. Population receiving two other Grade A services -	16,200	(5.8%)
4. Population receiving three other Grade A services -	204,164	(73.6%)
5. Population receiving four or more Grade A services --	6,300	(2.3%)
Total	277,114	(100%)

Comparison of Chesaning Site to Trebit Site (cont.)

C. Population within the Chesaning Grace B contour but not within Trebit Grade B contour:

1.	Population receiving no other Grade B service –	0	
2.	Population receiving one other Grade B service –	1,186	(0.7%)
3.	Population receiving two other Grade B services –	11,936	(7.1%)
4.	Population receiving three other Grade B services –	27,796	(16.5%)
5.	Population receiving four other Grade B services –	54,611	(32.4%)
6.	Population receiving five or more Grade B services –	73,057	(43.3%)
	Total	168,586	(100%)

D. Population within Trebit Grade B contour but not within Chesaning Grade B contour:

1.	Population receiving no other Grade B service –	0	
2.	Population receiving one other Grade B service –	22,180	(0.8%)
3.	Population receiving two other Grade B services –	32,450	(1.2%)
4.	Population receiving three other Grade B services –	110,000	(4.2%)
5.	Population receiving four other Grade B services –	259,800	(9.9%)
6.	Population receiving five or more other Grade B services –	2,198,091	(83.9%)
	Total	2,622,521*	(100%)*

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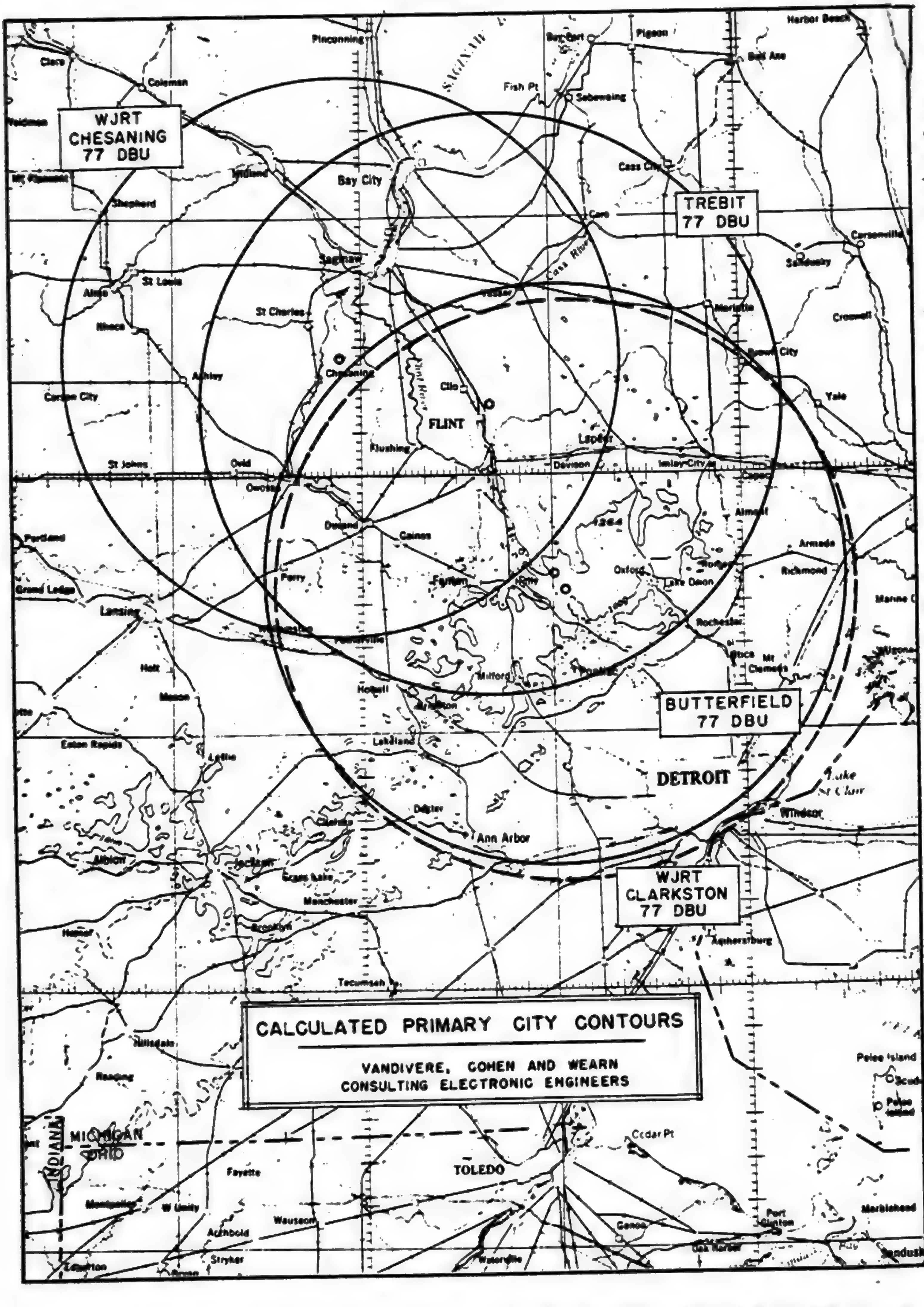
* Of which 2,314,749 (88.2%) reside within the Detroit urbanized area.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TREBIT
77 DBU
BUTTERFIELD
77 DBU
WJRT
CLARKSTON
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Bay City
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Chesaning
FLINT
DETROIT
Lansing
Ann Arbor
Windsor
TOLEDO
Pontiac
Lapeer
Owosso
Midland
Alma
St Johns
Jackson
Hillsdale
Harbor Beach
Bad Axe
Pigeon
Sebewaing
Caro
Cass City
Vassar
Marlette
Imlay City
Richmond
Mt Clemens
Amherstburg
Cedar Pt
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Pelee Island
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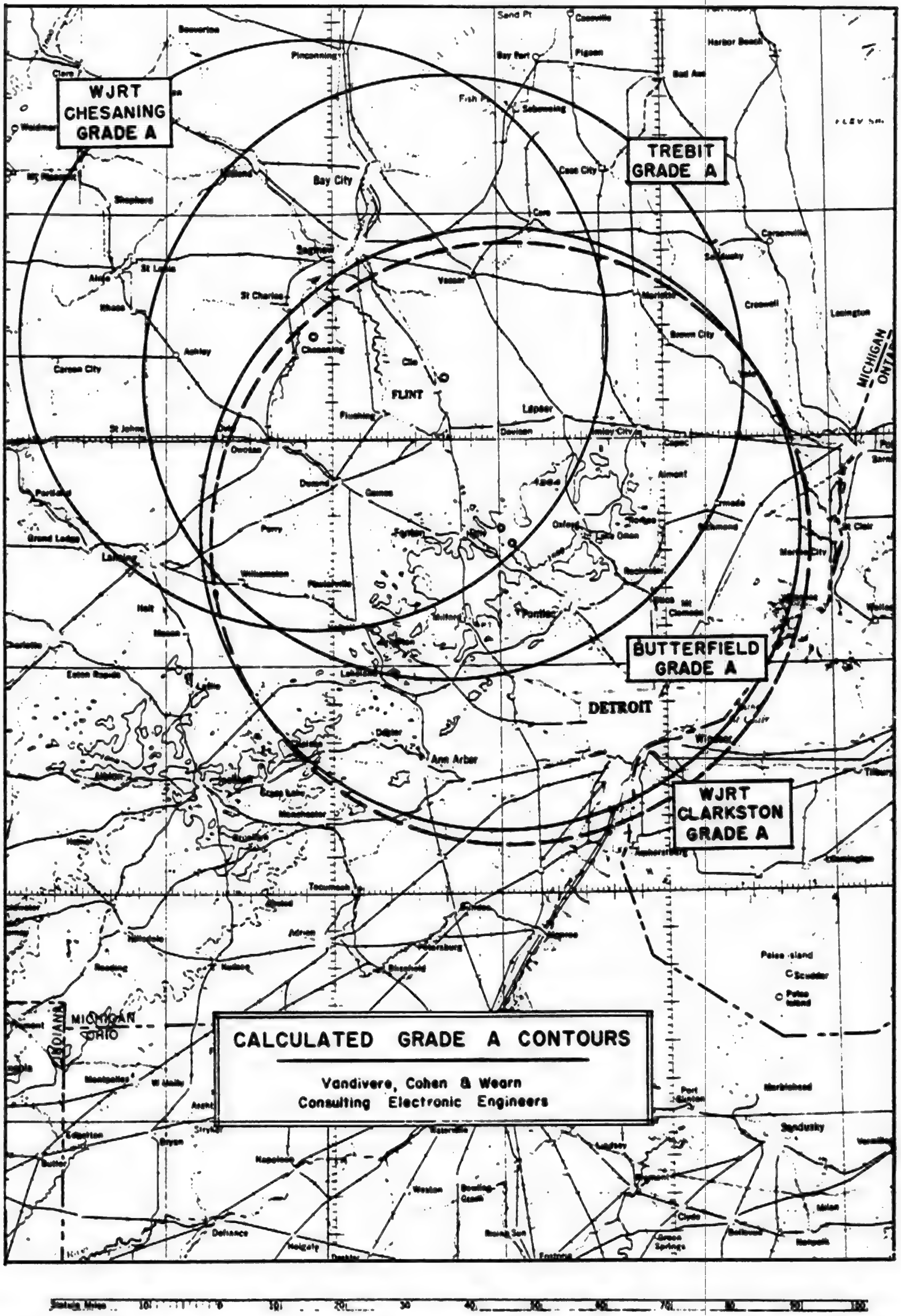
CALCULATED PRIMARY CITY CONTOURS

VANDIVERE, COHEN AND WEARN
CONSULTING ELECTRONIC ENGINEERS

BEST COPY

FIGURE 2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BUTTERFIELD
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Bay City
Saginaw
Lansing
Ann Arbor
Pontiac
Lapeer
Port Huron
Sandusky
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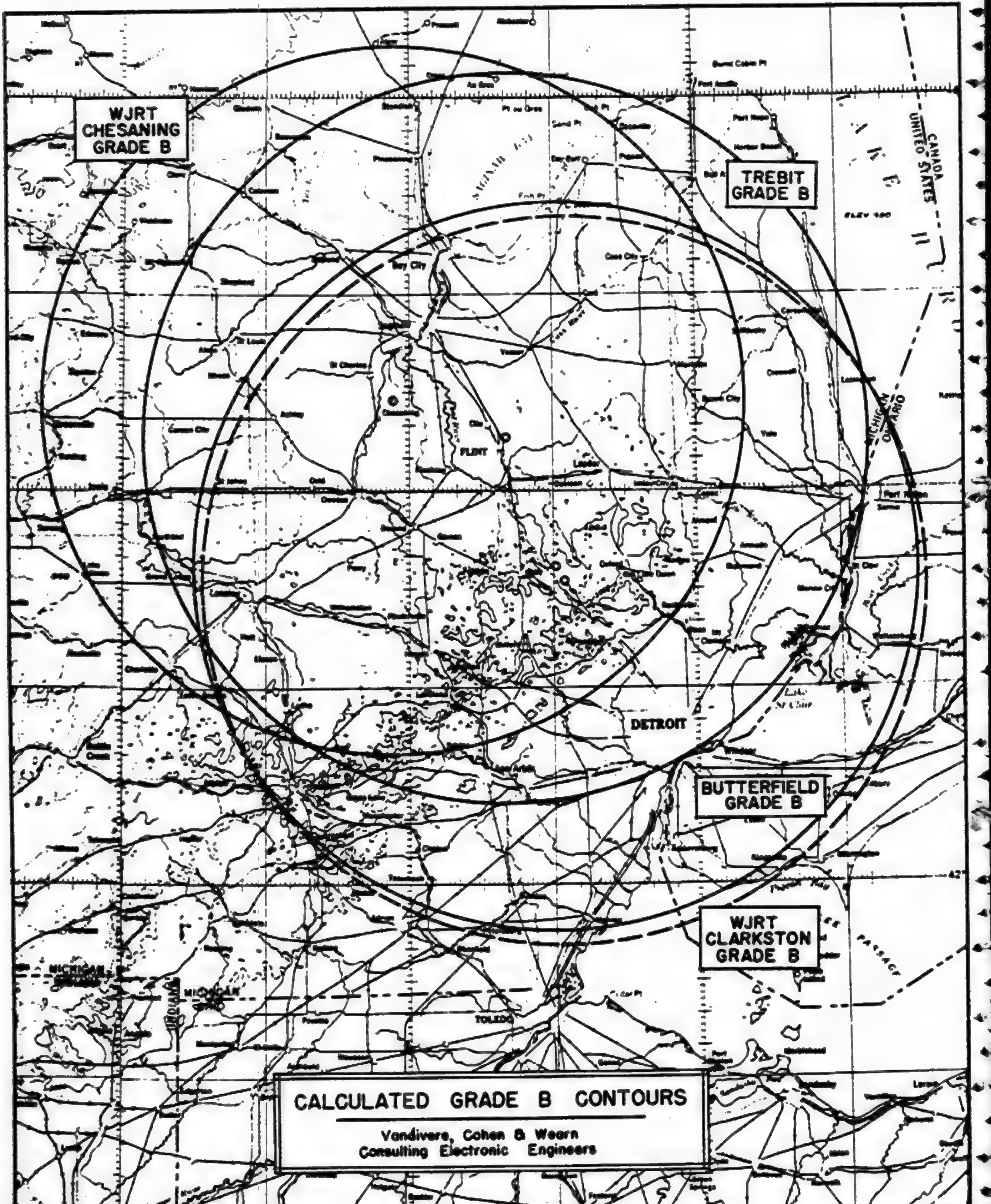
CALCULATED GRADE A CONTOURS

Vandivere, Cohen & Wearn
Consulting Electronic Engineers

AVAILABLE

FIGURE 3

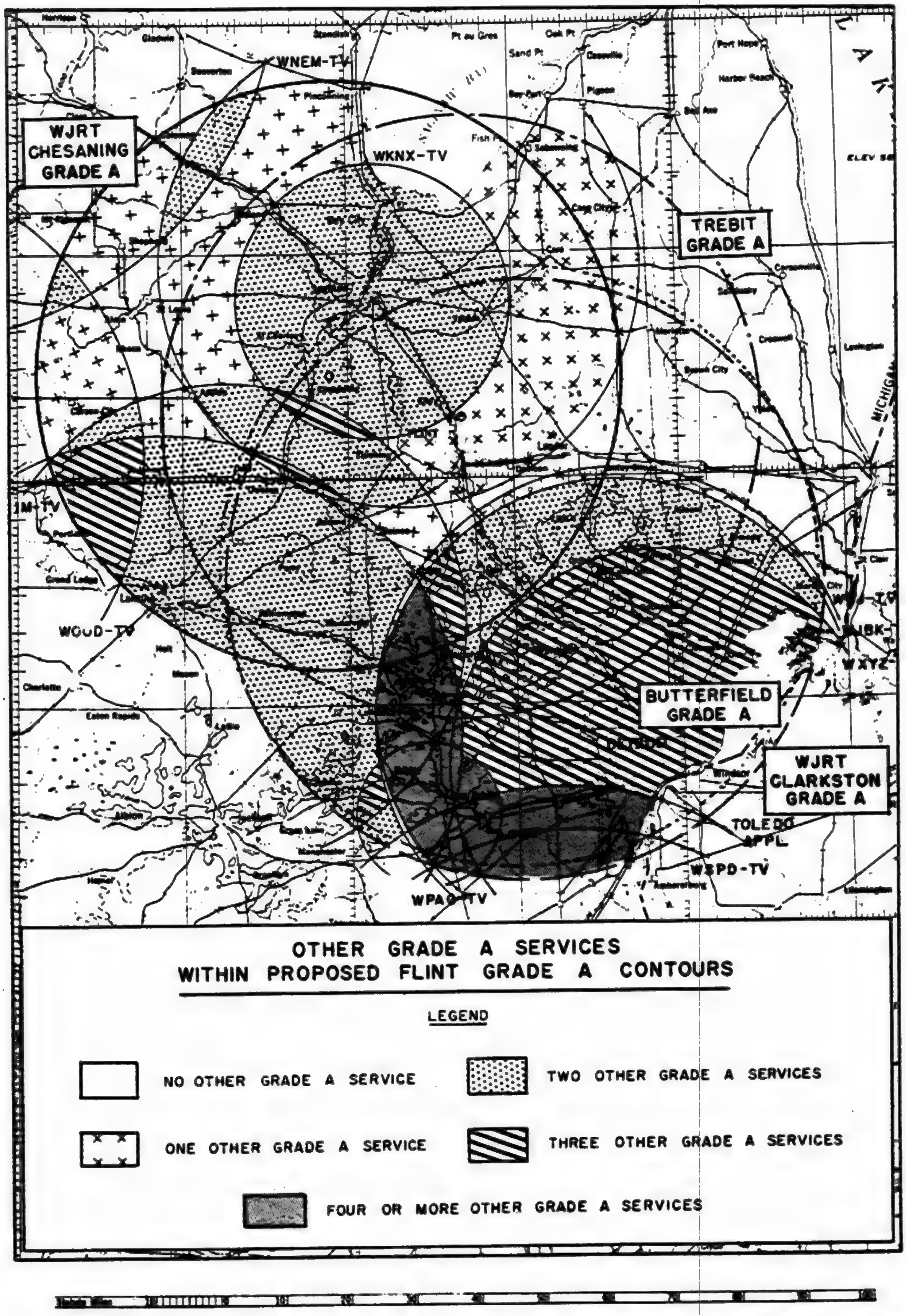

WJRT
CHESANING
GRADE B
TREBIT
GRADE B
BUTTERFIELD
GRADE B
WJRT
CLARKSTON
GRADE B
CANADA
UNITED STATES
MICHIGAN
ONTARIO
Bay City
FLINT
DETROIT
TOLEDO
Port Huron
42°

CALCULATED GRADE B CONTOURS

Vandivere, Cohen & Wearn
Consulting Electronic Engineers

BEST COPY

FIGURE 5168


Harrison
Gladwin
Standish
Pt au Gres
Oak Pt
Sand Pt
Caseville
Port Hope
Harbor Beach
Bad Axe
Beaverton
WNEM-TV
Pinconning
Bay Port
Pigeon
L A K
WJRT
CHESANING
GRADE A
Fish Pt
Sebewaing
WKNX-TV
ELEV
Cass City
Bay City
Caro
TREBIT
GRADE A
Carsonville
Sandusky
Croswell
Lexington
Brown City
MICHIGAN
Lapeer
FLINT
WOOD-TV
Charlotte
Eaton Rapids
Grand Ledge
Lansing
Mason
Albion
Manchester
BUTTERFIELD
GRADE A
Detroit
WXYZ
Windsor
WJRT
CLARKSTON
GRADE A
TOLEDO
APPL
WSPD-TV
WPAG-TV
Amherstburg

OTHER GRADE A SERVICES WITHIN PROPOSED FLINT GRADE A CONTOURS

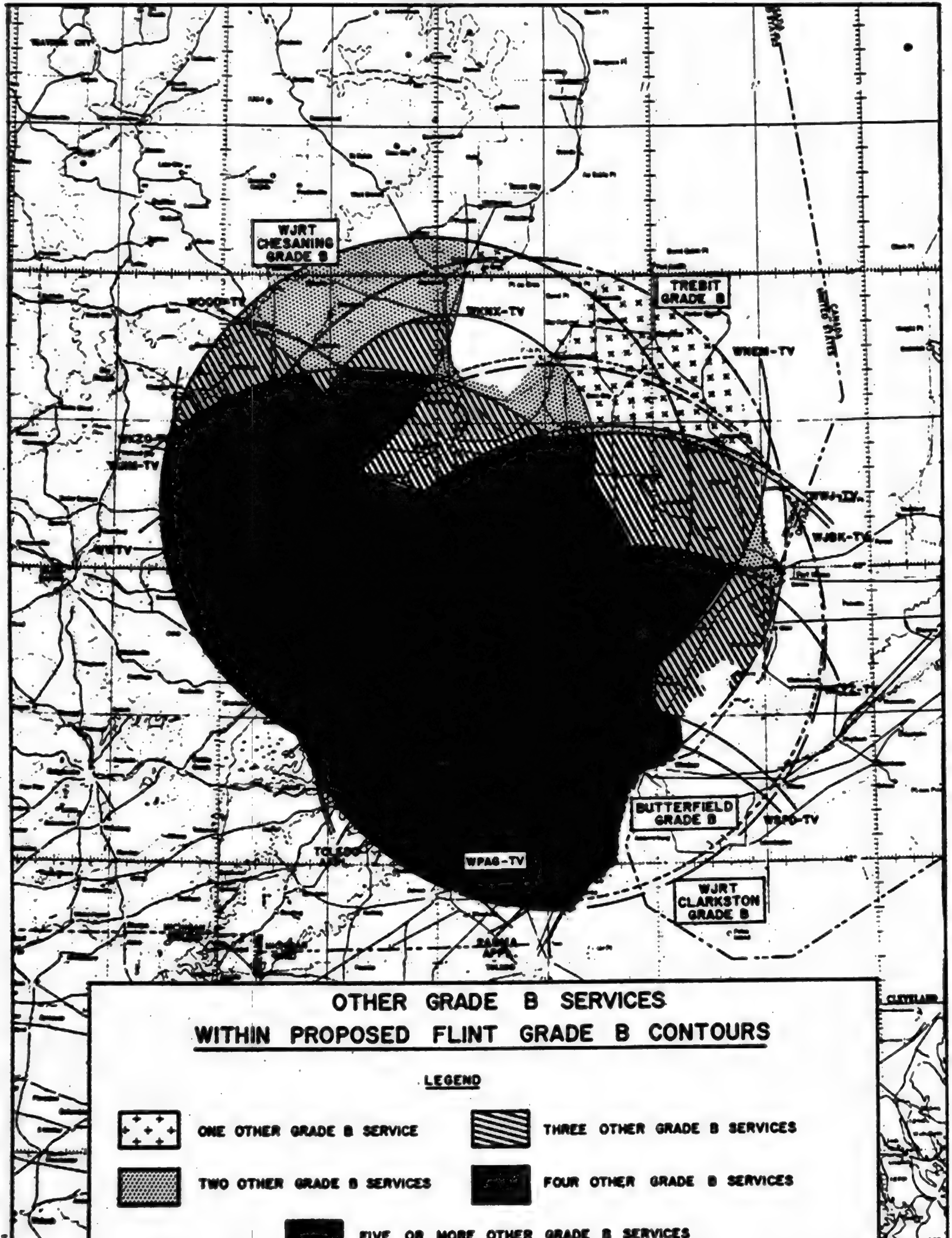
LEGEND

- ☐ NO OTHER GRADE A SERVICE
- ☒ ONE OTHER GRADE A SERVICE
- ░ TWO OTHER GRADE A SERVICES
- ▨ THREE OTHER GRADE A SERVICES
- ▩ FOUR OR MORE OTHER GRADE A SERVICES

AVAILABLE

FIGURE 5

J.A. 714


WJRT CHESANING GRADE B
TREBIT GRADE B
WOOD-TV
WKNX-TV
WNEM-TV
WJIM-TV
WWJ-TV
WJBK-TV
BUTTERFIELD GRADE B
WSPD-TV
WPAG-TV
TOLEDO APPL
WJRT CLARKSTON GRADE B
PARMA APPL
CLEVELAND

OTHER GRADE B SERVICES
WITHIN PROPOSED FLINT GRADE B CONTOURS

LEGEND

- ✚ ONE OTHER GRADE B SERVICE
- ▨ THREE OTHER GRADE B SERVICES
- ▒ TWO OTHER GRADE B SERVICES
- ▩ FOUR OTHER GRADE B SERVICES
- ■ FIVE OR MORE OTHER GRADE B SERVICES

BEST COPY

WJR Exhibit 92
Docket 10268 et al.

MINUTES OF SPECIAL MEETING OF THE BOARD OF DIRECTORS OF WJR, THE GOODWILL STATION, INC. HELD MAY 20, 1954.

A special meeting of the Board of Directors of WJR, The Goodwill Station, Inc. was held at the offices of the corporation, 2800 Fisher Building, Detroit 2, Michigan on Thursday, May 20, 1954 at 2:00 P.M. pursuant to notice of said meeting given in accordance with law and by-laws of the corporation.

The following directors, constituting a quorum, were present:

Selden S. Dickinson
Worth Kramer
G. F. Leydorf
F. Sibley Moore
John F. Patt
William G. Siebert

Mr. Patt acted as chairman of the meeting and Mr. Siebert as secretary.

The minutes of the special meeting of the Board of Directors held April 7, 1954 were read and approved.

The financial statements of the corporation . . .

* * *

The treasurer reported . . . (relates to exchange of securities).

* * *

At a meeting of the Board of Directors held February 25, 1953, a resolution was authorized for extension of option on purchase in full of property known as the Clarkston transmitter site. It was subsequently deemed advisable by Washington counsel that this property be deeded to WJR, The Goodwill Station, Inc. After discussion, on motion duly made and seconded, the following resolution was unanimously

AVAILABLE

approved:

> RESOLVED, That the action of the treasurer in purchasing two parcels of land known as the Clarkston television transmitter site for $11,241.00 be ratified and approved.

A discussion followed relative to disposition of Waterford property. The possibility of using this property as a future transmitter site appeared to be remote. After a discussion, the following resolution was approved:

> RESOLVED, That G. F. Leydorf and William G. Siebert be empowered to negotiate for the sale of the property known as Waterford Farm.

Discussion then followed as to the advisability of purchasing or renting property in Flint presently occupied by WTAC-TV. After discussion, the following resolution was approved:

> RESOLVED, That John F. Patt, Worth Kramer and William G. Siebert constitute a committee to negotiate for the rental of real estate and the rental or purchase of equipment from Trendle-Campbell Broadcasting Company.

It seemed advisable at this time to open a commercial account with the Genesee County Savings Bank in Flint, Michigan. After discussion, on motion duly made and seconded the following resolution was approved:

[5214]

> RESOLVED, That deposits be made in the Genesee County Savings Bank in the name of WJRT, a division, a division, WJR, The Goodwill Station Inc., copies of printed forms of resolutions to be attached and become a part of these minutes, and that the action to be taken by the officers of the company in this regard be ratified and confirmed.

It was agreed that any two of the following four persons be authorized signatories on the account:

Worth Kramer
F. S. Moore
John F. Patt
William G. Siebert

There being no further business, the meeting was adjourned.

Secretary

Chairman

[5217]

WJR Exhibit 95
Docket 10268, et al

MINUTES OF SPECIAL MEETING OF THE BOARD OF DIRECTORS OF WJR, THE GOODWILL STATION, INC. HELD JUNE 16, 1954

A special meeting of the Board of Directors of WJR, The Goodwill Station, Inc. was held at the offices of the corporation, 2800 Fisher Building, Detroit 2, Michigan, on Wednesday, June 16, 1954 at 11:00 AM pursuant to waiver of notice.

The following directors, constituting a quorum, were present:

Selden S. Dickinson
Worth Kramer
G. F. Leydorf
F. Sibley Moore
John F. Patt
William G. Siebert

Mr. Patt acted as chairman of the meeting and Mr. Siebert as secretary.

The minutes of the special meeting of the Board of Directors held May 20, 1954 were read and approved.

An extended discussion was had regarding the timing of procedures to implement the grant of Television Channel 12 at Flint, Michigan. It was recognized that the grant is not yet final in a technical sense. Both Kirkland, Fleming, Green, Martin & Ellis, the Corporation's

[5218]

Commission counsel, and Dickinson, Wright, Davis, McKean & Cudlip, the Corporation's general counsel, have expressed the belief that by reason of the nature of the original issue before the Commission and the grounds upon which the Commission's initial decision has been planted, there is a sound practicality that the grant will not be disturbed upon reconsideration and/or appeal. Both firms state, however, that the possibility of reversal exists and that they can give no positive assurance that the grant will be affirmed. The fact was noted that WJR has already made a substantial investment in the preparation and submission of proofs to the Federal Communications Commission, as well as in commitments for the acquirement of suitable transmitter sites. It was agreed that it was sound business judgment to take advantage of existing opportunities to acquire office and basic equipment facilities in Flint and to make commitments for the acquirement of transmitters, antennae and sundry equipment items from RCA rather than postpone such acquirement until the grant becomes final for otherwise a protracted delay in getting on the air is inevitable; such a protracted delay poses a number of personnel and operating difficulties which can be costly. It was also stated that the creditor situation in which Trendle-Campbell Broadcasting Corporation finds itself affords an unusually favorable opportunity to acquire facilities from it in Flint which WJR could not expect to duplicate in the open market. Upon motion duly made and seconded, it was therefore unanimously

[5219]

> RESOLVED, that the executive officers of the Corporation be and they are hereby jointly and severally authorized and directed to negotiate:

(a) A ten year lease with Charles E. Pemberton and Larue I. Pemberton, his wife, upon the property located on Lapeer Street, Flint, Michigan, now occupied or appurtenant to the building erected by Trendle-Campbell Broadcasting Corporation, at a rental of not to exceed $875.00 per month, and upon such further detailed terms and conditions as they in their judgment shall determine upon:

(b) The purchase from Trendle-Campbell Broadcasting Corporation of certain of its leasehold improvements and other facilities deemed by them usable, at a cost of not to exceed $40,000.00; and

(c) The acquirement from RCA of such transmitters, antennae and other equipment as may be deemed by them to be timely and suitably priced, at a total outlay of not to exceed $750,000.00

A further discussion was had relative to the various problems attendant television activities and general business prospects.

There being no further business, on motion duly made and seconded the meeting was adjourned.

Secretary

Chairman

[5223]

WJR Exhibit 97
Docket 10268, et al

MEMORANDUM

It is deemed appropriate at this time to make a factual report of conferences held recently in New York with officials of CBS and NBC, as well as with top station representative executives.

Both John Patt and I, earlier this week, took our recently prepared presentation, offering affiliation of WJRT to CBS, to New York and made the presentation to CBS-TV's President, Jack Van Volkenburg, and his two associates, Herb Akerberg, Vice President of Station Relations for Television, and Bill Lodge, Vice President in charge of Engineering.

I am attempting here to recall, as vividly as possible, the reactions of the CBS executives to our presentation.

JACK VAN VOLKENBURG, President, CBS-TV

Jack's initial reaction to our presentation indicated that he was "intrigued" by it and he congratulated us on the presentation itself. He stated that he had had no opportunity to discuss with either Herb Akerberg or Bill Lodge, prior to this meeting, anything concerning WJRT so he, in effect, was viewing our situation for the first time.

With his exceptional background in sales, much of which background he acquired in the midwest area including the Michigan region, he agreed with our premise that the markets of Flint, Saginaw, Bay City, Lansing, etc., were indeed important in themselves. He knew of the attitudes prevailing in these cities as to their individuality, their independence, their pride, and even intense jealousy of their own accomplishments. Thus, this recognition on the part of Jack concurred with the points made in our presentation of WJRT.

Jack, again with his sales background, recognizes fully the importance of an automotive classification to the television business, and, I believe, recognized that WJR, having served this motor area in radio so long and so well, would be helpful to CBS in their solicitation of additional automobile business. Automotive concerns alone have budgeted for the coming year, roughly, 35 to 40 million dollars for the television medium - an indication of the importance to the medium of the automotive classification.

Because of the importance of his next statement, I shall attempt to quote it as follows: "Herb and Bill will probably want to choke me for what I am about to say, for you see we haven't had any opportunity to discuss this prior to your visit. I think that your proposition is intriguing to CBS and that your proposed base rate of between $400 and $500 an hour is realistic and would be bought by CBS advertisers".

HERB AKERBERG, Vice President of Station Relations for CBS-TV

Herb, following Jack's statement as quoted above, was quick to point out that there were many points of conflict which he had not had a chance to go over with Jack prior to our meeting, many of which he felt were non-resolvable. He pointed out to John and me that he had been apprehensive about WJRT since we first informally approached him regarding a possible affiliation.

He indicated that from where he sat CBS was relatively happy with its present Michigan coverage, and that apparently CBS advertisers are also satisfied with it as now constituted with stations WJBK, WKNX (a UHF station in Saginaw-Bay City), approximately one-half of WJIM-TV, Lansing, and WKZO, Kalamazoo.

Herb felt that in affiliating with WJRT, CBS would, in effect, be "competing with itself," using two stations having Grade A signals which embraced the Detroit metropolitan area.

He did not agree with Jack that there was any merit in comtemplating affiliation with WJRT as a basic affiliate. The best he could see was a possible alternative arrangement which, in effect, means that if WJBK failed to clear for any network program or series of programs it would then be offered to WJRT.

BILL LODGE, Vice President in Charge of Engineering

Bill is also a member of their special committee which passes upon all applications for CBS-TV affiliation. Other members of this committee are Oscar Katz and Harper Carraine, both research men and "cost per thousand" experts.

Bill very flatly stated that, in his mind, WJRT with its present Clarkston transmitter site was a "misfit" as far as network patterns are concerned. He indicated that there was much too severe duplication of Grade A signals for CBS to even consider further.

When we pointed out the distances between the two cities and the individuality of the markets we propose to primarily serve, he cited CBS's manner of handling two situations in Texas - the Dallas and Fort Worth, and the Galveston and Houston situations. CBS uses one station in each instance to serve both cities, despite the bitter rivalry between the affected cities and the distinct individuality of each of those cities.

He challenged mildly our maps showing theoretical contours of WJBK and WJRT, stating that, in his opinion, Channel 2's propagation characteristics would be much more effective than would Channel 12's. He did this to minimize our claims of unduplicated Grade A and Grade B or better service. He states that he will study our presentation from this standpoint further.

He firmly took the position that if CBS were to accept WJRT's proposal it would place them in an almost indefensible position in dealing with other stations desiring CBS affiliation. At this point, a duplication between George Storer's WJBK and WSPD- Toledo was brought up, and Bill made haste to defend CBS's acceptance of this duplication on the grounds of greater distance between transmitters.

This conference closed with a commitment on the part of CBS to have their "cost per thousand" committee go over the proposal carefully before advising us of their final decision, which should be this coming Tuesday or Wednesday.

John and I later went in to see Harry Bannister, Vice President in Charge of Station Relations for NBC, to informally discuss with him the possibility of an NBC basic affiliation for WJRT. Bannister was by far the most candid and frank of all the network officials we have contacted.

HARRY BANNISTER

To open our discussion, Bannister made some predictions and evaluations, which while most interesting, were not pertinent to this memorandum.

Bannister reported his feeling that NBC would not be interested in basic affiliation with WJRT and he too pointed out the severe duplication of Grade A service over Detroit.

He indicated satisfaction with NBC's present Michigan coverage pattern which utilizes WWJ-TV, one-half of WJIM-TV, Lansing, WNEM, Saginaw-Bay City, and WOOD, Grand Rapids.

[5226]

When we pointed out informally, without maps of any kind, our superiority in coverage of the Flint, Lansing, Saginaw, Bay City, Port Huron area, he indicated that he knew this to be true but that NBC was loyal to old NBC radio affiliates, and that Milt Grennebaum of WSAM, Saginaw, had been with NBC a long time. I personally believe that Bannister was sincere in his statement of NBC loyalty and I feel that NBC's policy in this regard is considerably more to be admired than CBS's.

In Bannister's opinion, any station without a major network affiliation has a rough road to hoe. To quote him accurately, "Without a major network, you're dead." He went on to point out that television was unlike radio in this respect, stating "In TV you play with blue chips - programming costs lots of them."

He admitted that regional spots, special events, and regional commercial activity would certainly help a relatively independent station but that there weren't enough of this type of feature to fill up a day-to-day schedule.

In concluding this conference, Bannister expressed a real willingness to have us make a formal presentation later.

During the course of the past few months, Mr. Patt and I have had occasion to talk with executives of several station representative firms whose business it is to solicit national spot business for the station. At this writing, I cannot accurately quote these executives but I can recap their views, and I shall attempt to do so. We have signed a representative agreement with the firm of Free & Peters and here is Pete Peters' view:

[5226]

H. PRESTON PETERS

If WJRT is successful in making a major network affiliation, he predicts that the volume of national spot business accruing to WJRT will be at least three times that which would accrue should WJRT operate as an independent.

He further believes that this excellent volume of national spot business would start practically coincident with our going on the air, again provided WJRT has a basic network schedule. He feels that the station, without basic network affiliation, in the long range, has a splendid potential but that it would take two or three years to build, in buyers' minds the importance of WJRT in this area.

[5227]

LLOYD GRIFFIN

Lloyd is in charge of the New York area television sales for Free & Peters. He readily admits that many of the buyers' practices make very little sense but they still buy in accordance with the directions given them by the account and those directions 95% of the time are to buy only on stations having major network programming.

He goes on to state that a client controlling a half hour feature film will take undesirable marginal times on major network affiliate stations rather than purchase premium desirable time on stations not associated with a major network.

Lloyd too, shares Pete Peters' long range optimism concerning WJRT but frankly states that a great measure of his optimism stems from the leadership which he knows WJRT will have.

This memorandum can be shortened considerably by stating that the station representatives' viewpoints as described above are substantially the views of all the other representative executives contacted by John and myself. These include Frank Headley, president of H-R, Frank Pellegrin, Vice President of H-R, Lloyd Venard, president of Venard, Rintoul & McConnell, Pete James of Weed & Company, John

Stebbins of the Bolling Company and Lew Avery, president of Avery Knodel.

CONCLUSIONS:

In all candor, this memorandum has been an attempt to factually report what I have seen and heard, and, as a result of these exchanges of information it is believed that these conclusions can easily be reached.

1. If it is the station's desire, and I believe it is, to operate in the black as soon after commencement date as possible, affiliation with a major network is practically a must.

2. Utilizing WJRT's presently authorized site at Clarkston which not only throws a Grade A signal over Flint but over Detroit as well, neither CBS nor NBC will consider affiliating with us.

3. Although no mention or suggestion has been made, both CBS and NBC and ABC for that matter, would seek WJRT affiliation should we move our transmitter location to a point nearer Flint, thus eliminating Grade A duplicate coverage over Detroit.

[5228]

In view of the above and in view of the fact that construction has not yet been started at the Clarkston site, I wish to go on record as recommending that the directors immediately take steps to move our transmitter site to a point roughly within a 5-mile radius of Davisburg, Michigan, which will, as projected, provide for WJRT a Grade A signal over Flint, Lansing, Saginaw and Bay City, and will reduce its coverage of Detroit to Grade B service. From the Davisburg site, WJRT's Grade A service, as predicted, will encompass a population of approximately 1,900,000 and a Grade B or better service to slightly over 4,000,000 population.

To support my recommendation, I wish to state the following:

1. Acquisition of a major network will, according to all television experts, cause WJRT to operate in the black practically from its commencement date of operation.

2. The move of the transmitter site nearer Flint will dissolve immediately the opposition of Flint citizens' groups who have been inspired to vigorously oppose us.

3. Because of the assurance of profitable operation from the start, it will be unnecessary to maintain large reserves to cover apparently probable losses during the first two or three years of a relatively independent type operation. We, roughly then, will be spending a million dollars instead of the two million allocated to get WJRT off the ground and into black ink, thus permitting this company to use the second million to acquire additional television and/or radio properties.

4. The flagship of our company is still, and will be for years to come our radio facility. It is believed that the morale of the WJR radio organization will be strengthened considerably by the elimination of Detroit from WJRT's primary or Grade A service.

Worth Kramer
July 10, 1954

Addendum

The recommendation that I have made for the move of our transmitter site to a point near Davisburg is naturally contingent upon two very important factors:

[5229]

First, the assumption that such a move would be accepted by the Commission without the necessity of going through further extensive litigation.

Second, that a major network would agree to affiliate with WJRT on a primary basis.

Worth Kramer

WJR Exhibit 99
Docket 10268, et al.

WJR NEWS

August 10, 1954

FOR IMMEDIATE RELEASE:

WJRT, Flint's new channel 12 television station, has leased the studios and offices formerly occupied by WTAC-TV, it was announced today by John F. Patt, President of WJRT, Flint, and WJR, Detroit.

Acquisition of the lease by WJRT from the Trendle-Campbell Broadcasting Company will facilitate pre-operational planning and expedite inauguration of primary TV service to Flint. WJRT will occupy the former WTAC building on Lapeer Street effective September 1st. The lease agreement is for ten years, cancellable on one year's notice and includes an option to purchase.

Commenting on the lease, Patt said, "These studios are new and modern in every respect and have been acclaimed by artists, engineers and advertisers as one of the best functional buildings in television. When litigation is concluded, we plan to construct additional facilities at the Lapeer Street plant to make it the most modern and complete television operation in Michigan."

Patt also revealed that WJRT has ordered more than one million dollars worth of the latest technical equipment, including a new

50,000 watt air-cooled RCA transmitter and the most modern studio and field cameras and mobile equipment.

WJRT has been granted a construction permit by the FCC although an appeal for re-hearing has been filed by the Trebit Corporation and the W. S. Butterfield Theatres, Incorporated. Grant of channel 12 to WJRT was announced by the FCC May 14, after fifteen months of legal hearings and deliberation.

[5238]

WJR Exhibit 100
Docket 10268, et al

COPY OF FORM 701, FILED DECEMBER 1, 1954

Name of applicant - WJR, The Goodwill Station, Inc.

Post Office address (number, street, city, state) - Fisher Building
Detroit 2, Michigan

1. Have there been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendment thereto, or modification thereof since filing? Yes.

   If the answer is "Yes" give particulars in the space below:

   1. Former WTAC-TV studio building has been acquired.*
   2. Minor changes in stockholders.*
   3. Change in proposed chief engineer.*
   4. Change in network plans (see back of form).*
   5. Change in proposed transmitter location.*

   *Application for modification of construction permit reflecting these changes is in course of preparation and will be filed in the near future.

2. Identity of construction permit for which additional time is requested.

   File Number - BPCT-967
   Location - Flint, Michigan
   Call Letters - WJRT
   Frequency - Channel 12, 204-210 mc

3. Reasons why construction cannot be completed within the time specified in construction permit (use back of form)-see back of form

4. If delivery of equipment has not been made, from whom was equipment ordered? -

   When was equipment ordered? -

   What was the promised date of delivery, if any? -

[5239]

5. Has the equipment been delivered? Yes.

   If the answer is "Yes" when was installation commenced?

   95% delivered; 5% in storage; installation commenced June, 1954

   What is the extent of installation?

   Studio building has been acquired and furnished; studio technical installation is approximately 20% completed; studio lighting is approximately 80% installed; and studio production equipment and basic scenery are approximately 75% constructed.

6. By what estimated date can construction be completed? July 12, 1955

Dated this 30th day of November 1954

WJR, The Goodwill Station, Inc.
Applicant

By /s/ John F. Patt
John F. Patt, President
Officer of Application Corporation or Association

[JURAT dated November 30, 1954]

[5240]

Back of FCC Form 701

Applicant has commenced construction by acquiring studio facilities in Flint and preparing them in part for operation; also by investing a total of approximately $672,000 to date and is expending at the rate of $8,700 per month since July 1 for maintaining a nucleus staff at the Flint studio.

Applicant has been delayed in construction of the station authorized by construction permit, File No. BPCT-967, partially by the fact that no action has yet been taken by the Commission on the Petitions for Rehearing filed by W. S. Butterfield Theatres, Inc. on June 11, 1954 and by Trebit Corporation on June 14, 1954, and by Motions of a so-called "Citizens Committee for a VHF Television Station for Flint" filed on or about June 14, 1954, and partially because of changes in television station facilities and network affiliations occuring during the past two years, which have required a review of applicant's network affiliation plans.

[5250]

[Received Jan. 16, 1957
F.C.C. Mail & Files]

WJR Exhibit 104
Docket 10268, et al

* * * * *

Re: Written Interrogatories of John F. Patt

* * * * *

[5277]

Q. If such a meeting was held, did you express an opinion as to the possibility of obtaining a basic optional CBS affiliation at any given transmitter location?

A. Yes, I expressed my understanding that if we should take the corporate decision to file for a move in our transmitter site to a proposed location in the Chesaning, Michigan area that we would be able to obtain a CBS basic optional affiliation.

Q. If your answer to the immediately preceding question is in the affirmative, state what your opinion was and what transmitter location you mentioned?

A. Answered above.

Q. If you have testified that a management executives meeting was held, was any agreement reached concerning the filing of an application with the FCC for authority to move the transmitter site?

A. Yes, it was our unanimous decision at this time that we should change our plans in order to obtain a CBS affiliation and that we should further prepare the application necessary for this move for filing with the Commission in accordance with the advice given me by Mr. Rollo; namely, as soon as the petitions of our opponents for reconsideration were decided.

Q. If so, what was the agreement?

A. I believe I have covered our understanding and agreement.

Q. Did you attend a luncheon meeting with representatives of the Flint Citizens Committee at the Flint City Club on September 15, 1954?

A. Yes.

Q. If so, state to the best of your recollection what persons were in attendance and identify them if possible.

A. I was accompanied by Don Faust and Franklin Mitchell who had just been recently appointed as Operations Manager and Program Director respectively for our TV station. Present for the so-called Flint Citizens Committee, as nearly as I can recall, were Mr. Mott, Mr. Penney, Mr. Day, Mr. Summerfield and Mr. Bishop. There may have been one or two others but these man I am sure of. All of these men were active in the Flint community in business, cultural and civic activities. Mr. Bishop is in the

[5278]

sporting goods business. Mr. Day, I believe, is in the retail field in charge of one of the variety chain store groups. Mr. Mott's primary interest included the Mott foundation. Mr. Summerfield is in the automobile business and Mr. Penney is with the Chamber of Commerce.

Q. If you have testified that you attended such a meeting, please state what you told the group with reference to your television plans?

A. I told them that we had been spending a long time in reappraising the TV situation in Southeast Michigan. I told them that we had finally reached a conclusion that we would adopt their recommendation made in May to move the transmitter site of our station north of Flint and accordingly I was there to eat a little crow. I told them that we were motivated by a number of considerations in reaching this final decision including a desire to make ourselves acceptable in every way to the leaders of the Flint community who had taken such a strong position against our application by filing a strong petition against our operation with the FCC. I also said that there were numerous changes in the television situation in southeastern Michigan that had occurred since we had first filed and prosecuted our TV application in 1952 and 1953. Among the changes I told them about was the commencement of operations of a station in Bay City on Channel 5, the commencement of operations in Windsor, Canada of CKLW-TV on Channel 9, the increased power and tower heights of WWJ-TV and WJBK-TV Detroit, the anticipated increase in power and tower height of WJIM-TV in Lansing and the allocation of a new facility in the Parma-Onondago area by the FCC.

Q. What was said at this meeting, if anything, by anyone with respect to the Flint Citizens Group petition which it had filed with the Commission opposing the WJR television grant?

A. All of the Flint Citizens Committee men present expressed pleasure at receiving the news of our decision and one of them, Mr. Bishop I believe, proposed that they withdraw their petition against us in as much as, as he said, they had no reason other than transmitter location to prefer one application over another. All of the

[5279]

others expressed willingness to go along with this suggestion but I told the group that we didn't want them to take this step inasmuch as the three petitions were before the Commission at that time for review and we preferred to have a decision reached by the Commission entirely on the merits of the petitions without any action. It might be construed as an attempt improperly to influence the Commission's determination on the petitions.

Q. If anything was said about this petition, what did you tell the Group concerning it?

A. Answered above.

Q. Did you confer with your Washington counsel in Washington on September 21 and 22, 1954?

A. Yes.

Q. If so, who accompanied you and what was the purpose of the conference?

A. Mr. Faust and Mr. Jones were with me and the purpose was to begin preparation of the modification application in respect to the programming and engineering changes that would be involved in a move of transmitter site to Chesaning and an affiliation with CBS.

Q. If you have testified that agreement was reached by the management executives to file an application to move the transmitter site to the so-called Chesaning location did you obtain an option on property at that location?

A. Yes.

Q. If so, on or about what date?

A. As I recall, we received a telephone call from Detroit to the effect that an option had been obtained on, I think, one or possibly two parcels of property in the Chesaning area. This call came while we were in Washington on September 21st or 22nd.

Q. Did you retain a Washington radio consulting engineer to prepare the engineering portion of such an application?

A. Mr. Jones did.

* * * * *

[5284]

EXHIBIT A

May 21, 1954

Mr. Selden S. Dickinson
Dickinson, Wright, Davis, McKean & Cudlip
National Bank Building
Detroit 26, Michigan

Dear Selden:

* * * * *

Similarly, Station WJIM-TV of Lansing, which has had the best signal in Flint for several years, has improved itself by more power and a higher tower. Recently, also, a new station has taken the air on Channel 5 in Bay City, WNEM-TV, and this station is providing a very excellent signal in Flint. All of these stations are carrying

[5285]

network service, three of them being primary NBC affiliates at the present time; one, CBS, and one, ABC. Additionally, a uhf station in

Saginaw, KNX-TV, is carrying partial CBS and ABC service.

National advertisers are now and for the next three or four months will be making out their budgets for both network and national spot advertising. Whatever network, or networks, we succeed in negotiating arrangements with will better be able to provide commercial network programs to us if we are able to commence our operations in September or early October at the start of the fall-winter-spring radio-TV season. As you know, it is customary for the big shows which have taken hiatuses during the summer months to resume in the fall, and this is the season when many new shows and stars are taking to the air for the first time. If we miss the opportunity of an early fall start it is probable that we will miss the entire schedule of a substantial number of these programs, how many it is hard to say, but I should not be surprised if it were as much as 70% or 80% of them. Naturally, we would be losing for one year the income which these programs would represent, but also we would be losing considerable revenue from the adjacencies for spot advertising which these programs would offer. More than that, it would require that we would have to fill in this time at our own expense and we would be up against the problem of trying to sell this time with inferior features against the competition of the big shows which would be heard over the six stations I have mentioned above. In addition to the lost network and national spot programs and revenues, we would be out a whole season of weekend pro football and middle and late evening hockey televising.

As Mr. Kramer told the Board yesterday, he has good reason to believe that the sponsors of the Detroit Lions would put their entire schedule of football telecasts on WJR-T if we are ready to guarantee them time when the season starts sometime in mid-September. Similarly, he feels confident that we can get the Detroit Red Wings hockey schedule on our station. This schedule starts in mid-October, I believe.

It would be difficult to estimate how much money is represented by all of the network, national spot and local programming if we were unable to open our station in time for the regular fall season. Certainly it would run well into six figures, and it might well be at least a quarter of a million dollars -- likely more. As serious as would be these lost revenues, I believe the lost time involved would be even more serious.

* * * * *

[5286]

* * * * *

Very sincerely yours,
/s/ John F. Patt

[5321]

Butterfield Exhibit C
Docket 10268

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS
World Center Building 16th and K Streets, N.W.
Washington 6, D. C.

June 9, 1954

Mr. John F. Patt, President
WJR, The Goodwill Station, Inc.
Room 1243
Statler Hotel
Cleveland, Ohio

Dear John:

As suggested during our telephone conversation of today I am setting forth below the reasons for my concern over your proposal to move your Flint TV transmitter site.

In the first place, such an proposal will require the filing of an application for modification of construction permit, which injects an element of delay. While the application would normally be acted upon by the staff, there is a possibility that because of the fact that there will be pending before the Commission a petition for reconsideration the application might be referred to the Commission for action, and in any event, because of the change in location it will have to be cleared through the air coordinating committee. It is conceivable that this delay would extend beyond September 1 and you would not be able to commence construction at the new location until after the application for modification of construction permit has been approved.

My second reason for concern is that our opponents will in all probability utilize such an application as ammunition in support of their allegation that channel 12 is being moved from Flint in order to serve Detroit. I am not too concerned over this, but it is a factor to be considered.

As I told you by telephone, I have discussed with Kelley Griffith the possibilities of Trebit or Butterfield, or both, obtaining a stay order either from the Commission or the Court of Appeals. His view is generally to the effect that there is a distinct possibility of a stay being issued on the theory that substantial funds are about to be expended and if this is permitted a difficult situation might arise if the court reversed the Commission's decision. In my opinion, as I have

[5322]

told you before and as I told you today, I think there is much less likelihood of a stay being granted than does Kelley. The legal basis for a stay order is to avoid irreparable injury being caused the litigant pending the outcome of his litigation. Applying this theory to your case, I cannot see that irreparable injury would be done either Trebit or Butterfield through expenditure of funds by WJR. It seems to me that you would simply be proceeding at your own peril.

In accordance with your request I am enclosing herewith a copy of the Tri-State Television, Inc. request for a STA to construct studios in Fort Wayne. This request was filed with the Commission yesterday.

Sincerely,
/s/ Reed T. Rollo
Reed T. Rollo.

* * *

[5325]

Federal Communications Commission
Docket No. 10268
Exhibit No. Butterfield
Exhibit G
Date 3/14/57
Reporter Mills

[5333]

WJR NEWS
50,000 Watts
The Goodwill Station, Inc.

From:
Public Relations Department
Fisher Bldg., Detroit, 2, Mich.

May 14, 1954

FOR IMMEDIATE RELEASE:

The Federal Communications Commission's grant of Channel 12 in Flint, Michigan, to WJR, The Goodwill Station, brought an expression of appreciation and a statement of future intentions today from John F. Patt, president of the Goodwill Station.

Patt said: "The Commission's decisive vote in granting our application for TV Channel 12 in Flint makes us very proud and happy. We firmly resolve to become worthy of the confidence placed in us by the FCC and plan to build a television enterprise which all television viewers in this city and its environs will be proud to have as a neighbor and a daily companion."

Patt further stated: "WJR, The Goodwill Station, for many years has served Flint with quality network and regional radio programming. Now we welcome the opportunity of becoming even more closely integrated with this thriving city. We will promptly proceed with our carefully developed plans to provide a new dynamic television service to Flint and the surrounding area. No expense or effort will be spared to achieve our goal of making our Flint station the leading TV station in the State of Michigan."

"We plan to start construction of a new transmitter within sixty days. We plan to originate local and regional programs of highest quality from Flint with the hope of adding further prominence and stature to a city already nationally known for its industry, progress and heart. The name "Flint" will be emblazoned on the consciousness of Michigan viewers daily through numerous flashings on more than a million TV set screens of this entire homogeneous area.

"Within our service area, with Flint as a hub, is a population of more than four and a quarter million people whose cultural, economic and social interests are of great similarity. With two great State educational institutions and many other schools encompassed by this area, with many great sports and entertainment enterprises and features available throughout the area, with the cities of Detroit and Lansing and the entire thumb region of Michigan, including Bay City, Saginaw and Port Huron to draw on for talent and economic support, WJR Television in Flint promises to live up to the great reputation of WJR, The Goodwill Station in Detroit."

Patt also revealed that the radio and TV stations will be carried on as separate operations each with its own staff and studios.

[5335]

Law Offices of
Kirkland, Fleming, Green, Martin & Ellis
* * *
* * * Washington, D. C. * * *

May 17, 1954

Mr. Worth Kramer
WJR, The Goodwill Stations, Inc.
Fisher Building
Detroit 2, Michigan

Dear Worth:

I was very pleased to receive your call this morning, and as you well know, Reed and I are both very pleased with the Commission's decision to award Channel 12 to WJR.

With respect to the call letter matter, a public notice the Commission released on January 13, 1949, prohibits the use of common call letters for AM and television stations under common ownership unless both stations are located in the same city. The notice even goes so far as to say that the above prohibition applies even though the two different stations are located in the same metropolitan area. The public notice is reproduced in Part I of Volume I of Pike andFischer at Page 52:123 (Paragraph 52:303).

I think your question about network affiliation is part of the overall problem of being scrupulously careful to adhere to the representations made during the hearing. Reed and I will submit a detailed recommendation on this whole area in the near future. With respect to network affiliation, it is my preliminary feeling that you should not affiliate with anyone other than DuMont, unless (1) the other network is without a Detroit affiliate, or (2) the other network's signal is not receivable in Flint. This is based particularly on findings 81 and 82 on page 23 and conclusion 31 on pages 49 and 50.

In any event, as a general proposition, I think it would be wise to move slowly with respect to decisions of this nature until the 30-day appeal period has run. At that time, we will have knowledge

of what grounds (if any) Trebit and Butterfield will advance to the Commission or to the Court as part of their argument that the decision is incorrect. For this reason, I have not checked to see if the call letters WJR-T or WJR-F are available. However, as far as I can determine, neither call letter has been assigned to an existing station and, therefore, if the call letters are currently assigned to a ship or the like, there would appear to be a reasonable possibility to have them released. I note that the following call letters have been assigned to stations: WJRD (an AM station in Tuscaloosa, Alabama), WJRE (a television station in Indianapolis), and WJRI (an AM station in Lenoir, North Carolina).

Of course, there is the possibility that we could request the Commission to waive its Rules so as to permit the assignment of WJR-TV. However, there would be little likelihood of success and I do not think this is the time for such a request.

Cordially,

/s/ Russ
R. Russell Eagan

***
CC: Mr. John F. Patt ***
Cleveland, Ohio

[5341]

WJR
The Goodwill Station, Inc.
Detroit 2, Michigan

Worth Kramer
Vice President &
General Manager

June 15, 1954

Mr. Reed T. Rollo
Kirkland, Fleming, Green, Martin & Ellis
World Center Building
Washington 6, D. C.

Dear Reed:

This acknowledges receipt of the copy of your letter addressed to John, setting forth reasons for your concern over our tentative proposal to move slightly our Flint TV transmitter site location.

Also, this acknowledges receipt of the copy of Tri-State Television's request for STA to construct studios in Fort Wayne.

Cordially,

/s/ Worth

[5342]

WJR Inter-Office Correspondence

TO: Mr. Leydorf Date: June 17, 1954
Mr. Jones

Have just looked over the circles again on Kalamazoo. I believe the Kalamazoo transmitter is located nearly half way between Kalamazoo and Grand Rapids, and this should be spotted on the map before the final overlap is shown.

John F. Patt

[5343]

WJR Inter-Office Correspondence

TO: Messrs. Kramer Leydorf Date: June 18, 1954
Siebert Jones
Moore Quello

These are some of the extra maps I left here yesterday. These probably will not do for our presentation except possibly the one showing the uselessness of Lansing. Even this, however, to be accurate, would need to have the outlines of WJBK-TV added.

The attached pages are to indicate, in the rough, a visual presentation which should be printed or hand lettered by a professional advertising or promotion man, with borders or other embellishments and any ideas which may be suggested by Messrs. Kramer, Moore, Leydorf, Jones and Quello.

The idea is to present WJRT, our new television station, to CBS for possible affiliation in the Flint-Saginaw-Bay City-Port Huron-Lansing area.

The following pages are simply the basic idea and will need considerable enlargement of facts as well as careful editing and artistic handling.

John F. Patt

[5344]

WJR, THE GOODWILL STATION, INC.

Presents

To CBS-TELEVISION

(illustrate with CBS-TV eye)

(large letters) WJRT - FLINT

Southeastern Michigan's newest and most
interest-arousing TV Station

[5345]

WJRT STUDIOS IN FLINT

(Illustrate with architect's rendering of
studio building - perhaps in color?)

[5346]

WJRT TRANSMITTER BUILDING
CLARKSTON, MICHIGAN

(Reproduction of architect's drawings)
In color, if possible

[5347]

Special map of Southeastern Michigan showing all of the principal cities, with WJRT's tower rising dramatically 1,000 feet above Clarkston, with shadowed circles showing approximate A and B coverage areas.

[5348]

At the outset, we want to make it clear that we do not present WJRT as a primarily Detroit station. It is a Flint-Saginaw-Bay City-Port Huron-Lansing station, with incident primary coverage of Pontiac and Detroit. We do not expect CBS to consider WJRT for Detroit coverage ~~primarily~~, nor as a replacement for its present Detroit television affiliate. The fact that WJRT does have the ability to reach the metropolitan Detroit area with Grade "A" service, is rather to be regarded as a distinct plus for America's outstanding television network, which has and will have some necessary overlap of service in many parts of the country, and which will be favorably regarded by advertisers as giving them a "second chance", particularly in the big "A" markets of the nation.

However, in this request by WJRT to affiliate with CBS-TV, we are submitting this property as a station which will serve primarily Flint (72nd market), Saginaw-Bay City, 98th market (?), Lansing, 100th market, and the rich homogeneous area lying between Flint and Saginaw Bay, including the famous Thumb region.

[5349]

Let us have a look at how WJRT complements the coverage of CBS-TV's present Detroit affiliate.

(Map showing Grade "A" contours of WJRT and WJBK-TV with straight line drawn between the points at which the circles intersect. The circles may be drawn inside each other with light dots where circles overlap.)

Engineers note: Please count population two ways:

(1) Outside WJBK-TV's entire circle but inside WJRT's Grade "A".

(2) Count population north of the straight line and south of the straight line separately.

[5350]

The same treatment of Grade "B" contours for WJRT and WJBK-TV, counting populations two ways:

(1) Everything inside the WJBK-TV circle and everything outside of it for WJRT.

(2) Everything north of the straight line and everything south of the straight line.

[5351]

Flint is a big city all by itself. Flint is big, 72nd market, and growing. Too, Flint is extremely jealous of its own importance, industrially, commercially, and in the realm of culture and education. Here are some facts about the Flint metropolitan area which are impressive:

(List below market data for entire Flint trade areas, including households, retail stores, drug stores, gasoline stations, and any other such data.)

(Population).

[5352]

Flint perhaps is the capitol of General Motors:

(1) Chevrolet Employment______
(2) Buick " ______
(3) A. C. Spark Plug " ______
(4) Ternstedt " ______

[5353]

Flint has other important industries.

(List)

[5354]

The Saginaw-Bay City area, likewise, is an important and separate marketing area. Here are some statistics about this region.

[5355]

What about Lansing? Lansing is an important cultural and economic, as well as political, center in Michigan which for some time has had its own TV station. Primarily listed by NBC but also available to CBS-TV, and to ABC and Dumont as well.

The Lansing market is important as witness the following statistics:

However, turn page -

[5356]

There will be ample coverage by CBS-TV advertisers of the Lansing market with or without the use of a local Lansing station.

Look at the coverage of the Lansing region from the overlap of three Grade "B" contours - WKZO-TV at Kalamazoo, WJRT Flint, and WJBK-TV Detroit.

[5357]

What about television's cost to advertisers in Michigan?

Today a large number of CBS-TV advertisers are buying WKZO-TV at $800 per hour; WJIM at $700 per hour; WJBK at $2000 per hour; WKNX-Saginaw at $250 per hour; Total cost $3750.

WJRT's rate for Flint-Bay-City-Saginaw will be 600 ~~$450.00~~ per hour. It is submitted that economical and effective coverage of lower Michigan can be obtained by the use of WKZO-WJRT-WJBK, at a total cost of $______.

Advertisers will be quick to spot the cost difference in this kind of a package against NBC's cost of $______ per hour, for Grand Rapids $900 per hour; Lansing $700 per hour; Bay City $350 per hour; Detroit $1800 per hour; total $3750.

[5358]

Let's look at topography. So far, we have shown, theoretically, coverage based on uniform soil and ~~topographical conditions~~ [flat terrain]. However, there are important ridges located in southeastern Michigan which affect television reception greatly. By getting on top of one of these ridges, as WJRT has done, one is able to take advantage of the additional height and to look down into the areas below. These same ridges, however, provide hurdles which television signals find it

[5358]

hard to jump and, therefore, restrict the service limits to something less than what the predicted contours might show.

Let us have a look at two ridges running from northeast to southwest, which affect the reception of the various TV stations in Detroit, Lansing, Flint, Saginaw and Bay City.

[5359]

Show topographical map.

[5360]

That's it in a nutshell. (Illustrate nutshell)

Except for a brief summary.

[5361]

1. Television advertisers, for the most part, are interested only in the first 100 markets.

2. WJRT has four of these first 100 - in Flint, 72nd, Saginaw-Bay City, 98th market, Lansing, 100th market, and Detroit.

3. WJRT will have a total population served in Grade "A" of ______, in Grade "B"______.

4. Ignoring the Grade "A" area served by WJBK-TV, the Grade "A" area of WJRT has a ~~remainder~~-service of ________ population.

5. Also, ignoring the population served south of the common boundary of WJRT and WJBK-TV, WJRT with Grade "B" service has a population of________people.

6. Flint is extremely jealous of its position as an industrial and cultural community. It passionately looks forward to having its own TV station.

Plant City

7. Flint is the General Motors capitol of Michigan., desirious of CBS Primary affiliation

8. WJRT will have the finest studio facilities money can buy.

9. WJRT will have the finest technical facilities money can buy:

Duplicate power supply

Mobile unit
Duplicate camera chains and film chains.

Etcetera.

10. WJRT will have the finest staff it is possible to assemble.

[5362]

In short:

WJRT will follow in the proud tradition of WJR-Radio in Detroit.

Finally, WJR and CBS have been partners in the Motor City, and over a wide area, for many years.

[CBS Should accept the invitation to affiliate in Fall of 1954]

[5363]

Free Speech Mike salutes the CBS-TV eye.

[5364]

June 24, 1954

Mr. John F. Patt
1243 Statler Hotel
Cleveland 1, Ohio

Dear John:

Per our conversation, I am forwarding the following:

1. Letter from Sam Morris, professional prohibitionist.

2. Informational copy of memorandum from Quello to Campbell-Ewald group suggesting certain copy changes in presentation of WJRT to CBS-TV.

3. Typewritten copy of significant first page of FCC construction permit.

4. Telegram from VHF lobby group.

5. Memo from Quello regarding industries other than G.M. in Flint.

6. Additional material from Quello on why Flint market merits a primary network affiliation.

7. Copy of suggested draft release on our acquisition of WTAC-TV

[5364]

offices and studios which you wish to review, taking particular note of the sentence in the Construction Permit requiring commencement of construction to begin by not later than July 12, 1954.

I am asking Miss Schymick to make arrangements for your hotel reservation based on your arrival next Wednesday morning and your departure Thursday evening.

Best regards,

WK/s

[5365]

Mr. Kramer:

Only thing missing here is Schedule A - the rate, the free hours, if any and the percentage of rate paid to station.

There are 2 or 3 items which would need to be questioned.

/s/ JNP

[5366]

DUMONT
TELEVISION NETWORK
CONTRACT
OF
AFFILIATION

[5367]

16. Network Use of Station Programs and Facilities.

A. Before offering to another network organization any sustaining program originated by the Station after the effective date of this agreement, the Station will offer to deliver each such program to the Network upon terms and conditions specified by the Station. The Network shall have 30 days after receipt thereof to accept or reject the offering. If the Network does not accept any such offering within 30 days, the Station shall have the right to offer the program to another network organization upon the same terms and conditions.

B. At the Network's request, the Station shall permit the Network to use whatever studios, facilities, equipment and personnel Station may have available for the purpose of originating all or part of any Network programs from the area served by the Station; provided that the Network shall reimburse the Station for any additional costs necessarily incurred by the Station as a result of the Network's use thereof.

17. Program Offerings.

All programs delivered by either party to the other after the effective date of this agreement shall be subject to all of the terms and conditions hereof. In the event of any conflict between this agreement and any program offering and/or acceptance, this agreement shall prevail unless there is a subsequent written agreement, signed by both parties, expressly subordinating the conflicting provisions hereof in connection with a particular offering or acceptance.

18. Changes in Station's Operations.

If the Station's transmitter location, power, frequency or authorized hours of operation should be changed, and the value of Station as an affiliate is thereby, in the opinion of the Network, lessened, the Network shall have the right to terminate this agreement upon not less than 30 days' written notice to the Station.

19. Assignment of Agreement.

The Station shall not assign this agreement or any of its rights hereunder, except that if the license or control of the Station is transferred, such transfer shall be made subject to the assumption, in writing, of this agreement by the transferee, and the Network shall be immediately notified of such transfer and furnished with a duplicate original of such assumption. The Station shall promptly notify the Network of any change in the corporate name of the owner of the Station.

20. Term of Agreement.

The term of this agreement shall begin at 3 A.M., New York City time, as of the effective date of this agreement and shall remain in effect for a period of one year. This agreement shall be automatically renewed upon all of the provisions herein contained, including this clause of automatic renewal, for a further term of one year from the time of expiration of the original or any renewal term, unless either party notifies the other in writing at least 90 days prior to the expiration of such original or renewal term of its intention not to renew.

[5370]

TRENDLE - CAMPBELL - MEURER, INC.
Detroit 26, Michigan

* * *

July 9, 1954

WJR - The Goodwill Station, Inc.
28th Floor - Fisher Building
Detroit 2, Michigan

Attention: Mr. Worth Kramer,
Vice President and General Manager

Gentlemen:

In furtherance of the sale to you of our leasehold improvements in the premises described as 2302 Lapeer Street, Flint, Michigan, and the arrangements set forth in your letter to us of July 8, we represent and warrant that the purchase price therein set forth, received by us from you, will be used first to discharge any and all obligations of any creditors in full satisfaction and discharge of all of their rights pertaining to the said leasehold improvements.

It is specifically understood and agreed that without the within warranty, the transaction set forth in the said letter of July 8, would not have been concluded.

A copy of this memorandum is being sent to the Creditors' Committee of Trendle-Campbell Broadcasting Corporation, attention Mr. Walter Krapohl, Flint, Michigan.

Yours very truly,

TRENDLE-CAMPBELL BROADCASTING CORP.

/s/ H. Allen Campbell
Vice President & General Manager

[5371]

Kirkland, Fleming, Green, Martin & Ellis

* * *   * * *   * * *

Washington 6, D. C.

July 6, 1954

Mr. John F. Patt
2718 Landon Road
Shaker Heights 22, Ohio

Dear John:

Since talking with you on the phone, I have discussed the question on moving the transmitter site some 15 miles to the north with Reed and Kelley Griffith, and although we have not come to any final conclusion, several serious questions present themselves. These questions are not related to the economics of such a move but rather to the problems that would be created before the Commission.

In the first place, I understand that you are anxious to get on the air by September and it is obvious that even if we run into no obstacles, it would take some time to secure Commission approval of an application to modify the Construction Permit to so relocate the transmitter. In the first place, we would have to get CAA approval, which takes some time even if no problems are presented. In addition, it normally takes about three weeks to process an application merely to change a transmitter from General Electric to RCA, although it is true under certain circumstances the staff will expedite the processing of applications.

Another problem is that we would have to file such an application on a Form 301 and we would either have to state that there were no programming changes or set out the changes. If we propose a different network than DuMont, this will result in a new program schedule and we run into the problem of the fact that one of our major preferences was in programming. If we change the programming, in any way, Trebit and Butterfield will petition the Commission to designate the modification application for hearing and will probably claim the right to a comparative hearing. This would lead to further delay and the remote

[5371]

possibility of a further hearing.

[5372]

Another factor is that Butterfield has requested that the record be reopened, and if we file an application to change the transmitter site, this will give them additional arguments for reopening the main proceeding.

Of course, if we file such an application, Butterfield and Trebit will argue that we are much too late to do so. I doubt that this particular argument would stand up, but it may be appealing to some Commissioners and, again, I think it would add to Butterfield's argument that a rehearing should be held.

In addition, the filing of such an application would seem to cut both ways as to the pending petitions for reconsideration. On the one hand, it could result in the withdrawal of objections by the Flint citizens group. On the other hand, Trebit could argue that such an application proves that their assertion with respect to transmitter locations was correct and that we in reality are trying to strengthen our case.

We will, of course, give this matter more detailed consideration, but I felt that the above considerations should be given to you at this time.

Cordially,
/s/ Russ
R. Russell Eagan

* * *

[5373]

WJR
The Goodwill Station, Inc.
Detroit 2, Michigan

John F. Patt
President

* * *

July 13, 1954

Mr. William G. Siebert

Radio Station WJR
Fisher Building
Detroit 2, Michigan

Dear Bill:

I have your three separate memorandums dated July 8th concerning arrangements we have agreed to with Allen Campbell on:

1. Leasehold improvements less work done on the television tower.

2. A purchase or rental of R. P. Lewis Company's partitions, and

3. Modification and assignment of lease of Mr. Pemberton's property from Trendle-Campbell to ourselves.

All of these arrangements conform to my understanding of the deal we made with Allen Campbell, and are in order to execute simultaneously with the purchase of studio control equipment from RCA at 70% of the original price, plus the purchase from RCA of the tower for a flat $2500.

With kindest regards,

Sincerely yours,

/s/ John

* * *

Believe we should continue renting the Lewis partitions, Bill.

[5375]

CBS TELEVISION

Office Communications

To: Mr. Akerberg cc: Mr. Shurick
Mr. Lodge

July 20, 1954

SUBJECT: WJRT - FLINT, MICHIGAN

This will supplement my memorandum of July 14 concerning the coverage pattern of WJRT, Flint, Michigan.

Subsequent to the preparation of the July 14 study, the management of WJRT have tentatively proposed a different transmitter location - one about 9 miles due east of Flint, and about 18 miles north of the site originally proposed. The purpose of this memorandum is to review the effect of this proposed move, particularly with regard to overlap with WJBK-TV and the possible desirability of adding WJRT to the CBS television network.

Attached hereto are a map and memorandum prepared by Mr. Davis, similar to those attached to my earlier (July 14) study.

In summary, overlap with WJBK-TV would still be extremely serious. The change in location would only reduce from 94.4% to 92.8% the homes served by WJBK-TV which would also be served by WJRT. The incremental homes added by WJRT alone (and these homes, of course, would have fringe service from WJBK-TV) would be 92,000 for the new site versus 1,192,000 duplicated by both WJBK-TV and WJRT.

In my opinion, WJRT would produce such serious overlap with WJBK-TV from either of the two proposed sites, that it could not be considered a logical affiliate for CBS television.

[5376]

WJR
The Goodwill Station, Inc.
Detroit 2, Michigan

John F. Patt
President

* * *

September 16, 1954

Mr. Worth Kramer
W J R, Fisher Building
Detroit 2, Michigan

Dear Worth:

I have just finished reading your speech, and I hope you can hear the applause. It is certainly a dandy. You have a very clever, new approach to old truths, which need to be restated again and again. I am so very happy that you are getting a nice reaction from all sides. I think it is a speech worth delivering again whenever you have the time and the right audience opportunity.

The luncheon with Harding Mott, Bill Bishop, Bud Summerfield, and Ted Penney more than lived up to my fondest hopes. I was a little fearful that they had gotten themselves so far out on a limb that they would not be willing to crawl back. They seem to be genuinely pleased with our modesty and sincerity in "eating crow", and the luncheon really developed into a lot of fun. All of them offered to help us in every way, and invited Don Faust to drop by.

Mott perhaps was the most non-committal, although he was cordial, and our two most outspoken opponents in May, Bishop and Summerfield, more or less overruled Mott in saying that they would take affirmative action in notifying the Commission of their position once we filed for a new site. I think it is possible that we can announce our intention to do something of this kind perhaps even in advance

of our actually filing it. I want to get Reed's philosophy and perhaps the advice of one or two Commissioners on this point.

It is my plan to have Clarence and Don fly to Washington Tuesday morning with me, spend a couple days completing the application form, which will remain undated but ready for instantaneous filing - the exact time to be worked out with Reed. I am asking Bill Siebert to complete the financial and corporate data, and I think by the end of next week the application should be in order.

We are trying to keep as many things identical as possible, and to that end we will work to identical local programming, although CBS network programs will be substituted for DuMont. We will make the percentage of local live originations come out the same, but we may have to adjust the film percentage downward, in order to accommodate a few more network shows. For the present we are including only those network shows that are on WJIM-TV (not WKNX-TV).

Don and I discussed the rate schedule briefly, and while this does not need to be finalized for a long while yet, I should think we might aim for a national rate of $700. per hour - the same as WJIM-TV, and try for the same rate with CBS. As to local, I believe we should go no higher than $450. per hour, inasmuch as we want to really make ourselves attractive to the local merchants who have been so unanimously against us. As to a AA rate, it seems that a small minority of stations have such a rate, mainly in the great big markets, and I believe we should defer establishing such a rate until we have gotten well launched and have gotten in a fairly sold out condition.

These are items of course that we can discuss later, as we near the air target date, whatever that turns out to be. Don feels that if we do not hit the air by February, we would be just as well off to wait until a mid-summer or an early fall start - and this makes sense to me.

Sincerely yours,
/s/ John (RB)

[5395]

Law Offices Of
Kirkland, Fleming, Green, Martin & Ellis
Washington 6, D. C.

* * *

August 19, 1954

Mr. John F. Patt, President
WJR, The Goodwill Station, Inc.
* * *
Cleveland, Ohio

Dear John:

In accordance with your request of last Tuesday I have today forwarded Clarence Jones copies of the technical portions of an application that would be required to change the transmitter site of WJRT. A comparable supply of the non-technical portions of the application is enclosed.

As you know, I am reluctant to see you file such an application, but we have thoroughly discussed the pros and cons, and I recognize that you are faced with compelling economic reasons which outweigh the legal considerations. If the application to change location runs into the difficulties I anticipate, you could, of course, have it dismissed without prejudice before it is designated for hearing.

Sincerely,
/s/ Reed T. Rollo

* * *
Enclosure

[5396]

August 19, 1954

Mr. Clarence Jones
WJR, The Goodwill Station, Inc.
Fisher Building
Detroit, Michigan

Dear Clarence:

In talking with John Patt on Tuesday of this week he advised me that he desired to have an application ready for filing immediately after the Commission acts on the pending petitions for reconsideration of the Flint grant to move WJRT from its presently authorized site to a new site. I expect the petitions for reconsideration to be acted upon by the Commission sometime during the month of September.

I understand that several sites are still under consideration and until a final decision is made it will, of course, be impossible for you to prepare the engineering sections of the application. Nevertheless, I am enclosing herewith a supply of Section V-C and V-G which I understand from John will be prepared by you. I believe you are sufficiently familiar with this application form to prepare it without assistance from me. However, if you have any questions, please do not hesitate to call on me.

The non-technical portions of the application will, of course, be prepared under John's supervision.

Sincerely,
Reed T. Rollo

* * * Enclosure
cc: John F. Patt

[5397]

WJR
THE GOODWILL STATION, INC.

August 31, 1954

Mr. Herbert V. Akerberg
Columbia Broadcasting System
485 Madison Avenue
New York 22, New York

Dear Herb:

In accordance with our conversation last Thursday, I have had our Engineering Department survey a new Alternate Site No. 2-A, located some nine or ten miles north of the original Owosso Site which we presented to you. This site has not been fully checked for CAA approval, but subject to such approval and to the availability of property and utilities, we believe we can offer such a site to CBS for our Flint station. It may be necessary, in locating property and utilities, and in getting CAA approval, to actually locate the site somewhere between Alternate Site No. 2 and this proposed Alternate Site No. 2-A. Alternate Site 2-A hugs the Lansing-Saginaw airway (near Fergus), and is as far north as 71 DB service over Lansing and 77 DB service over Flint will permit.

I have also had our engineers check the effect of the ridge which exists between WJBK-TV and this new site, which tends to flatten out the contours of both stations in the direction of the other station. Giving effect to these two factors, (1) the changed transmitter site northward, and (2) the flattening of Grade B service area contours due to terrain conditions, we arrive at an overlap by WJRT of WJBK-TV of a population of 477,256, or 10.8% of WJBK's total Grade B service area.

According to our engineers, there is a distinct possibility that the service contours when actually measured, will be even more flattened than shown on the attached map, two copies of which are being supplied to you. In case this proves to be the fact, the overlap may be reduced below 10%. Of course it is impossible to eliminate the overlap which will occur over the metropolitan area of Flint itself, as WJRT must cover its home city with a minimum of 77 DB.

[5398]

The 10.8% overlap of WJBK-TV by WJRT compares with a present overlap by WJIM-TV of 14.4%. At the same time, WJRT's overlap of WKZO-TV would be considerably less than the 28.3% caused by WJIM-TV. I do not have the exact figure on this, but Site No. 2 showed a 16.8% overlap of WKZO-TV, but this is substantially reduced by moving northward.

I hope these maps and the analyses will present sufficient reasons to have you give us the affirmative answer which we were both anticipating last Thursday.

With kindest regards,

Sincerely yours,
John F. Patt

[5400]

SUMMARY OF MEETING WITH REPRESENTATIVES OF THE CITIZENS' COMMITTEE FOR A VHF TELEVISION STATION IN FLINT

I. Luncheon Meeting held Wednesday, September 15, at the City Club of Flint.

A. Present at this meeting were: C. S. Harding Mott, William Bishop, Arthur Summerfield, Jr., E. J. Penny, John F. Patt, Franklin Mitchell, Donovan Faust.

II. Summary of Remarks by Mr. Patt.

A. This meeting called in order to keep the Committee apprised of progress to date and to fill them in on the present WJR thinking.

B. Since the WJR application for a television station in Flint was filed two years ago, many changes have taken place in television, generally, and in this area, specifically.

1. For instance, several new stations have gone on the air. WNEM-TV in Bay City is already on; CKLW-TV in the Windsor-Detroit area is presently testing; and another channel has been added in the Jackson Area and is presently in hearing.

2. The UHF frequencies, an unknown quality two years ago, have been tried by several applicants in the area and in most cases have found rough going.

3. Also, the existing VHF stations have installed higher power transmitters and taller towers giving them a considerably broader coverage. Both WJBK-TV and WJIM-TV have gone to maximum power and height. WWJ-TV will be ready to do so soon, and WXYZ-TV has increased power.

4. WJRT's proposed channel affiliation, the DuMont Network, has not grown in stature with the remainder of the industry as anticipated; has, in fact, retrogressed. The past couple of years have proved that an independent or semi-independent station faces tremendous losses for several years and usually cannot render a good service to the community. It is now felt that DuMont would be of such little help that such an affiliation would not enable WJRT to give the service envisioned.

II. C. These factors necessitate a re-evaluation of our thinking. It is felt that a major network affiliation is necessary in order to give the Flint area a top quality TV service. Inasmuch as DuMont cannot presently be considered a major network, and NBC, CBS and ABC could not affiliate with WJRT at the present transmitter location because of a substantial duplication of coverage, we are seriously considering moving the site to a point northwest of Flint. This, of course, would be a location more in line with the Citizens' Committee thinking. Although the move would mean cutting the number of people in the WJRT coverage area from over four million to one million nine hundred thousand, it would also make possible an affiliation with one of the major networks.

At this point, Mr. Patt demonstrated what the various coverage patterns of NBC and CBS would be in the Michigan area with WJRT, affiliate of NBC and then of CBS. Although no such statement was made, it was indicated the CBS pattern would be more favorable.

III. Committee Reactions.

A. The statements by Mr. Patt were very favorably accepted by all present, the principal comment being, "That's all that was desired in the first place" and that "No one had anything against WJR, they simply wanted a television station for Flint, and if WJR was prepared to give it to them, they were happy."

B. Mr. Mott and Mr. Bishop initially made comment about filing in support of the transmitter move, but after some discussion, decided this move was too strong. It was finally agreed by all present that no further objection would be made by the Committee and that the petition could be withdrawn. Mr. Patt pointed out that this meeting was not called in an attempt to get the Committee to change its position, and that WJR was prepared to allow the present appeal to be decided before taking action on the change in transmitter site.

C. Mr. Summerfield inquired if rates would be cut in half since the number of people in the coverage area would be halved. Mr. Patt replied that rates would be commensurate with the size of the Flint area market and that local rates would be offered to take care of local advertisers.

D. Mr. Bishop introduced a thought about selecting call letters more representative of Flint although this was not pursued to any great extent.

IV. Mr. Patt gave a brief background on Don Faust and Bud Mitchell and informed the group that both were now in Flint. He also reiterated the meeting was called in a wish to keep the Committee informed and to make them aware of the projected move and perhaps to "eat a little crow" with them -- at their expense. The wish was expressed that the proposed change not become public knowledge at this time.

[5402]

WJR Inter-Office Correspondence

TO: Mr. John F. Patt

Carbon Copy: Mr. Worth Kramer September 24, 1954

Here is the summary of the meeting with the Citizens' Committee which you requested. It covers most of the points to the best of my memory.

The attached statement concerning the transmitter move has been kept as brief as possible. I am not at all sure it is what you had in mind, but perhaps it will give you a start.

/s/ ADF
A. Donovan Faust

[5403]

W J R
THE GOODWILL STATION, INC.
Detroit 2, Michigan

John F. Patt
President

1243 Statler Hotel
Cleveland 1, Ohio
Prospect 1-8343

September 23, 1954

Mr. Reed T. Rollo
Kirkland, Fleming, Green, Martin & Ellis
16th and K Streets, N. W.
Washington, D. C.

Dear Reed:

This is a rather clumsy attempt at a press release which might be issued by WJR when we file our Application for Modification. In dictating it, I did not think it came off too well, but I wanted to get something on paper in order that we are in a position to decide what we want to say when the change is filed.

Perhaps it will be best to let the modification speak for itself and make no comment, although the trade papers and other newspapers may be left to draw their own conclusions and may speculate somewhat. What is your reaction to this statement or to saying anything? Perhaps there is something accompanying your application which expresses it better. If so, I would appreciate your assistance with this draft.

With kindest regards,

Sincerely yours,
/s/ John
RB

JFP: RDB
Enclosure

[5404]

DRAFT DRAFT

With the Commission having reconfimed its final decision to grant Channel 12 at Flint to station WJR, the station is now planning to file immediately for a Modification of Construction Permit, which would move the transmitter site from a point south of Flint to a location northwest of that city. This change in plans by The Goodwill Station for its television operation, was announced this week by John F. Patt, WJR President, who said the move had been decided upon by the Directors of his company after carefully weighing a great many factors.

"More than two years have elapsed since the freeze was lifted, and in television's development this is a very long time and many things have occurred," Patt said. Among developments of the last year have been the inauguration of three new television facilities in the southeastern Michigan area, which has caused a realignment of network affiliations. Also, several stations have increased their tower height and their operating power, so that this area in which WJR originally proposed a "new and different TV service" has plenty of competition.

By asking the Commission at this time for a change in transmitter site, WJR believes it will have the opportunity of best providing the type of service that the people of Flint and the surrounding region, including Saginaw, Bay City, Midland, and Lansing, may desire. We are hopeful that the Commission will grant this request for modification in short order, in order that we may commence construction immediately and inaugurate service early in 1955.

[5405]

Law Offices of
Kirkland, Fleming, Green, Martin & Ellis

* * *   * * *   * * *

Washington 6, D.C.

September 23, 1954

Mr. John F. Patt, President
WJR, The Goodwill Station, Inc.
* * *
Cleveland, Ohio

Dear John:

I am enclosing herewith a draft copy of the WJRT application for modification of construction permit for your examination. Copies are also being sent to Worth, Bill and Don, and I shall appreciate it if you will examine the application with care in order to correct any errors that may have crept in and also to suggest revisions which might strengthen the application.

I wish to call your attention specifically to the following matters:

1. Table I of Section II shows only one of your daughters as married. As I recall, two of them are married, and if the records of the corporation have been corrected reflect the married name of the

second daughter, Table I should be corrected accordingly. Otherwise, it should remain as is.

2. As Bill mentioned in his letter to me, the stock holdings shown on Table I reflect certain recent changes which have not yet been reported to the Commission. However, the figures shown on Table I will correspond with the ownership reports by the time the application is filed.

3. You will note on Table II that I have used the year 1954 as the date you and your associates severed your connections with WGAR. Although the transfer was approved on December 30 or 31, 1953, it was not consummated until 1954.

4. The total called for in answer to paragraph 1.a. of Section III will have to be supplied after Exhibit F-1 has been completed by Clarence.

[5406]

5. Exhibit L-2. You will note that I have referred to an examination of the current addresses of stockholders as a partial support for a representation that more than 80% of your stock is owned by U.S. citizens. I suggest that Bill review the entire list in order to verify this statement.

6. Exhibit F-1. I call your attention to the fact that I have listed on page 2 the identical items which were shown in Exhibit No. 21 in the hearing, but have omitted the dollar values. Clarence is to supply the dollar values and show which of the items have already been purchased either from RCA or from WTAC-TV.

7. Exhibit F-3. The balance sheet as of August 31, 1954 should be attached. Bill did not forward it to me with his draft of Sections I, II and III.

8. Exhibit P-4. Please add the address of Howard Town.

I talked with Jules Cohen today about the engineering portion of the application, and he told me that he had quoted a fee to Clarence yesterday and that if you retained him, he would like ten day's notice, but if necessary, he could have the engineering portion prepared in less time. If his firm is to be retained, I suggest that it be done the early part of next week so that we will not be delayed in getting the application filed.

As you know, I have been somewhat apprehensive about this application, first because it might possibly become involved in a further comparative hearing, and secondly, because a grant of the application might be reversed in court. As a result of our discussions when you were here on Tuesday and Wednesday, I feel quite confident that the application will be granted by the Commission. However, there is a possibility that Trebit and Butterfield would both be considered parties in interest under section 309(c) of the Communications Act and, therefore, would be entitled to protest a grant of the application without hearing. This would mean that a hearing would be held and the Commission would automatically stay the grant of the modified construction permit pending further litigation. In all probability, the application would be granted by the Commission after the protest hearing, after which our opponents could appeal to the court. In the meantime, I presume that our opponents will file an appeal from the original grant and both appeals would be consolidated at a later date. I recognize that you have no choice from a business point of view about filing the application to move. However, I have spelled the legal obstacles out in a little more detail than I did when you were here, particularly the provision of the law which requires the Commission automatically to stay a protested action. I am not sure whether I mentioned that while you were here.

Sincerely,

/s/ Reed T. Rollo

* * *

cc: Worth Kramer
William G. Siebert
Don Faust

Enclosure

[5459]

September 29, 1954

Mr. Reed T. Rollo
Kirkland, Fleming, Green, Martin & Ellis
* * * Washington, 6, D.C.

Dear Reed:

We are sending out a press release today concerning Fritz Leydorf's resignation. I will see that a copy is sent to you; if not with this letter, then later.

In regard to a couple of items in your letter of September 23, you are a little prematrure in having my second daughter married. Only the oldest is married presently but Patricia is planning on a wedding this winter, probably in December.

As Bill has no doubt told you, the stock holdings reported in Table 1 reflect new changes that have been made and which will be duly reported.

Bill is preparing to send you the balance sheet as of August 31, although if you later wish the balance sheet for September 30, it can be supplied if our filing is delayed.

The more I think about the timing for the filing of our application, the more I lean toward waiting the 30-day period for court action or lack of it. What do you think? There is a question in my mind as to whether the filing of the modification will encourage our opponents to file an appeal or perhaps might tend to discourage them. In view of my recent talks with Harry Bitner, I am fairly hopeful that he will not see fit to go further in the courts inasmuch as he expressed to me the thought that the Flint operation "would not be particularly profitable."

It seems to me that we should leave the engineering proposal as nearly the same as before in the application inasmuch as any minor changes that we might

[5460]

make would be the result of final conclusions and decisions made later

[5460]

on. Of course, we would have to reflect the WTAC equipment purchase. I think Clarence feels that we should make the changes conform to the actual facts as we believe them to be now, but I am simply wondering if that will raise any questions which need not be raised.

Sincerely,

JFP/s

[5465]

October 1, 1954

Mr. John F. Patt
1243 Statler Hotel
Cleveland 1, Ohio

Dear John:

Attached you will find a couple of suggested changes in the statement to be made when the FCC confirms WJR's TV grant.

I am underlining the portions which I feel somewhat strengthen the statement.

Cordially,

WK/s
encl.

cc: Messrs. Rollo, Siebert, Moore, Faust

[5466]

(Statement to be made if and when FCC confirms TV grant to WJR)

We are delighted that the FCC has reaffirmed its final decision in our favor to operate a new television station at Flint. While actual construction has been delayed several months in awaiting the outcome of litigation before the Commission, our key television personnel has been appointed and they have been active in making many plans so that viewers of Flint and surrounding area can now look forward to early commencement of service.

During the past few months, we have carefully considered the changing picture facing us today from that which existed more than two years ago when we filed our original application. This appraisal, involving many factors including network affiliation prospects, has resulted in a decision to ask the FCC for a transmitter site northwest of Flint. The site selected by our engineers will serve Flint with a high quality signal, will avoid duplication of the Metropolitan Detroit area which caused concern to several Flint organizations, and is believed to be an optimum site for service not only for Flint, but for the Saginaw-Bay City-Midland-Lansing area as well, where outlets are presently inadequate to serve all four of the national networks. An application to modify our construction permit will be filed immediately, and when granted, construction of our transmitter building and tower will follow forthwith.

Fortunately, we have already occupied our new studio and office building in Fling, acquired by lease from the former owners of WTAC-TV, and under our new operations director, A. D. Faust, and his staff, we are already at work on program plans and installation of the most modern TV technical facilities.

[5467]

First Draft

(Statement to be made if and when FCC confirms
TV grant to WJR)

We are delighted that the FCC has reaffirmed its final decision in our favor to operate a new television station at Flint. While actual construction has been delayed several months in awaiting the outcome of litigation before the Commission, our key television personnel has been appointed and they have been active in making many plans so that viewers of Flint and surrounding area can now look forward to early commencement of service.

During the past few months, we have carefully considered the changing picture facing us today from that which existed more than two years ago when we filed our original application. This appraisal, involving network affiliation prospects, has resulted in a decision to ask the FCC for a transmitter site northwest of Flint. The side selected by our engineers will avoid duplication of the Metropolitan Detroit area, which caused concern to several Flint organizations, and is believed to be an optimum site for service in the Flint-Saginaw-Bay City-Midland-Lansing area, where outlets are presently inadequate to serve all four of the national networks. An application to modify our construction permit will be filed immediately, and when granted, construction of our transmitter building and tower will follow forthwith.

Fortunately, we have already occupied our new studio and office building in Flint, acquired by lease from the former owners of WTAC-TV and under our new operations director, A. D. Faust, and his staff, we are already at work on program plans and installation of new and modern TV equipment.

[5468]

WJR
The Goodwill Station, Inc.
Detroit 2, Michigan

John F. Patt
President

October 25, 1954

Mr. Worth Kramer
WJR, Fisher Building
Detroit 2, Michigan

Dear Worth:

I hope your Spokane-San Francisco trip was most successful, not only in the speech, which I understand was well received, but in getting a good rest. As you know, I will be in New York all week at the Ambassador Hotel, and you can reach me there if there are any special developments to report.

I am enclosing a copy of a letter addressed to Reed Rollo. Would you follow through with Clarence to see if he has any word yet from Lapas. As you know, Clarence and Bud have been up in Traverse City, Cadillac, and Bay City visiting TV stations there, and are planning to be in Kalamazoo on Wednesday and Ft. Wayne on Thursday, where I have written ahead for appointments. We will be much interested to read their reactions.

I am enclosing two copies of my statement to be made if and when the FCC confirms our TV grant. I now think we should release only the first and third paragraphs, and leave out the middle paragraph until we have proceeded to file our amendment application.

I think we should project our sales and profit for November and December on the basis of our October figures compared with a year ago, in advance of our November Directors' meeting. At that time we should be able to have a pretty good picture of our earnings for the year and our prospects for 1955. This will be useful in determining the rate of dividend for the last quarter and to determine whether we need to make any substantial further overhead reductions for 1955. I think it is realistic to look forward to the possibility that we may have to make some horizontal cuts in all departments, over and above the fine economies we have already effected. We will have ample time to discuss this before the next Borad meeting, which is four weeks away. I understand Mrs. Parker may be East at that time, and I have asked her to try to be present for this meeting.

With kindest regards,

Sincerely yours,

/s/ John (RB)
John F. Patt

* * *

Enclosures

[5470]

October 25, 1954

Mr. Reed T. Rollo
Kirkland, Fleming, Green, Martin & Ellis
* * * Washington 6, D.C.

Dear Reed:

I haven't checked with you for more than 10 days, but I think it is time we recheck at the Commission with the Chief of the Commission's Opinions and Review staff or one of the Commissioners to see what is going on. As I understand it, the Commission is still waiting for the Opinion and Review Section to write the decision, and the original draftsman has left the Commission and it has been reassigned to someone else. I will be in New York City at the Ambassador Hotel all this week, at least through Thursday, and would appreciate your giving me a ring there if anything new transpires. Our patience, as you know, by now has become quite elastic.

As I understand it, you now agree that we should not file any amendment application until 30 days have elapsed following the Commission's pronouncement. Meanwhile, it has been my hope that we could get this application in final form to submit earlier than that if some development appears to warrant it. All we are waiting on now, as I understand it from you, is information through Clarence Jones from Lappas that we have an informal OK on our proposed transmitter site. He still did not have this approval when I talked with him in Detroit last week.

I am enclosing a final revision of our statement when our grant becomes final. The middle paragraph especially must be eliminated if we plan to hold up our modification application.

Sincerely yours,

* * * CC: Mr. Worth Kramer

[5475]

WJR, The Goodwill Station, Inc. * * *

2302 Lapeer Rd.
Flint 7, Michigan

November 18, 1954

Mr. Reed T. Rollo
Kirkland, Fleming, Green, Martin & Ellis
* * * Washington 6, D. C.

Dear Reed:

The following is assorted information that Clarence Jones and I have been able to get together for FCC Form 701. We are supplying this information rather than a completed form inasmuch as considerable question exists in our minds regarding the information desired. Here are the points which you may wish to use in preparing the application.

Paragraph 1 - Changes in information heretofore submitted. The following possible entries exist:

A. Acquisition of studio building from WTAC-TV to supplant proposed studio building.

B. The RCA equipment contract has been rewritten due to the purchase of WTAC-TV equipment and to reflect subsequent equipment innovations by RCA. The actual technical complement remains essentially the same. The new contract number is T-8208-C which replaces contract T-8208-B.

C. One deletion in listed personnel. (George F. Leydorf)

D. Minor change in stock holders.

Paragraph 3 - We are unable to supply feasible reasons for retarding construction other than the one which I presume you will use, i.e., the various petitions that have been filed objecting to the decision.

Paragraph 5 - 95% of the equipment has been delivered to the studio building in Flint or placed in storage in Detroit, Michigan. The remaining 5% is in storage in Camden, New Jersey and is immediately available. Installation was commenced in June, 1954.

The extent of installation may be summarized as follows:

[5475]

A. A 20 ft. gravel roadway has been built to the transmitter building site.

[5476]

B. Grading has been completed for the transmitter building.
C. Studio technical installation is 20% completed.
D. Studio lighting is 80% installed.
E. Studio Production equipment and basic scenery is 75% constructed and delivered.

Paragraph 6 - Estimated date construction can be completed - July 12, 1955.

Some of the above may or may not be applicable, therefore, we felt it best to supply you with the information so that you might select what should be used. If more specific details are required, please let me know, and I will endeavor to furnish them.

* * *

Sincerely,

/s/ Don
A. Donovan Faust
Director of Television Operations

cc: Mr. John F. Patt
Mr. Worth H. Kramer
Mr. Clarence W. Jones

[5477]

November 26, 1954

Mr. John F. Patt, c/o Kirkland, Fleming, Green, Martin & Ellis
World Center Building, 16th & K Streets, N. W.
Washington 6, D. C.

Dear John:

Here are two copies of the revised release which has been prepared for use when and if.

I recall that you wanted to have a couple of copies with you so I'm forwarding them to you in care of Reed.

Good luck!

Cordially,

WK/s
encl.

[5478]

DRAFT:

FOR IMMEDIATE RELEASE:

WJRT's longstanding goal of primary TV service to the Flint area came closer to realization today with the announcement that the Federal

Communications Commission has denied the petition for rehearing filed by the Trebit Corporation and the W.S. Butterfield Theatres, Incorporated.

Commenting on the FCC announcement, John F. Patt, President of WJRT, said "We are very pleased that the FCC has reaffirmed its decision of last May 14 permitting us to build and operate a television station at Flint. While actual construction has been delayed several months in awaiting the outcome of this litigation, our key television personnel has been appointed, and they have been active in making plans so that viewers of Flint and surrounding areas can now look forward to early service.

"Fortunately, we have already occupied our new studio and office building in Flint, acquired by lease from the former owners of WTAC-TV, and under our new operations director, A. D. Faust, and his staff, we are already at work on program plans and installation of the most modern TV technical facilities."

WJRT was granted a construction permit by the FCC last May but the appeals for rehearing and reconsideration filed by the losing applicants have prevented finalization of plans for the Flint operation.

However, while waiting for FCC action on the petitions before it, WJR has appointed key personnel and has purchased equipment that will expedite initiation of service to Flint when litigation is ended.

On August 10, WJRT leased the studios and offices at 2302 Lapeer Street formerly occupied by WTAC-TV. A. Donovan Faust was appointed Operations Manager August 17th and occupied the newly leased offices September 1st, along with Franklin Mitchell, WJRT Program Director, Clarence Jones, Chief Engineer, and Engineers Howard Town and Ken Clark.

The new Flint station will transmit on channel 12 with maximum power of 316,000 watts.

[5487]

WJR, The Goodwill Station, Inc. * * *

Television Operation
2302 Lapeer Rd.
Flint 7, Michigan

December 7, 1954

Messrs. John Patt and Worth Kramer

WJR, The Goodwill Station, Inc.
* * * Detroit 2, Michigan

Dear John and Worth:

The enclosed story appeared today, Tuesday, December 7, in the Flint News-Advertiser. As you already know, Don Johnson, the Editor, is a professional "aginner" and has as a policy adopted the opposing view to anything handled in the Journal. He is a good friend of Les Lindow's and has banking business connections with Myron Winegarden, the attorney who prepared the Citizens' Committee Petition. Ted Penny advises me it was Winegarden who insisted that he write the letter over Ralph Thomas' signature, inquiring about our intentions of changing the transmitter site. Ted was reluctant to have the letter go out on Chamber Stationery, but Winegarden insisted. Incidentally, he is a member of the Board of Directors of the Chamber.

I took occasion today to drop in on several of the Citizens' Committee members for the purpose of restating the true facts as differentiated from the collection of rumors, mis-statements and heresay which appeared in the Advertiser. I divulged no new information, merely reiterating our intentions as previously stated. Personal calls were made on Harding and C. S. Mott, Bill Bishop, Ralph Thomas and Durfee Day, as well as Ted Penny. Day is president of the Retail Merchants Division of the Flint Chamber of Commerce, Manager of J.C. Penny Co., Flint, and a member of the Citizens' Committee Steering Committee. All voluntarily urged that, if at all possible, we make an announcement of modification of transmitter site as soon as possible and indicated a willingness to help us in any way possible after that time.

In addition to the above calls, I managed to sit in on a couple of koffee klatches with retail merchants. This was accomplished through a neighbor of mine. For the most part they did not seem to attach too much importance to the Advertiser story, but they did indicate curiosity about some of the statements made. The concensus was, however, that the story might have some considerable effect upon the general public.

Everyone I talked with today had read the News-Advertiser story except one. You may not be too surprised to learn that it was the President of our Chamber of Commerce.

Incidentally, I also stopped in to see Bud Summerfield, but he was unable to see me.

In light of this recent development, your further thinking on the suggestion that our change of site be announced immediately would be appreciated.

Sincerely,

/s/ Don
A. Donovan Faust

* * *

Encl.

CITY VOICES DISAPPOINTMENT OVER FCC DECISION

TV Station Ruling Stirs Residents' Ire

Action in Awarding License to WJR Termed 'Puzzling'

Widespread disappointment is being expressed throughout the city today following announcement by the Federal Communications Commission that Detroit's WJR could proceed with construction of a television station to broadcast on Flint's channel 12.

Awarding of the channel to WJR had been opposed by the Trebit corporation which owns Flint radio station WFDF and Butterfield Theaters. Both had applied for the channel and had asked the FCC for a rehearing of its earlier decision favoring WJR.

In its decision yesterday, FCC denied the re-hearing and told WJR to go ahead with construction.

The FCC also denied the Flint Citizens Committee the right to intervene in the case. The committee, made up of civic leaders, business men and representatives of community interests, came into being when the FCC originally awarded the channel to WJR and asked to be heard in opposition.

"The FCC appears to have taken a high-handed and arrogant attitude when it denies a responsible group of Flint residents an opportunity to be heard in an important matter of this kind," a member of the Committee remarked last night.

"It doesn't seem that the city of Flint should be forced to accept WJR which at best would be a second rate, carpet-bag operation as far as television for Flint is concerned. It certainly is to be hoped that the FCC decision will be challenged in the courts and that the FCC will properly be reminded that it represents the people of this nation and not special broadcasting interests."

With the FCC announcement re-affirming its previous decision, it came to light locally that WJR had been making overtures, within recent weeks, to gain Citizens Committee approval for a change in location of the station's transmitting tower. In its application to the FCC originally, WJR planned to locate its tower about 16 miles South of Flint.

The tower location was believed to be a tip-off that WJR was principally concerned about serving the Detroit area by the backdoor and only secondarily serve Flint. This was a matter of great concern to many residents of the city who feel that Flint

[5490]

is large and important enough to have a television station which will devote its efforts to servicing the immediate area.

According to the rumor mill, WJR representatives recently approached several members of the Citizens Committee and pointed out that it might be possible to move its tower location to a site North of Flint and wondered, if the change could be made, if the Citizens Committee would withdraw its opposition. The Committee did not commit itself, according to reports, but asked WJR to put it in writing. WJR sent a letter but it didn't promise a thing.

Just where the transmitting tower will be located has not been announced. But it is said that WJR is quite willing to make a change as it was unable to obtain a first-rate network connection with its tower South of Flint where it would be easy to send a picture into the Detroit area where the best networks are already represented.

In fact, there are some reports that WJR isn't too anxious to have the license but this will probably be denied by WJR. Given the brush-off by the best networks and thus shoved off the Detroit area gravy-train, WJR would have dropped back to a second-rate operation which is all that many residents of the Flint area are expecting from it any-way.

Confusion over the FCC vote which re-affirmed the permit for WJR was also being expressed locally. Three commissioners voted to deny a re-hearing (thus confirming the license for WJR), one voted in favor of a re-hearing, one commissioner was indefinite and two abstained from voting. Thus it was in reality a minority of the seven FCC commissioners who decided the case.

Further puzzlement comes from the fact that late last week the FCC handed down two decisions in similar cases and held just the opposite from the WJR case with even the two abstaining commissioners voting.

[5494]

WJR, The Goodwill Station, Inc.
Detroit 2, Michigan

1243 Statler Hotel
Cleveland 1, Ohio * * *
December 10, 1954

Mr. A. Donovan Faust
WJRT * * *
Flint, Michigan

Dear Don:

Thanks for the clippings you sent to me in New York and for the fill-in concerning the Flint News-Advertiser story and Les Lindow's and Myron Winegarden's connection therewith.

I am hoping we will be able to complete our modification application by early next week, and can file it, together with an appropriate statement that will be crystal clear as to our plans and intent. I know the present situation is a little tense for you, with the kind of slanted treatment Mr. Johnson gives his stories about us. I am sure though that we will win out in the end, and that it will all be worth the waiting.

In regard to any material which you may gather regarding Flint as a market, I think it is not necessary to duplicate this material for both Worth and me, and that we can route it so that we can both have a look at the clippings or other data.

I would like to have you attend the Pontiac airport zoning hearing December 21st, to see what takes place. Since we have no present immediate interest in this proposed ordinance, I do not see any necessity for taking part. I would be interested however, in what may or may not be said concerning television towers generally, since there is always the possibility of our having ultimate interest in this whole general area, although there is none that we presently contemplate.

With kindest regards,

Sincerely yours,
/s/ John
John F. Patt

* * *

cc: Mr. Worth Kramer

Federal Communications Commission
Docket No. 10268
Exhibit No. WFDF - D
offer of proof

WFDF EXHIBIT D

EXCERPTS FROM HEARING RECORD WJR DETROIT TV PROPOSAL 1947 - 48, APPLICATION NO. BPCT - 212

DOCKET NO. 8648.

1. WJR EXHIBIT 20 - DESCRIPTION OF PROPOSED TELEVISION PROGRAMS. PP 1-12 THIS EXHIBIT.

2. EXCERPTS FROM LEYDORF TESTIMONY (TR. 213-215) RE WJR DETROIT STUDIO PROPOSALS. PP. 13-15 THIS EXHIBIT.

[5518]

DESCRIPTION OF PROPOSED TELEVISION PROGRAMS

THE CHURCH HOUR

Sundays, 11 a.m. -- 12 Noon

A one-hour church service originating in a different church each Sunday. All denominations will be represented. A number of churches have already been contacted and have signified a desire to have their services televised.

MOTHER'S ALBUM

Sundays, 12 Noon -- 12:15 p.m.

Fifteen minutes of inspirational music, poetry and philosophy. We will use transcribed music, featuring old numbers.

DOWN ON THE FARM

Sundays, 12:15 p.m. -- 12:30 p.m.

With motion picture film and tape recorder, we will, with the cooperation of Michigan State College, prepare a program that will reveal various phases of farm life--the operation of a dairy farm, safety devices, new types of machinery, fighting plant disease, shearing sheep, etc. MSC has assured us of their cooperation in producing such a show, and it will be as interesting and entertaining to the urban audience as it is informative to the rural audience.

IN OUR OPINION

Sundays, 12:30 p.m. -- 1:00 p.m.

A forum on which leaders in various phases of civic, business, industrial and professional life, will discuss matters of current interest.

[5519]

VESPERS

Sundays, 7:30 p.m. -- 8:00 p.m.

Here we will create a home atmosphere with neighbors dropping in for hymn singing and worship. It will be patterned after the highly popular "Seth Parker" program. We anticipate that viewers not only will watch the action on the screen, but will join in the singing.

KNOW YOUR CITY

Sundays, 8:00 p.m. -- 8:15 p.m.

A visit to interesting and historical spots throughout Detroit, designed not only to give viewers a better knowledge of the city, but a higher respect for it. This would be presented through the medium of a commentator and film prepared exclusively by WJR.

MEET THE TEACHER

Sundays, 8:15 p.m. -- 8:30 p.m.

Very few parents know the teachers who train their children. We believe a better acquaintance, with the teacher and a better understanding of her problems will make for a better relationship between home and school. We propose to visit schools with the WJR camera, introducing not only the teaching staffs and children in action, but also the educational facilities, pointing out their needs, etc. Through the use of tape recorders, we will accompany the film with proper sound effects and interviews with teachers and children.

FEATURE MOVIE

These programs will be standard 16 mm motion pictures as supplied by a number of commercial firms. The production of motion pictures

[5520]

for television is expanding and a wide selection of these is now available.

NEWS AND WEATHER

In these newscasts, we will give the day's happenings in capsule form, using maps, charts, pictures of personalities in the news, as well as straight shots of the newscaster.

FOOD, FUN, FASHIONS

Mon., Wed., Fri. 3:30 p.m. -- 3:45 p.m.

The WJR Housewife and fashion expert talks on and demonstrates household tips, displays latest styles in garments, and tells about shows, night spots, and other entertainment. This is planned as an audience show. The visual possibilities, insofar as TV is concerned, are obvious. The program will be enlivened by questions from the studio audience.

MEET THE MISSUS

Mon., Wed., Fri. 3:45 p.m. -- 4:00 p.m.

This is an audience show and would simply carry on following the sign-off of the above show. Women will be selected from the audience to compete for prizes, answer questions, perform stunts, etc. A "Truth or Consequences" type of production.

BILLY ADVENTURE

Mon. thru Fri. 4:00 p.m. -- 4:15 p.m.

A juvenile serial presented by puppets. This would be a continuing story with well-established characters. Wholesome, constructive adventure--entertainment.

[5521]

BOY SCOUTS

Monday, 4:15 p.m. -- 4:25 p.m.

Featuring Boy Scout activities. A different Scout Troop would take over each week, filling the period with story-telling, performing Scout achievements, assignments, hints to adult Scout Masters. This is planned to have general interest, in addition to having the full backing of the Boy Scouts.

DETROIT IN ACTION

Mon., Wed., Fri., 7:30 p.m. -- 7:45 p.m.

This would be presented through the medium of a narrator and WJR film, produced daily, exclusively for this program. It would be a "roving reporter" type of show, the reporter, equipped with 16 mm camera equipment, following up news tips and stories of local interest in Detroit. General Motors Corporation in Detroit has agreed to process WJR film, permitting the televising of daily "takes".

BARBERSHOP QUARTET

Mon., Wed., Fri., 7:45 p.m. -- 8:00 p.m.

Singing of this type is very popular in Detroit. There are numerous groups that are members of the national society and competitive concerts produce turn-away crowds. For variety's sake, we would introduce a different quartet each week.

TELEVISION THEATER

Mondays, 9:30 p.m. -- 10 p.m.

The Detroit Public Schools, Wayne University and numerous amateur theatrical groups offer a source for stage plays. Wayne

University has expressed a desire to cooperate with WJR in developing productions especially for television. Catholic Theater has assured us of its cooperation. We anticipate organizing a Television Workshop of our own to train writers and actors for television. This will permit us to produce original works, as well as standard plays, for which releases can be obtained.

DISC JOCKEY

Mondays, 10:00 p.m. -- 10:25 p.m.

As the title indicates, this show will follow the format of popular disc jockey productions. We will use records of big name bands. For screening, we will picture the emcee, occasional guests and singers. As an innovation, we hope to build up a motion picture library of big-name band leaders and their star performers, so that these pictures, too, can be shown during the musical numbers. Representatives of record companies with whom we have talked informally, have assured us of their cooperation in procuring such film.

DO IT YOURSELF

Tues., Thurs., 3:30 p.m. -- 3:45 p.m.

WJR's TV Housewife will answer specific questions submitted by mail, demonstrate various phases of sewing, hat decoration, floral arrangement, etc.

WITH THE LADIES

Tues., Thurs., 3:45 p.m. -- 4:00 p.m.

WJR's 16 mm cameraman and society editor will attend gathering of women, Red Cross activities, club meetings, concerts, the

[5523]

theater, or lectures. The film will be compiled in a show during which the society editor will give names of those present, describe their garb, and tell about the meeting. This will be the WJR Society Page.

THE WOMAN'S VIEWPOINT

Tuesdays, 7:30 p.m. -- 7:45 p.m.

This will be a forum type of show, featuring women discussing, not only matters of feminine interest, but of general interest as well. The Detroit Federation of Women's Clubs has assured us that they will collaborate in the production of this feature.

WHERE AWAY?

Tues., Thurs., 7:45 p.m. -- 8:00 p.m.

About the most interesting places in the city are the train and bus terminals. In this program we propsoe to interview travelers, persons waiting for incoming passengers, and porters. To avoid the possibility of picking up something that should not be on the air, this will be done with film and tape recorder, thus permitting editing in the studio.

[5523]

TOPS IN SPORTS

Tuesdays, 8:00 p.m. -- 8:15 p.m.

Detroit is one of the best sports cities in the nation, both from the participant and spectator viewpoints. During this period, experts will demonstrate various sports, both indoor and outdoor. Professionals, as well as amateurs, will be used.

[5524]

GLEE CLUB

Tuesday & Thursday, 8:15 p.m. -- 8:30 p.m.

This program will feature the "Accent on Youth" boys' glee club, with popular and semi-classical numbers. This group is part of an all-city chorus and represents various Detroit high schools. The director, Don Large, assures us that the glee club will be pleased to appear on WJR television. They sing a capella, so will not be affected by the ban on instrumental music.

SPORTS

Tues.-9:30 p.m.	Fri.-9:45 p.m.
Thur.-8:30 p.m.	Sat.-9:30 p.m.

Although it is impossible to list this far in advance, the specific events that will be televised at a given time, the sports offerings in Detroit, both amateur and professional, are such that we will be able to televise some type of sports show in each of the periods indicated on our proposed schedule. Reports from television stations indicate that sports events are the most popular of all TV shows. WJR will cover this field thoroughly.

GIRL SCOUTS, CUB SCOUTS, CAMPFIRE GIRLS

These groups will be presented in the same manner as the Boy Scouts. Girl Scouts will appear on Tuesdays, 4:15 p.m. -- 4:25 p.m., Cub Scouts on Wednesdays, and Campfire Girls on Thursdays. Thus, will be met the interests of thousands of Detroit youngsters.

[5525]

THE QUESTION MAN

Wednesdays, 8:00 p.m. -- 8:30 p.m.

An audience quiz show. The big demand for tickets to such shows indicates an interest in watching them even though the spectator might not have an opportunity to participate.

WERE YOU THERE

Wednesdays, 8:30 p.m. -- 8:45 p.m.

Just as AM programs are popularized through the mention of names, so will TV programs be enhanced through the televising of people. In this once-a-week show, we will compile 15 minutes of film, taken at busy street intersections, in stores, etc. The showing will be accompanied by narration giving interesting and humorous descriptions of the photographer's experiences in the filming. We plan visits to such luncheon clubs as Rotary, Exchange, Lions, Adcraft. A conspicuous sign on our equipment will inform those being filmed when the program will be televised, so they can see themselves on the screen. This will be accompanied by narration and tape recordings.

LEADER OF THE BAND

Wednesdays, 8:45 p.m. -- 9:00 p.m.

This will be a record program featuring the music of big-name bands. The screen will carry the emcee, guest interviews, and pictures of the musicians whose music is being featured.

TALENT ON PARADE

Wednesdays, 9:00 p.m. -- 9:30 p.m.

This is a talent-hunt type of show and will employ whatever entertainment is permitted under AFM regulations existing at the

[5526]

time the program is prepared. Even under the AFM ban such acts as vocalists, comedians and vaudeville performers, will make a good show. There is a wealth of such talent in Detroit.

LET'S GO PLACES

Wednesdays, 9:30 p.m. -- 9:45 p.m.

Travel motion picture. This series will be planned to give factual information to those who are planning vacation trips by motor or train. Whenever specific information is not incorporated in the picture, we will add it through the use of a staff narrator. Films will be obtained from commercial producers of such pictures. There is an ample supply.

MICHIGAN OUTDOORS

Wednesdays, 9:45 p.m. -- 10:00 p.m.

The Education Division, Michigan State Department of Conservation, has a library of films featuring Michigan animal life, canoe trips on Michigan waterways and hunting. This department has assured us that such films are available for television. New films of this nature are constantly in the making. This program will be highly entertaining, as well as educational.

STORIES FROM THE OPERAS

Wednesdays, 10:00 p.m. -- 10:25 p.m.

Condensed presentations of operas through the use of transcriptions and accompanying narration. Screen will show narrator and we will make use of available illustrations and photographs of composers.

MEET THE MASTERS

Thursdays, 7:30 p.m. -- 7:45 p.m.

In its Institute of Arts, Detroit has one of the finest collections of paintings in the country. The director of the Institute, Mr. Ted Richardson, has indicated a willingness to participate in this program. We will televise famous paintings and he will explain what makes them great and give facts about the artists.

WEEKEND PLEASURE

Fridays, 4:15 p.m. -- 4:25 p.m.

There is a wealth of motion pictures depicting Michigan tourist resorts, scenic and historic spots, and motor tours, all of which afford the urban dweller an escape from the hustle and noise of the city. A Friday afternoon program of these would perform a real service to those planning week-end trips. Also to all viewers, it would mean a better knowledge of the state.

SPELLDOWN

Friday, 8:00 p.m. -- 8:30 p.m.

From the studio audience, we will pick two teams to compete in a spelldown. Prizes will be awarded winners. Clubs throughout the city will be invited to compete against each other.

TEENTIME TROUBLES

Friday, 8:30 p.m. -- 8:45 p.m.

A forum type of program featuring high school boys and girls in a discussion of their own problems and their views on current issues.

[5528]

INVITATION TO A DANCE

Friday, 9:00 p.m. -- 9:45 p.m.

A disc jockey will introduce the current hits and talk about the prominent band leaders. Guest dance instructors will be shown on the screen during numbers, as will dancing couples in the studio. School groups and social fraternities will be invited to participate.

MOVIE SHORTS AND CARTOONS

Saturday, 3:30 p.m. -- 4:00 p.m.

Saturday afternoon will be the children's hour, and nothing is more popular with youngsters than movie shorts and cartoons. A sure way to keep kids off the streets--and interested.

AMERICA, THE BEAUTIFUL

Saturday, 4:00 p.m. -- 4:25 p.m.

There is available a fine library of educational movies of a pictorial and historical nature. We will draw from these for the continuation of our Saturday afternoon filming.

YOUR GOVERNMENT

Saturday, 7:45 p.m. -- 8:00 p.m.

Municipal, state and national officials will report on their specific duties. On occasion, we will have film made in Washington so that senators and representatives may be pictured in their own offices.

THIS IS AMERICA

Saturday, 8:00 p.m. -- 8:30 p.m.

Virtually all nationalities are represented in Detroit. Most of them have fine singing groups. Basically, this will be a patriotic

[5529]

program, revealing through the viewpoint of the immigrant or foreign-born the many privileges and opportunities offered in America. This will be an audience show and nationals of the groups represented will be invited. Included will be a capella singing of native songs, native legends and a short, patriotic talk.

OLD FASHIONED DANCE

Saturdays, 9:00 p.m. -- 9:30 p.m.

Participation in square dancing in costume is very popular. There are a number of albums of appropriate music. The old numbers will be interspersed with current hits for variety. The screen will show the caller and couples demonstrating the various steps.

[5530]

to proceed with the installation.

Q. Do you have plans for the placing of an order for a transmitter and other equipment on a contingent basis; that is, contingent upon the granting of the application? A. Yes, we do. We have a proposal in hand now.

Q. And do you propose to place such orders on a contingent basis for the equipment? A. Yes.

Q. What are the studio plans of the Applicant? A. At the present we are exploring, have been exploring and are now exploring two possibilities. We are trying first to find suitable studio space for the television studio and associated offices and we have looked ove a number of such sites; we are also in the second phase of this studying the problem of constructing a building to house these studios and offices and we have obtained the services of Schley and Ward, Architects, who have studied our requirements and have furnished us with the design of a proposed studio building which appears elsewhere in this exhibit.

Q. Has that firm of architects made any trips to investigate the requirements for a television studio? A. Mr. Schiey has returned sometime ago from a trip to New York, and Philadelphia, where he visited the NBC, CBS, DuMont, and WAFI television studios. And I am sure that some of the ideas that he obtained there are represented in the design

[5531]

that he has furnished to us.

Q. Now, has the Applicant arrived at any conclusion as to whether to build a building or to rent an existing building and remodel it for the purpose of using such a building for television studios? A. We have not come to a decision. We are still hoping to find suitable space. If we do not, then we will have to build the building.

Q. Has an investigation been made to find space in an existing building which could be remodeled for television studios? A. Yes, an investigation has been going on for some time.

Q. And is that with the idea of renting the building for television studios and then remodeling it? A. Yes.

Hearing Examiner Blume: How would the completion of the studio fit into the ten-month schedule that you gave us earlier?

The Witness: If we are successful in obtaining an existing space, very well.

Hearing Examiner Blume: What if you have to build your own building?

The Witness: The construction of the building the architect tells us will require about a year, and a portion of that time will overlap and the building will still be under the construction when the installation of the equipment can begin.

[5532]

By Mr. Russell:

Q. Could you get on the air prior to the completion of the studios? A. Yes, we can get the mobile equipment in eight months.

Mr. Smith: I did not hear you.

The Witness: We can get the mobile equipment in about eight months. We have other equipment that we can put test pattern on; we can put the film on without any elaborate studio construction being necessary.

Mr. McCoy: You do not contemplate temporary television studios in your present building?

The Witness: A study was made of the Fisher Building in December and there was no available space that is suitable for television in the building because--mainly because of the ceiling height limitations. The study then continued to search for that in other buildings. I would say that you could do something there, some simple things, certainly put on film from there.

By Mr. Russell:

Q. Mr. Leydorf, could you also put on network programs? A. Yes.

Q. That is, prior to the completion of the studios? A. Yes.

Q. Now, referring to Exhibit No. 7, in answering the question that Mr. McCoy had in mind earlier, the sixth item:

[5533]

December 9, 1954

Mr. John F. Patt
* * * Cleveland 1, Ohio

Dear John:

I have been giving considerable thought to our Flint situation and Reed's call this morning, indicating that Trebit had filed a petition for re-argument, has solidified my thinking considerably.

We now know that Trebit intends fully to take this matter on to the courts, which seems to negate the argument for waiting a full 30 days following last Monday's decision before filing our application for modification of our transmitter site location.

I feel strongly that we should, either by means of a publicity release or a paid advertisement, make a statement to the Flint public stating most factually our present position.

We are now fully licensed to proceed with building our transmitter and tower at the Clarkston site. We, however, are currently petitioning the Commission for a modification of transmitter location which will permit us to erect our tower northwest of Flint.

Should the Commission pass favorably upon our modification application, we will proceed forthwith to build our transmitting station at our site northwest of Flint, and will be bending every human effort to expedite the beginning of our TV service to Flint and environs.

Should, however, the Commission fail to pass favorably upon our modication [sic] application, we will proceed to construct our tower at the Clarkston site which has been the bone of contention with certain Flint interests.

[5534]

Many have voiced complaints at the length of time it is taking for Flint to have a primary television service. No one regrets more than we do the delays which have been caused by continuing petitions on the part of the losing litigants. While we regret these delays greatly, we intend fully to go ahead with our plans as stated, and whether it be six months or sixteen months hence WJR looks forward to the opportunity which lies ahead in bringing Flint television at its best.

Certain irresponsible statements have been unfortunately printed, some even indicating that WJR really has no interest in the Flint television license. To date, WJR has invested over 3/4 of a million dollars in technical equipment which is already housed in Flint awaiting Commission action on WJR's proposal to move its transmitter site northwest of the city. This appears to us to be sufficient proof of our earnestness and our intent to prosecute vigorously our television plans for Flint.

The above paragraphs, John, are rough indeed but may form the basis of a release which we might well wish to consider. I believe, after talking to Reed this morning, that he would favor such a release and I am sure that Don feels that it would be extremely helpful in his contacts with the Flint leaders.

Would appreciate your thoughts in the matter.

Best regards,

WK/s

[5621]

[Received June 7, 1957, FCC]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON BEHALF OF WJR, THE GOODWILL STATION, INC.

[5625]

8. The record in the further hearing was opened on December 18, 1956 (tr. 105-07)* and was closed on April 17, 1957 (tr. 1768). Lake Huron Broadcasting Company (Lake Huron) was permitted to participate in the further hearing as an intervenor.**

II. WJR's Corporate Structure***

9. On January 7, 1953, the Commission granted WJR's application (BTC-1405) requesting consent to the de jure relinquishment of control of WJR by Mrs. Frances S. Parker (then Mrs. Frances S. Richards) through the sale of 2.47% of her individually held stock. Accordingly, Mrs. Parker reduced her individual stockholdings from 24.91 to 22.45% but retained her stockholdings of 26.12% in her capacity as executrix of the Estate of G. A. Richards, Deceased. The Commission ruled that her combined holdings of 48.57% constituted de facto control and recognized that de facto control would remain in her as long as her combined holdings did not fall below 35% (see exchange of correspondence between WJR and the Commission dated December 5, 1952;

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* All transcript references are to the further hearing unless otherwise noted.

** WJR preserves its exception to the granting of Lake Huron's Petition to Intervene.

***WJR preserves its exception to the ruling (tr. 1230) that this subject is relevant under the further hearing issues.

December 15, 1952; and January 7, 1953). The Commission was also apprised of the statement set forth in WJR's letter dated December 15, 1952 that "it should be recognized that the question of de facto control of WJR, The Goodwill Station, Inc. [by Mrs. Parker's combined holdings of 48.57%], is of a temporary nature because 26.12% of the stock is in the Estate of George A. Richards, Deceased and in the normal course of events this 26.12% will be transferred * * * to the trustees in accordance with the terms of Mr. Richard's Will."

10. Thus, as of the original hearing herein, Mrs. Parker with combined holdings of 48.57% had de facto control of WJR, which was temporary in nature in view of the fact that the 26.12% held in her

capacity as an executrix would be transferred in the normal course of events to the testamentary trustees who were identified in the May 14, 1954 Final Decision (Finding 25).

11. Between the time of the original hearings and the further hearings, Mrs. Parker reduced her combined stockholdings below the 35% de facto control point to 29.99% through the sale of some of her individually held stock. Between 1953 and 1956, Mrs. Parker reduced her individual stockholdings from 22.45% to 3.855% through periodic sales of a total of 96,050 shares to WJR officers, directors, stockholders and employees, including the sale of 28,444 shares to her daughter, Rozene B. Moore and her son-in-law, F. Sibley Moore and the gift of 100 shares to her grandson, George Richards Moore.*

12. The WJR officers, directors and stockholders as of the original hearing and as of the closing of the further hearing on April 17, 1957 appear as follows:**

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* Mrs. Parker sold 4000 shares of the 96,050 to brokers. Before consummating an agreement to sell which would reduce her combined holdings to below 35% Mrs. Parker received the prior approval of the Commission. (BTC-2296, granted August 10, 1956).

** See stipulation received at original hearing (tr. 1985), BTC-2296 and Forms 323 filed by WJR from May 15, 1953 to date. The shares and percentages listed as of April 17, 1957 include a 5% stock dividend which was paid on December 7, 1956.

a. John F. Patt (President and Director then and now) now holds 19,430 shares (3.584%) rather than 3,600 shares (0.697%). He no longer holds an option topurchase 15,000 shares. John F. Patt also now holds a total of 4,200 shares (0.774%) as trustee for his three daughters* rather than none. Joan Frances and Martha Patt Thompson, daughters of John F. Patt, now each hold 1,050 shares (0.1935%) rather than none. Ruth R. Patt, wife of John F. Patt, now holds 5,250 shares (0.968%) rather than none.

b. Worth Kramer (Vice President and Director then and now) now holds 14,832 shares (2.735%) rather than 1,720 shares (0.333%). He no longer holds an option to purchase 5,000 shares.

c. George F.Leydorf is still a Director but resigned as Vice President effective August 31, 1954. He now holds no shares (00%) rather than 1,100 shares (0.213%). His option to purchase 5,000 shares expired April 30, 1957.

d. George W. Cushing retired and resigned as Vice President on August 16, 1955. He now holds no shares (00%) rather than 1,200 shares (0.232%).

e. Gordon Gray resigned as Vice President on December 31, 1953. He does not, and did not, hold any stock.

f. William G. Siebert (Secretary, Treasurer and Director then and now) now holds 12,600 shares (2.323%) rather than 2,705 shares (0.524%) and no longer holds an option to purchase 5,000 shares. Evelyn G. Siebert, wife of William G. Siebert, now holds 215 shares (0.040%) rather than none. William E. Siebert, son of William G. Siebert, still holds 10 shares (0.002%).

g. F. Sibley Moore (Vice President and Director then and now) holds 8,400 shares (1.549%) rather than none. He no longer holds an option to purchase 5,000 shares.

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* Martha Patt Thompson - 1,050; Patricia Patt Cloutier - 2,100 and Joan Frances Patt - 1,050.

[5628]

h. Frances S. Parker, as an individual (Director then and now) now holds 20,900 shares (3.855%) rather than 115,950 shares (22.448%).

i. Frances S. Parker, as Executrix of the Estate of G. A. Richards, still holds 141,683 shares (26.124%).* This stock, upon settlement of the estate, will be transferred to testamentary trustees L. R. Jackson and the Bank of America National Trust and Savings Association of Los Angeles.

j. Selden S. Dickinson (Director then and now) now holds 2,835 shares (0.523%) rather than 200 shares (0.039%) and no longer holds an option to purchase 2,500 shares.

k. C. Russell Feldmann and L. R. Jackson, as trustees of the G. A. Richards' Life Insurance Trust still hold 44,877 shares (8.274%).*

l. Rozene R. Moore (daughter of Frances S. Parker and wife of F. Sibley Moore) now holds 29,207 shares (5.385%) rather than 7,373 shares (1.42%).

m. Less than one percent stockholders (other than those listed above) now hold a total of 235,491 shares (43.460%)** rather than a total of 205,008 (39.689%).

III. The Timing of the Filing of WJR's Modification Application

13. WJR's hearing proposal contemplated, inter alia, a new studio building to be located in Flint, operation from a transmitter

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* No change other than the 5% stock dividend paid December 7, 1956.

** Included in this amount is 840 shares (0.155%) held by Elmer O. Wayne who was elected Vice President on November 7, 1956. Half of the 840 shares are owned by Mr. Wayne solely and half are owned jointly with his wife. Also included are 210 shares (0.039%)owned by Kathryn Wayne (wife of Elmer O. Wayne) and 52 (0.010%) owned by Mark Wayne (his son), and 400 shares (0.0737%) held by Elmer O. Wayne, as Custodian for Mary Wayne (his daughter), a Minor, under the Laws of the State of Michigan and 400 shares (.0737%) held by Elmer O. Wayne, as Custodian for Mark Wayne, a Minor, under the laws of the State of Michigan.

[5681]

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101. A comparison of the studio building originally proposed by WJR with the one presently contemplated by WJR reveals the following pertinent information (WJR Exhs. 11, 90 & 114 and Faust, tr. 689ff).

102. Both studio building proposals specify three studios. The largest in the former WTAC-TV building has more area than the largest as originally proposed (3043 sq. feet versus 2900 sq. feet). The second studio was larger in the original proposal (1768 sq. feet versus 1008 sq. feet) and the third studio is approximately the same size in both (320 sq. feet originally and 306 sq. feet now) (Ibid).

103. In addition to the three regular studios, the former WTAC-TV building, unlike the hearing proposal of WJR (or the Trebit

[5682]

and Butterfield proposals), contains facilities for originating live-camera programs from a news room studio and the announce booth. In view of the heavy schedule of local live programs proposed by WJR, the availability of five separate programming areas rather than three is a distinct advantage in the set-up and dry-run rehearsing of programs. In this respect, the former WTAC-TV building is superior to the one proposed by WJR at the hearing. The former WTAC-TV building also contains more space for scenery storage and workshop, has a larger master control room and film projection room, specifies a larger area for film editing and storage than any such room available in the prior proposal and makes specific provision for a 16 mm film processing room and a dark room. All of the above facilities have a direct relation to the successful day-to-day production of programs. Of less direct utility in effectuating the program proposals are the following areas which were present in the original WJR proposed building, but which are not included in the former WTAC-TV building: Radio recording room, private star dressing rooms, tryout room, basement, garage and separate high voltage room.* The original WJR building also provided two sponsors' rooms and two separate studio control rooms whereas the present proposal includes only one of each, in both cases smaller than the original. Both proposals provide for

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* Included in the engineering lab in the former WTAC-TV building.

[5683]

two clients' rooms and two regular dressing rooms. The presently proposed offices are not as spacious as those originally proposed and do not include as many private offices for secretaries but are adequate for the needs of the proposed staff (Ibid).

104. While the originally planned building was larger than the one presently proposed (25,900 sq. feet versus 15,100 sq. feet), the space differential must be evaluated in light of its actual functional utility in the preparation and production of programs. The original building included many features which, though desirable, offered only a limited contribution to the implementation of the WJR program proposal. Included are such areas as the extra parallel corridor on the first floor, the stairwells required by its two-story construction, an outsized lobby, the landing on the second floor above the lobby, large sponsors' rooms, four-car garage and basement. The total of this space, after allowing for a smaller lobby and one smaller sponsors' booth, is approximately 8800 sq. feet. When this is deducted from the total original building area of 25,900 sq. feet, the remaining area is 17,100 sq. feet, a real difference of only 2,000 sq. feet exists as between the two WJR proposals. A substantial portion of this difference is consumed in the more spacious office included in the original proposal (Ibid).

105. The Flint studio facilities proposed by WJR, Trebit and Butterfield at the original comparative hearing compare as follows

[5684]

with the modified WJR proposal (Ibid, WJR Exhs. 11 & 114, Butterfield

Exh. 10 and WFDF Exh. 7c).

FACILITY	WJR		TREBIT	BUTTER-FIELD
	Original	Modified		
Studio "A"-sq. ft.	2900	3043	1672	3120
Studio "B"-sq. ft.	1768	1008	1520	587
Studio "C"-sq. ft.	320	306	None	None
Total Studio Space-sq. ft.	4988	4357	3192	3707
Scenery Storage and Workshop-sq. ft.	1416*	1624	3800	2170**
Master Control Room-sq. ft.	851	964	560	120
Studio Control Rooms-sq. ft.	900*	88	82	78
Film Projection Room-sq. ft.	240	297	357	150
Engr. Lab. & Work Room-sq. ft.	840	663	1071	72
Announcer Room-sq. ft.	56	66	120	48
Clients' Rooms	(2)	(2)	None	(1)
Sponsors' Rooms	(2)	(1)	None	None
Dressing Rooms	(4)	(2)	(2)	(2)
Offices & Other Rooms***	(29)	(24)	(21)	(13)
Garage	(1-4 units)	None	None	None

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* WJR Exh. 11 shows that the space allocated to the scenery and equipment room is 20' x 40' x 16' rather than 20' x 24' x 16' as shown in WJR Exh. 114. Also, WJR Exh. 11 shows that the studio control rooms should not include the 4' x 28' space labelled "Sponsors" which was included in the measurements shown in WJR Exh. 114.

** 900 sq. ft. limited to 10 ft. ceiling.

*** Other than Lobby, Basement and Rest Rooms.

[5685]

106. The building presently proposed by WJR allocates space for 16 mm film processing, dark room and a large film editing room which were not specifically included in the originally proposed studio building. In addition to the three regular studios, the former WTAC-TV building contains floor ducts and acoustic wall treatment which permit use of the

news room as a news studio. Also, live commercials and smaller scope programs can be conducted in the announce booth. In the latter case, window location permits placing the camera in either the Master Control Room or Studio "A" for shots into the booth. The extra utility of these two areas adds 333 square feet to the total studio space available (WJR Exhs. 11 & 90 and Faust, tr. 692 & 695).

107. There has been no change in WJR's plans respecting its remote Detroit studio. The transmitter studio facilities proposed compare as follows (Ibid; WJR Exhs. 106, 113 & 115 and Faust, tr. 605-06):

FACILITY	WJR		TREBIT	BUTTERFIELD
	Original	Modified		
Transmitter Studio-sq. ft.	143	150	None	None
Transmitter Projection Room-sq. ft.	85	135	None	None
Transmitter Film Vault-sq. ft.	40	44	None	None

108. The studio ceiling heights in the Flint studio buildings compare as follows (Ibid and Faust, tr. 695, 697 & 703; Butterfield Exh. 10 and Holland Original, tr. 859 H):

WJR Original	Studios "A" and "B"	27'
	Studio "C"	12'*
WJR Modified**	Studio "A"	18'6"
	Studio "B"	17'6"
	Studio "C"	18'10"
Trebit***	Studio "A"	13'9"
	Studio "B"	13'9"
Butterfield****	Studio "A"	26'
	Studio "B"	20'

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* WJR Exh. 11 lists the height as 12' rather than 16' as shown by WJR Exh. 114.

** The heights of the WJR modified studios represent an average height, allowing for the slight fall in the roof from one side of the studio to the other (Faust, tr. 695, 697 & 703).

*** The Trebit studios contain structural pillars which limit the clear working area.

**** A part of the Butterfield Studio "A" (840 out of 3120 sq. feet) is limited by an overhanging balcony.

* * * *

[5703]

Effectuation

29. There is no basis in this record for concluding that WJR cannot effectuate the program proposals set forth in its modification application. To the contrary, there is affirmative testimony that its staff and studio plans are adequate to effectuate the proposals and that network option hours will be no bar to carrying out WJR's local live proposals.

30. WJR, as shown by its past broadcast record, which is spelled out in detail in this record, subscribes to and practices the belief that representations made to the Commission in applications or hearings should be adhered to. Only it, of all three applicants, proved

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*Originally computed at 65.94%.

[5704]

this by a past broadcast record at the original hearing. However, it is recognized that no man or corporation can predict the future with exactitude. There have been logical reasons for each and every change that has occurred in WJR's program plans since the record in this proceeding was closed. It would indeed be a blind and disingeneous licensee who would not make program changes made necessary by the passage of time. That WJR religiously adheres to representations made to the Commission with respect to proposed programming is amply demonstrated by WJR Exhibit 49, which shows that WJR's AM promises and performances compare as follows:

	% 1948 Actual	% 1948 Proposed	% 1951 Actual	% 1951 Proposed	% 1951-52 Actual
1. Entertainment	75.44	76.09	77.77	77.58	76.64
2. Religious	1.74	1.88	1.48	1.34	1.21
3. Agricultural	2.08	2.08	2.08	2.08	2.11
4. Educational	1.94	1.79	1.78	2.48	2.11
5. News	10.82	11.01	10.51	11.71	11.18
6. Discussion	0.89	0.45	0.83	0.89	1.11
7. Talks	7.09	6.70	5.55	3.92	5.64
8. Total	100.00%	100.00%	100.00%	100.00%	100.00%

* * * *

[5708]

WJR's Past Broadcast Record

40. This record demonstrates that WJR has had a long and distinguished history as a licensee of the Commission.*

41. WJR, which has been the licensee of standard broadcast station WJR since 1927, made a comprehensive and detailed showing as to its stewardship at the original hearing. All of WJR's key staff personnel have had extensive broadcast experience, and all have been active in Detroit civic activities during their association with WJR pursuant to the company's policy (WJR Exhs. 15, 18, 19, 22, 24, 27-34, 33a, 38, 44, 59, 61 and 63 and Patt, Tr. 375-76 and Guest, Tr. 693). Treasury shares of WJR stock were made available in December of 1950 to employees having at least five years of service at which time all eligible employees purchased stock, being allowed to do so on a deferred purchase payment plan (Patt, Tr. 363). Some 54 of the then present employees of WJR were stockholders (Ibid). WJR has a policy of maintaining a pay scale generally higher than that of other stations in Detroit (Patt, Tr. 398). For the

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*Transcript references in paragraphs 41-46 are to the original hearing record.

benefit of its employees, WJR maintains a pension plan, a group insurance plan, a bonus plan, a hospitalization and surgical plan, and has a practice of maintaining employees on full salary when they are ill over long periods of time (Patt, tr. 396-7).

42. WJR has unusually excellent transmitter, technical and studio facilities as evidenced by photographs of its unique AM mobile studio; outside view of its transmitter building and AM antenna; interior views of its transmitter building showing the control desk and transmitter and standby studio facilities; master control room in the Fisher Building; FM transmitter in the Fisher Building; offices and studios in the Fisher Building and news room (WJR Exh. 13 and Leydorf, tr. 33-34).

43. WJR has always subscribed to the industry code of the National Association of Radio and Television Broadcasters (WJR Exh. 16 and Patt, tr. 382-6 & 426). Inasmuch as WJR is of the opinion that higher standards of service can be adopted on a local rather than a national basis, WJR also has its own Code. WJR's local code sets forth its general policy and its specific policies on public affairs and community service, controversial public issues including politics, news programs, religious programs, children's programs and advertising standards (WJR Exh. 16). WJR formed an advisory council in January of 1951 composed of representatives of civic, cultural and other community organizations to aid the station in its public service activities (Patt, tr. 392-95).

44. As representative of its programming over the years, WJR made a detailed showing as to its programming in the recent past. WJR submitted its weekly program schedule for the Commission's 1951-52 Composite Week together with analyses of the programs by type and class (WJR Exhs. 45, 46 & 47). WJR also submitted the proposed and actual analyses of weekly program schedules set forth in WJR renewal applications filed August 30, 1949 and June 30, 1952 which demonstrated

that WJR meticulously carried out its AM program proposals (WJR Exhs. 46 & 47).

45. WJR also made a detailed showing as to programs broadcast during the period October, 1951 through October, 1952. The showing included the following:

(a) NON-NETWORK PUBLIC SERVICE PROGRAMS (WJR Exh. 39 and Hornung, tr. 632): WJR broadcast a total of 443 hours and 50 minutes of such programs during the period in question, all of which were sustaining. The 115 pages of information submitted respecting these programs show that all fields of public service activities and interests were covered.

(b) NETWORK PUBLIC SERVICE PROGRAMS (WJR Exh. 40 and Hornung, tr. 633): WJR broadcast a total of 157 hours and 15 minutes of such programs during the period in question, all of which were sustaining.

(c) NON-COMMERCIAL SPOT ANNOUNCEMENTS (WJR Exh. 41): During the period in question, WJR broadcast a total of 13,660 public service non-commercial spot announcements for some 175 civic, cultural, governmental, educational and welfare organizations.

[5711]

(d) OUTSTANDING WJR PROGRAMS AND PROGRAM SERIES WJR Exhs. 51 & 52 and Mitchell, tr. 714): WJR made a showing as to some 51 individual programs and some 29 program series produced by WJR during the period in question, which WJR considered to be outstanding programs. Some of these programs were sponsored and some were sustaining.

46. In addition to the above-detailed showing, WJR presented further details concerning its past record. The President of WJR testified that with respect to educational programs, the WJR policy has been, and is, not only to offer sustaining time but to seek out participation on the part of educational institutions and to work with educational representatives in arranging and building educational programs (Patt, tr. 370).

For example, the University of Michigan program has been on WJR every week since 1927 (Patt, tr. 370). The program director and public service director testified as to the details of the station's programming and their non-broadcast public service activities (Mitchell, tr. 712-15 and Hornung, tr. 628-46). The farm director testified as to current WJR agricultural programs and activities, including non-broadcast public service activities (Wells, tr. 612-16). Edgar A. Guest, Jr. described his current WJR news and entertainment programs and non-broadcast public service activities

[5712]

(Tr. 691-94. The moderator of the discussion program "In Our Opinion" detailed the outstanding speakers who have appeared on the program (Cushing, tr. 699 and WJR Exh. 60). The Associate Director of Music described the CBS network program originated at WJR entitled "Make Way for Youth" and testified that during the period October, 1951 to October, 1952 the "Make Way for Youthl chorus made some 22 non-broadcast appearances before various community organizations (Large, tr. 702-4 and WJR Exh. 64). In line with its policy of refusing to accept advertising copy that is not in good taste, WJR turns down at least several dozen accounts a year. Just one account which was dropped would have produced $25,000 a month income to WJR had it been carried. Other Detroit stations carried this particular account (Patt, tr. 387-88).

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[5942]

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER HERBERT SHARFMAN

Findings of Fact

* * * *

[6001]

92. The time to complete construction at Clarkston under the then applicable construction permit expired on January 12, 1955. Under the rules an application to extend the construction period had to be filed,

in the absence of a showing of good cause for delay, at least 30 days before January 12. On December 1, 1954, WJR filed an application (FCC Form 701) for additional time to construct the facilities authorized by the Commission's grant of May 14, 1954. In reply to Par. 1 of the application which requires that the applicant state whether there "have been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendment thereto, or modification thereof since filing?", WJR submitted the following information:

> 1. Former WTAC-TV studio building has been acquired.*
> 2. Minor changes in stockholders.*
> 3. Change in proposed chief engineer.*
> 4. Change in network plans (see back of form).*
> 5. Change in proposed transmitter location.*
>
> * Application for modification of construction permit reflecting these changes is in course of preparation and will be filed in the near future.
>
> Studio building has been acquired and furnished; studio technical installation is approximately 20% completed; studio lighting is approximately 80% installed; and studio production equipment and basic scenery are approximately 75% constructed.

The information on the "back of form" referred to is as follows:

> Applicant has commenced construction by acquiring studio facilities in Flint and preparing them in part for operation; also by investing a total of approximately $672,000 to date, and is expending at the rate of $8,700 per month since July 1 for maintaining a nucleus staff at the Flint studio.
>
> Applicant has been delayed in construction of the station authorized by construction permit, File No. BPCT-967, partially by the fact that no action has yet been taken by the Commission on the Petitions for Rehearing filed by W. S. Butterfield Theatres, Inc. on June 11, 1954 and by Trebit Corporation on

June 14, 1954, and by Motions of a so-called "Citizens Committee for a VHF Television Station for Flint" filed on or about June 14, 1954, and partially because of changes in television station facilities and network affiliations occurring during the past two years, which have required a review of applicant's network affiliation plans.

[6014]

116. George C. Leydorf, formerly WJR's vice president in charge of engineering, who, as WJR represented and the Commission found in its Decision (9 RR at 242) would spend 80% of his time in the television operation during the first year, resigned August 17, 1954, effective September 1, as vice president and as chief engineer, though he remains as a director.[35/] Leydorf had gone on terminal leave some time before May 1954, and it was not until some time subsequent to May 14 that Kramer learned of his intention to resign. Dale B. Hornung, who had been proposed as the public service director (9 RR at 242), resigned in March 1954. George W. Cushing, proposed moderator of one of the discussion programs (9 RR at 242), resigned in September 1955.

* * * *

[6021]

CONCLUSIONS [1/]

1. Two matters may be disposed of in this paragraph before passing to other considerations: 1) Trebit and Butterfield have consistently argued (as does WKNX-TV in its Proposed Conclusions, Par. 1-17) that WJR has abandoned its original proposal and that the modification application embodying changes in its proposal was no more than an amended application which, under the rules, was not timely filed.[2/] This argument has already been rejected by the Commission in its Memorandum Opinion and Order released December 17, 1956 (see footnote to Par. 128, Findings of Fact). The Commission there

held in effect, that WJR, when it filed its modification application was "more than a mere applicant," and so not bound by the rules relating to the amendment of as yet ungranted applications, but was to be treated under the rules relating to construction permit modifications, by which "its conduct was procedurally proper." The Commission also held that it was precluded by virtue of the Court of Appeals' Order, pursuant to Section 402 (h) of the Communications Act, from eliminating WJR as a party. 2) WKNX-TV contends that "With WJRT operating as a CBS affiliate from Chesaning, WKNX-TV will lose its CBS program sponsorship and Saginaw will be deprived of its only local outlet" (Proposed Conclusions, Par. 30). At the hearing it proposed to offer evidence to this effect but the Hearing Examiner ruled that in any event he could not entertain the offer by reason of the Commission's ruling in its Memorandum Opinion and Order on WKNX-TV's request to enlarge or clarify the issues, released January 24, 1957 (14 RR 979, 984), that Section 402 (h) of the Communications Act limits its authority to add or delete issues in the remand proceeding, and that it could not therefore grant WKNX-TV's request to enlarge the issues, to include, among other things, consideration of the effect of a grant of any of the applications in suit upon existing television service (Tr. 1679);

1/ In these Conclusions some material, where believed to be supported by the present findings, is taken, at times with some change, from this Hearing Examiner's Initial Decision in Docket No. 11412 (released January 17, 1956).

2/ In its Further Proposed Conclusions (Par. 7), in which Trebit concurs (Further Proposed Conclusions, Par. 1), Butterfield declares:

> " . . . in vital and controlling areas, WJR abandoned its original proposals with which Trebit and Butterfield were competing herein. WJR has not and cannot amend its original proposals so as to substitute the new proposals therefor. Accordingly, WJR is not entitled to further comparative consideration here and its above-entitled application must be dismissed or denied."

and that he could not agree with counsel for WKNX-TV that even under the present issues (counsel stated that the petition to enlarge the issues had been prompted by an excess of caution) it was a relevant consideration. And it must continue to be held that whether, as WKNX-TV argues, the shift of WJR's operation to Chesaning would "needlessly deprive Saginaw of its only operation" (Proposed Conclusions, Par. 32) is not material under the issues specified by the Commission pursuant to the Court's remand.

2. The Court, in remanding the case, ruled that the Commission had not properly exercised its discretion when it made a non-hearing determination of the difference between WJR's two proposals. The further hearing on remand was limited in scope and purpose; it was solely to receive evidence to aid in evaluating the merits of the matters raised in the petition of Trebit and Butterfield for rehearing. It was not an original comparative hearing involving WJR's application as modified and Trebit's and Butterfield's proposals. To be decided is not whether WJR's proposal in its modification application is now better than the proposals of Trebit and Butterfield, for the changes in WJR's modified proposal which might improve its original proposal are not to be considered as a basis for sustaining the original grant to WJR; but whether the changes proposed by WJR in its modification application, filed after grant of the construction permit, worsen WJR's original proposal to the extent that it would now be more in the public interest to grant the application of either Trebit or Butterfield. In other words, the question is whether the proposed changes materially affect the decisional basis of the Commission's preference of WJR. The Court of Appeals held that the Commission must receive evidence before it can make findings on the significance of WJR's proposed changes. The issues framed by the Commission call for evidence to determine the differences between WJR's two proposals in respect of programing, transmitter site, and studio building, and whether the time at which WJR filed its modification application reflects adversely upon its character and fitness.[3/] This supplemental initial decision, therefore, does not start from scratch, but

with the Commission's particular findings and conclusions on matters not subsumed in the categories specifically mentioned by the Court accepted as the "law of the case," and a comparative evaluation then made on the composite picture.

3/ The joint petition of Trebit and Butterfield, filed December 28, 1954, declared (Par. 5.E) that "virtually every subject dealt with in the hearing and relied upon by the Commission having to do with comparisons between applicants" was affected by the changes, and specified other changes they thought significant in the WJR proposals. On appeal they also argued that the entire character of WJR's proposal had been altered. The Court of Appeals in its Decision, however, limited the matters requiring rehearing to "transmitter site, programming, and studio building," and whether "WJR's late revelation of its changed situation reflects upon its character and fitness as a licensee."

[6023]

3. Timing of Filing of Modification Application (Issue No. 2). The Court (page 5, slip opinion) said that it did not "share the Commission's view that 'it is hard to conceive of a more forthright or open approach' than WJR's," but expressed no opinion, and left to the Commission, whether under FCC v. WOKO, 329 U.S. 223, "WJR's late revelation of its changed situation reflects upon its character and fitness as a licensee." WJR's opponents charge it with deliberate concealment, if not misrepresentation, of its plans in order to preserve its status as the successful applicant. It should be noted that the wording of the applicable issues does not permit an independent determination with respect to WJR's intentions at the time of the comparative hearing to construct and operate the station proposed in its original application, nor does it appear from the record that WJR did not intend during the course of the comparative hearing to effectuate the proposal it there advanced. It is true that from the time commercial television in the Detroit area was proposed, WJR has been eager to get a television grant, and it can hardly be denied that self-interest has motivated its tactics. As long as the pursuit of self-interest is not incompatible

with the public interest, however, an applicant may adopt any legitimate methods, procedural or other, to achieve its end. In our system of broadcasting, with private licensees operating under regulation, it is expected that self-interest, albeit subordinate to the overriding public interest, will be a factor. It would be appropriate, however, to take WJR's eagerness to receive a grant into account to appraise the nature and purpose of its representations and conduct. And, of course, if there were evidence that WJR had not intended, as early as 1952 or 1953, to effectuate its proposal, it would have been similarly relevant to the concealment issue, though in terms that issue relates only to the modification application.

4. The record does not establish that up to the time of the Commission's Decision on May 14, 1954, WJR did not intend to go through with a DuMont affiliation. That WJR was not actuated by any unyielding loyalty to DuMont, however, is clear. Whatever its gratification at the fact that DuMont would enable it to provide, together with its local live programs, a "unique" service to the Flint area, it is a mere statement of the obvious to point out that it hoped to gain a competitive advantage because of the relative availability of DuMont. But, as indicated above, up to the date of the Commission's Decision WJR had manifested no intention to cast DuMont aside. Subsequently, however, WJR, weighing the probable benefits and risks from continued adherence to a DuMont affiliation, exerted strenuous efforts to obtain a more advantageous network association. Though DuMont as a network was still a going concern in the summer of 1954, there were signs of impending difficulties which a sensitive observer, not wedded to DuMont through thick or thin, could reasonably heed. DuMont's sustaining time had decreased,

and much of its commercial time was cooperative, in which the station normally has to sell the programs to the sponsor. And it may be noted that the course of events during the fall of 1954 and in 1955 justified WJR's concern, since the DuMont network has dropped out of the picture. It cannot be held that the shift from DuMont back to WJR's first love, CBS, was prompted by mere unsupportable whim or of itself, and apart from any possible covert tactics, discussed below, evinces a reprehensible attempt by WJR to abandon a preference point. To be considered presently, however, is whether the fact that the new network change was not revealed to the Commission until the Form 701 was filed on December 1, 1954, and then not completely ("Change in network plans" and on the "back of form" 701, a statement that "changes in television station facilities and network affiliations occurring during the past two years . . . have required a review of applicant's network affiliation plans."); and that it was not until the modification application was filed on December 16, 1954, that the Commission was expressly informed that WJR proposed "network affiliation with CBS," reflects adversely upon WJR's qualifications. The Commission in the Decision (9 RR at 251) said that WJR "would not have selected DuMont if all networks were available and that WJR would make a change in its affiliation to improve its competitive position." Suspicion naturally directs itself to the apparent celerity with which WJR became disenchanted with DuMont once it had been chosen in a final Decision. It has already been indicated, however, that the mere fact that WJR transferred its network allegiance does not itself imply that its designation of DuMont had been a mere sham for competitive purposes and with no intent to perform. Not overlooked has been WJR's rather apathetic regard for DuMont, after the Decision, as contrasted with its brisk though unsuccessful attempts to interest the other networks in an affiliation at Clarkston. Two conclusions are equally and reciprocally valid: there having been reasonable grounds for re-evaluation of the network picture, fortuitously though the necessity may have occurred to WJR after the Decision, the fact that its new relationships do not entirely square with its prior assurances does not *per se* reflect upon the latter; and the fact that it has now left DuMont, expressly though not exclusively named in its prior proposal, does not infect its new representation.

5. Before discussing the question of the first disclosure to the Commission of the new network association, mentioned in the previous paragraph, it will be convenient to consider the unfolding of WJR's studio plans. Attention was focused upon this matter

by the Court as follows (page 5, slip opinion):

> "Another defect in this 'reason' for WJR's withholding of the truth until after denial of the petition for rehearing is the fact that it refers to only part of the changed proposal [the transmitter site]. For example, it does not explain why WJR withheld for at least six months the fact that it had abandoned its plan of building a new two-story television building and had already leased an existing one-story building, partially installed its equipment in that building and given it a nucleus staff."

6. Butterfield, Trebit and WKNX-TV in their present Proposed Findings expressly impeach WJR's good faith with regard to its studio plans. Butterfield alleges (Further Proposed Findings, p. 16) that "prior to the Commission's decision of May 14, 1954, WJR abandoned its original studio plans upon which the Commission relied in its decision herein."[4/] Now, if WJR had initiated discussions with WTAC-TV looking toward the acquisition of the latter's television studios before May 14, it would, of course, appear that WJR had, before it learned of the Commission's Decision, already laid plans to scuttle its representations. But, though it is clear that WJR was first contacted by Allan Campbell of WTAC shortly before that station went off the air around April 30, 1954, proposing that WJR acquire WTAC's facilities, and though Kramer had told Patt of this proposal before May 14, the record does not support a conclusion that negotiations were entered into with WTAC prior to May 14, the date of the issuance of the Decision. Patt

did not visit the WTAC studios until May 19; it was not until May 20 that WJR's Board of Directors, in special meeting, authorized a committee composed of Patt, Kramer and Siebert to negotiate for the WTAC facilities; and the first meeting (an "investigation situation") was not held with Campbell of WTAC until June 1. There is, therefore, nothing in this record to indicate that WJR's original representation that it would expend $776,000 on its main studios in Flint was fictitious, nor any evidence that the decision to acquire WTAC-TV's studios was made prior to the release of the Decision.

4/ See, also, Trebit Further Proposed Findings, p. 8. WKNX-TV alleges (Proposed Findings, p. 67): "That the acquisition of the WTAC-TV studios was being seriously considered by WJR even before the grant was announced on May 14, 1954, is further evidenced by the fact that the 'Press Release' which WJR issued, upon learning of the grant, although stating that WJR planned 'to start construction of a new transmitter building within 60 days,' made no mention of any plans to start construction of an elaborate $776,000 studio building in Flint."

* * * *

8. Both Trebit and WKNX-TV contend that WJR was in violation of Rule 3.613(b) because it did not notify the Commission promptly of its change in studio plans or location. That rule provides that a permittee shall "notify the Commission promptly of any change of the location of the main studio within the community." This rule was not in terms applicable to WJR's situation, since it was not changing the "location" of the studio, which had not in fact been "located" in the original application, and no rule, regulation or announced policy of the Commission required WJR to advise the Commission of the facts WJR publicly announced by press release on August 10, 1954. But it has already been indicated that had WJR done nothing by way of formal filing beyond its opposition of June 21 it could not be absolved of the consequences of concealment of the altered situation, and the mere fact that there was no contravention of a specific rule is by no means

exculpatory. Under consideration at this point, however, is the question posed at the end of Par. 7, above - is WJR entitled to the benefit of what is tantamount to a locus penitentiae? Had there been an affirmative intentional misrepresentation, as distinguished

[6027]

from non-disclosure, it would undoubtedly have to be held that there could be no subsequent rectification which would rehabilitate the declarant. The Hearing Examiner believes, however, that non-disclosure ripens into actionable concealment only if the Commission, before it acted upon the pleadings, was not apprised of the true situation. The Commission did not release its Memorandum Opinion and Order on the petitions for rehearing until December 6, 1954, while the Form 701 was filed on December 1, 1954. Now the Hearing Examiner is not unmindful of the mechanics of Commission filings - that the petitions for rehearing and opposition were docket matters and involved the Commission's hearing functions, while the Form 701 entailed action by the processing staff; and that WJR may have decided to wait until action on the petitions for rehearing was, as it felt, probably imminent, and then to file a Form 701, to absolve itself from a charge of concealment, but to do so in a manner not likely to come immediately to the attention of the Commission in its deliberation of hearing matters. Apart from such conjectures, however, the fact remains that WJR did reveal through a Commission filing its acquisition of the WTAC studios (publicity had been given to the transaction on August 10, 1954), before the Commission had ruled upon the pleadings in which the question of studio superiority was in issue. It is concluded, then, that the timing of WJR's modification application does not reflect adversely upon it, so far as studio change is concerned, since even before the filing of that document WJR had effectively divulged the WTAC-TV studio acquisition.

9. To return now to the question of the public acknowledgment of the new network proposal, left temporarily in Par. 5, above. The

matter of network affiliation, also raised by the June 1954 petitions for rehearing, was treated by WJR as though the status quo had not been altered. The discussion in the Findings of Fact shows that it cannot be concluded that as to network affiliation the position of WJR had been so nearly crystallized in June 1954 as in the WTAC studio acquisition. Consequently, if the analysis regarding studio acquisition plans in the prior paragraph is valid, it is at least equally certain that WJR cannot be charged with concealment of the possibility of change in its network affiliation, which it broached in the Form 701 filed on December 1, 1954. When it elaborated upon its network plans in the modification application filed on December 16 it did not injuriously affect its status.

10. Acquisition of a new transmitter site, an indispensable feature of WJR's proposal, was not consummated until September 1954. It has already been noted that WJR indicated in the Form 701 filed on December 1, 1954, that it was not proceeding with construction at Clarkston, since it declared that it would file a modification application to effectuate, among other things, a change in transmitter site. It did not reveal that it had not begun actual construction at Clarkston, and indeed had stopped any work at that site in July 1954. But it was not until December 16, 1954, when

it filed the modification application, that it specified Chesaning. The Court of Appeals (p. 4, slip opinion) expressed disapproval of WJR's claimed reason for withholding announcement of its new transmitter site - "that the new proposal might be construed as an attempt to improve its transmitter site at a time when the Commission was considering Trebit's claim of superiority over the original WJR transmitter site." The Court declared that "The Commission, in accepting that explanation, assumed that the new WJR transmitter proposal really was an improvement over the old." The Court, in appraising the validity of WJR's explanation, apparently limited its consideration to the propagational advantages or disadvantages of the sites; it seemed to be clear to the Court that on this basis Chesaning was no improvement over Clarkston. Counsel's advice to WJR that a move might be construed as an attempt to overcome a point raised by the Citizens' Committee - that WJR would be a Detroit and not a Flint outlet, and that WJR had vainly attempted to assure the citizens that they were wrong - was, not being part of the record on appeal, of course not given any attention by the Court.

11. Issue No. 2, which calls for a determination "whether the time at which WJR filed its modification application reflects adversely upon its character as a licensee," contemplates the exercise of discretion in the ultimate conclusion. WJR's opponents contend that it has been absolutely disqualified, while the Broadcast Bureau, not going to that extreme, declares that WJR exercised "poor judgment" in not more timely disclosing the changed situation. However strict or loose the standard to be applied, it is impossible to say that WJR's conduct redounds to its credit. But when the Commission phrased the issue as it did, it evidently did not feel that a mere finding that WJR's behavior was not affirmatively creditable, or even that to some extent it is subject to criticism, is sufficient to remove it from comparative consideration. The Court said (p. 5, slip opinion) that "late revelation of its changed situation" is to be dealt with "upon a consideration of all of the evidence." The discussion above shows that 1) in some though not in all of the particulars WJR had been advised by counsel to delay formal filing because that action might be construed as an attempt to influence the Commission in passing upon the petitions for rehearing; and 2) that WJR, though somewhat late in the day, did disclose the changed situation before its laggard conduct became a fatal millstone. It also appears that

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WJR, whatever the justification for its belief, felt that it should not file the modification application until the air clearance problem was settled;

that it had engaged an expert to work on the matter; that during November 1954 there was some confusion within the WJR organization as to what steps, if any, were being taken to reduce the height of the tower, and that the reduction in height question was not resolved until late November; and that the copies of the modification application sent to WJR by counsel on December 1 were still not complete, details being filled in in the next two weeks. It is clear that WJR had no intention of filing the modification application during the pendency of the petitions for rehearing; but even had the Commission acted earlier WJR would not have been in a position to file the modification application much sooner than it did. It can only be assumed that had the Commission acted in October or November, WJR would have bestirred itself to receive informal assurance, at least, that there was no air hazard objection, with more expedition than it exhibited.

* * * *

25. The ultimate question must now be resolved - do the changes proposed by WJR in its modified proposal and its late revelation of these changes so affect the decisional basis of the Commission's preference of WJR that the public interest would better be served by a grant to Trebit or Butterfield? Standing alone, the proposed changes would not warrant a conclusion that WJR should not remain the successful applicant in the comparative proceeding. For, while WJR is no longer to be preferred because of its superior studio facilities or integration of principals and management, the significant factors which persuaded the Commission to prefer WJR over Trebit remain unaffected. These preferences are for WJR's local live programing and the fact that a grant to WJR would avoid concentration of control of the media of mass communications. Similarly, the significant factors of WJR's superior local live programming,its broadcast experience and satisfactory record of performance, which the Commission considered determinative in

WJR's favor against Butterfield, remain unaffected. It is realized that the Commission's [6040] preference of WJR centering around programing was "of a composite nature" (Par. 94, Findings of Fact) and took its then studio proposal into account. Though this studio preference can no longer be credited to WJR, since its new studios are adequate to present its programs it is not believed that the preference has been significantly lessened.[13/] And as indicated in the conclusions on Issue No. 2, above, a ruling adverse to WJR, because of the timing of its modified proposal, in the light of all the evidence is not warranted.

[13/] The Commission had awarded some preference to WJR, "by no means decisive" however (9 RR at 260d), partly because of the participation of Mr. Leydorf, who is no longer a staff member. Integration was not an "area" which the Court specified should be considered in the further hearing (the briefs of Trebit and Butterfield on appeal do not mention Leydorf's resignation). The question of diversification of the media of mass communication, held by the Commission to be the decisive factor between WJR and Trebit (9RR at 260p), could also be deemed affected by post-decisional developments which, however, are not to be considered under the issues pursuant to the remand. After the decision WJR principals acquired a substantial stock interest in a television station in Indiana, and Trebit has divested itself of broadcast holdings. Trebit declares (p. 6, Reply to Findings):

> "Adverting to the footnote on page 66 of WJR's findings, we note it has gone to considerable pains to give its version of Trebit's present position with respect to diversity and control of mass media which emphasizes the fact that Trebit is no longer stigmatized on these counts. We have no objection to the Examiner taking official notice of the Commission's records with respect to the fact that the Bitners have divested themselves of other broadcast holdings, do not now own any television stations and are solely possessed of a regional radio station in the City of Flint which has a distinguished record of service to that community far superior to WJR's."

Although these subsequent actions on the part of WJR and Trebit are known and mentioned, the Hearing Examiner resists the temptation offered by Trebit to take official notice of them for purposes of decision, since the question of diversification is not an "area" in which change is to be considered.

At Tr. 1230 the Hearing Examiner ruled, at the suggestion of counsel for WKNX-TV, that WJR's present stock ownership, which has changed since the original application, could be considered under the issues for a limited purpose, as the changes might affect the reliance to be placed upon WJR's promises. WJR excepted to this ruling and none of the parties have urged any related findings or conclusions.

[6042]

ERRATUM

On page 67, paragraph 106, of the Supplemental Initial Decision released September 12, 1957, under Title and Time, the following should be added:

Title	Time
"Keep Posted	Tuesday 8:30 - 9:00 p.m."

/s/ Herbert Sharfman
Hearing Examiner
Federal Communications Commission

Dated: September 16, 1957
Released: September 20, 1957

[6086]

[Received Oct. 23, 1957 -
F.C.C. Mail & Files]

EXCEPTIONS AND REQUEST FOR ORAL ARGUMENT BY LAKE HURON BROADCASTING CORPORATION

* * * * *

[6089]

EXCEPTIONS TO INITIAL DECISION

* * * * *

[6133]

Exception No. 49

1. To the Examiner's conclusion that the changes proposed in the MP, no matter how substantial, cannot be treated as tantamount to a new application not entitled to comparative consideration with those of Trebit and Butterfield.

Exception No. 50

1. To the Examiner's conclusion that the changes proposed in the MP, no matter how substantial, cannot be treated as tantamount to a new application, and his failure to conclude if such modified application is to be considered comparatively with Trebit and Butterfield that other persons must likewise be accorded a comparative hearing on applications tendered for Channel 12 in Flint within ten days after the instant hearing was ordered.

* * * * *

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DECISION

By the Commission: Commissioner Lee dissenting; Commissioners Craven, Ford and Cross not participating.

Preliminary Statement

1. This proceeding involves the mutually exclusive applications

of WJR, The Goodwill Station, Inc.; Trebit Corporation; and W. S. Butterfield Theatres, Inc. for construction permits for a new commercial television station on Channel 12, Flint, Michigan. After a full comparative hearing proceeding, the Commission, on May 12, 1954, adopted a Final Decision, released May 14, 1954, favorable to WJR. Briefly, the Decision was based on: (1) preferences to WJR over Trebit on the grounds of proposed programming, meaningful superiority of studios and equipment, integration of ownership and management and diversification of control of mass media of communication; and (2) preferences to WJR over Butterfield on the ground of proposed programming, meaningful superiority of studios and equipment, broadcast experience, integration of ownership and management and preparation of program plans.

2. Within the time provided by statute, Trebit, Butterfield and the "Citizens Committee for a VHF Television Station for Flint" filed petitions for reconsideration and rehearing of the Commission Decision of May 12, 1954 contesting each of the grounds relied upon by the Commission in awarding preferences to WJR. The matters challenged, *inter alia*, were the findings and conclusions based thereon as to WJR's studios, programming proposals and transmitter site. On June 21, 1954, WJR filed oppositions to these petitions wherein it relied on its hearing proposals. No mention was made of changes in its proposals. On December 1, 1954, WJR filed an application for modification of construction permit (Form 701) for extension of completion date. This application, in response to questions contained therein, set forth information relative to the acquisition of the WTAC studios and the changes in network and transmitter plans. This Form 701 did not detail the changes, but indicated that an application for modification of construction permit reflecting the changes would be filed in the near future. On December 2, 1954, the Commission adopted a Memorandum Opinion and Order denying the petitions for reconsideration and rehearing. The December 1,

1954 application for modification of construction permit was not then before the Commission for consideration in this proceeding. This application was thereafter granted on December 21, 1954.

3. On December 16, 1954, WJR filed its application, File No. BMPCT-2689, for modification of construction permit. As hereinafter set forth in detail, the requested changes dealt mainly with a change of transmitter site, reduction of antenna height, change in studios and change in network plans with a consequent alteration of program plans.

4. On December 28, 1954, Trebit and Butterfield filed a joint petition requesting the Commission to reconsider its actions of May 12 and December 6, 1954, in the light of the changes set forth in the aforesaid modification application and to reopen the record for further hearing. On January 5, 1955, Trebit and Butterfield filed appeals to the United States Court of Appeals for the District of Columbia Circuit from the Commission's actions of May 14 and December 2, 1954.

5. On April 1, 1955, the Commission denied the joint petition filed by Trebit and Butterfield on December 28, 1954, whereupon these parties filed new appeals.

6. On April 14, 1955, the Commission granted the WJR modification application, and on May 12, 1955, Trebit and Butterfield filed a joint petition for reconsideration of this action, which petition was denied on June 10, 1955. Trebit and Butterfield appealed this action on June 22, 1955.

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7. All of the aforesaid appeals were consolidated and, on May 24, 1956, the Court released a Decision which remanded the proceeding to the Commission. The Court held that the Commission erred in denying on April 1, 1955 the joint petition filed by Trebit and Butterfield on December 28, 1954, and by refusing to reopen the record for the purpose of considering the effect of the changes set forth in WJR's modification application on its Decision of May 12, 1954. The Commission

was directed to conduct further hearings on the question of differences between WJR's original and modified proposals and to reconsider its Decision in light of the differences thus disclosed. The Court also indicated that the Commission should consider whether the timing of WJR's revelation as to the changes reflects upon its character and fitness as a licensee. The Commission petitioned the Court to broaden the remand to also permit inquiry into changes which had occurred in the Trebit and Butterfield applications subsequent to the original grant. On July 9, 1956, the Court denied the petition by per curiam order.

8. Accordingly, on October 19, 1956, the Commission reopened the record and remanded the proceeding for further hearing before an Examiner and for the preparation of a supplemental Initial Decision in which, in light of the evidence adduced under the issues specified, the grant of WJR's application would be reconsidered on a comparative basis with the applications of Trebit and of Butterfield. Further hearing was ordered on the following issues:

(a) To determine the differences between the proposals advanced by WJR, The Goodwill Station, Inc., in its original application and those proposals advanced by it in its application for modification of its construction permit, insofar as those differences relate to the areas of transmitter site, programming and studio building.

(b) To determine, in light of the facts, whether the time at which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee.

9. On December 17, 1956, Lake Huron Broadcasting Company, licensee of Station WKNX-TV, Saginaw, Michigan was admitted as an intervenor.[1]

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[1] Lake Huron Broadcasting Co., Inland Broadcasting Co. and Sparton Broadcasting Co., all licensees of TV stations in the general area of Flint, filed Sec. 309(c) protests against the Commission's grant of the WJR modification application.

10. Further hearing was commenced on January 6, 1957, and the record was closed on April 17, 1957. On September 12, 1957, Examiner Herbert Sharfman released his Supplemental Initial Decision which would affirm the grant to WJR. Exceptions and Replies to Exceptions and supporting briefs were filed, and oral argument thereon was heard by the Commission en banc on January 21, 1958.

Differences Between WJR Original and Modified Proposals

Transmitter Site

11. The new WJR transmitter site is at Chesaning, Michigan, approximately 44 miles northwest of the original site at Clarkston, Michigan. Chesaning is 23.4 miles northwest of Flint. Clarkston lies 20.8 miles southeast of Flint. As shown in the tabulation below, WJR proposed no change in its effective radiated power, but the height above average terrain would be decreased from 1000' to 940'. Area within the Grade A contour would decrease in the move from Clarkston to Chesaning; area within the Grade B contour would increase. The decrease in population within both contours is mainly attributable to the loss of the densely populated Detroit urbanized area, no part of the Detroit urban area being within the Chesaning Grade A or B contours. From Clarkston WJR would have rendered a Grade A signal to 96% of the Detroit metropolitan area and 100% of the Detroit urbanized area. Operation from Chesaning would comply with Rule 3.685(a) which specifies a minimum signal of 77 dbu over the principal city. From Chesaning there would be line of sight over the city of Flint with no intervening natural obstructions. From Chesaning and Clarkston the Grade B contours would extend 62.5 and 64 miles respectively. From Clarkston WJR would not place a Grade A signal over Saginaw, Bay City or Lansing. From Chesaning both Saginaw and Bay City are within the principal city (77 dbu) contour and Lansing is within the Grade A contour.

12. The following table shows pertinent data regarding the several sites:[2/]

2/ For all the applicants herein the respective antenna heights above average terrain were used in all directions for locating contours. As of February 13, 1957, when the evidence was presented, the latest authorized values of antenna height and power were employed in conjunction with the propagation curves in the Commission's Rules. Uniform distribution of rural populations within minor civil divisions was assumed in computing population.

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	WJR			
	Clarkston	Chesaning	Trebit	Butterfield
(a) Miles from nearest Flint boundary	17	20	4.4	14.4
(b) Miles from furthest Flint boundary	24.7	26.8	11.1	21.8
(c) dbu at furthest Flint boundary	86	84.5	99	88.5
(d) Overall Height of antenna above ground	946'	999'	979.5	937'
(e) Height of site above mean sea level	1,110'	600'	810'	1,103'
(f) Height of antenna above average terrain	1,000'	940'	1,000'	1,011'
(g) Effective radiated power	316 kw	316 kw	316 kw	312 kw
(h) Grade A area (sq. mi.)	6,320	5,985	6,320	6,514
(i) Grade A population	3,630,660	865,387	929,100	3,612,602
(j) Grade B area (sq. mi.)	10,800	11,180	11,640	11,340
(k) Grade B population	4,302,550	1,325,545	3,779,480	4,319,956

13. The following tables show a comparison of population within the Grade A and Grade B contours of the several sites now encompassed within other Grade A and Grade B contours.

Comparison of Grade A Contours of Existing Stations Encompassing Populations Within Proposed Grade A Contours

	WJR							
	Clarkston		Chesaning		Trebit		Butterfield	
	Pop.	%	Pop.	%	Pop.	%	Pop.	%
Within no other Grade A Contour	40,948	1.1	33,618	3.9	43,796	4.7	39,800	1.1
Within one other Grade A Contour	248,745	6.9	318,800	36.8	307,057	33.0	249,000	6.9
Within two other Grade A Contours	150,655	4.2	497,074	55.4	343,933	37.1	151,500	4.2
Within three other Grade A Contours	2,678,317	73.9	30,900	3.6	225,552	24.3	2,671,302	73.9
Within four other Grade A Contours	501,995	13.9	2,995	0.3	8,762	0.9	501,000	13.9

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Comparison of Other Grade B Contours Encompassing Populations Within Proposed Grade B Contours

	WJR							
	Clarkston		Chesaning		Trebit		Butterfield	
	Pop.	%	Pop.	%	Pop.	%	Pop.	%
Within no other Grade B Contour	0	0	0	0	0	0	0	0
Within one other Grade B Contour	10,649	0.2	21,624	1.6	42,618	1.1	8,650	0.2
Within two other Grade B Contours	50,833	1.2	40,307	3.0	60,821	1.6	51,900	1.2
Within three other Grade B Contours	352,561	8.2	238,388	18.0	320,592	8.5	354,500	8.2
Within four other Grade B Contours	324,441	7.5	147,331	11.1	352,520	9.3	324,000	7.5
Within five or more Grade B Contours	3,564,066	82.9	877,895	66.3	3,002,929	79.5	3,580,906	82.9

14. The following tables compare the Chesaning and Clarkston[3/] sites with respect to the populations not common to each within the respective Grade A and Grade B contours and the population encompassed in these areas by the Grade A and Grade B contours of other television stations.

Population Within Chesaning Grade A Contour but not Within Clarkston Grade A Contour

	Pop.	%
Within no other Grade A contour	17,970	3.9
Within one other Grade A contour	73,400	16.0
Within two other Grade A contours	361,519	78.4
Within three other Grade A contours	7,890	1.7
Within four or more other Grade A contours	0	0

[3/] The figures for the WJR Clarkston site are substantially the same as those for the Butterfield site.

Population Within Clarkston Grade A Contour but not Within Chesaning Grade A Contour

	Pop.	%
Within no other Grade A contour	25,300	0.8
Within one other Grade A contour	3,345	0.1
Within two other Grade A contours	33,100	1.0
Within three other Grade A contours	2,655,307	82.5
Within four or more other Grade A contours	499,000	15.6

Population Within Chesaning Grade B Contour but not Within Clarkston Grade B Contour

	Pop.	%
Within no other Grade B contour	0	0
Within one other Grade B contour	13,174	6.1
Within two other Grade B contours	24,457	11.3
Within three other Grade B contours	15,888	7.3
Within four other Grade B contours	102,931	47.3
Within five or more other Grade B contours	61,085	28.0

Population Within Clarkston Grade B Contour but not Within Chesaning Grade B Contour

	Pop.	%
Within no other Grade B contour	0	0
Within one other Grade B contour	2,199	0.1
Within two other Grade B contours	34,983	1.1
Within three other Grade B contours	130,061	4.1
Within four other Grade B contours	280,041	8.8
Within five or more other Grade B contours	2,747,256	85.9

15. The following tables compare the WJR Chesaning site and the Trebit site[4] with respect to the populations not common to each within the respective Grade A and Grade B contours and the populations encompassed in these areas by the Grade A and Grade B contours of other television stations.

4/ As indicated in footnote 3, *supra*, the WJR Clarkston site is substantially equivalent to the Butterfield site and the tables in paragraph 14, *supra*, serve as a comparison of the WJR Chesaning site with the proposed Butterfield site.

Population Within the Chesaning Grade A Contour but not Within the Trebit Grade A Contour

	Pop.	%
Within no other Grade A contour	17,422	8.2
Within one other Grade A contour	34,593	16.2
Within two other Grade A contours	151,341	70.9
Within three other Grade A contours	9,512	4.5
Within four or more other Grade A contours	533	0.2

Population Within Trebit Grade A Contour but not Within Chesaning Grade A Contour

	Pop.	%
Within no other Grade A contour	27,600	10.0
Within one other Grade A contour	22,850	8.3
Within two other Grade A contours	16,200	5.8
Within three other Grade A contours	204,164	73.6
Within four or more other Grade A contours	6,300	2.3

Population Within Chesaning Grade B Contour but not Within Trebit Grade B Contour

	Pop.	%
Within no other Grade B contour	0	0
Within one other Grade B contour	1,186	0.7
Within two other Grade B contours	11,936	7.1
Within three other Grade B contours	27,796	16.5
Within four other Grade B contours	54,611	32.4
Within five or more other Grade B contours	73,057	43.3

Population Within Trebit Grade B Contour but not Within Chesaning Grade B Contour

	Pop.	%
Within no other Grade B contour	0	0
Within one other Grade B contour	22,180	0.8
Within two other Grade B contours	32,450	1.2
Within three other Grade B contours	110,000	4.2
Within four other Grade B contours	259,800	9.9
Within five or more other Grade B contours	2,198,091	83.9

16. WJR's change of site, coupled with its change of network affiliation hereinafter discussed, results in a reduction of population to which it would bring a new network service. Under

[6375]

the original proposal, a new network would have become available to 4,302,550 persons within the Grade B contours, whereas under the new proposal 21,624 persons not now within the Grade B contours of an existing CBS affiliate would receive a new network service.

17. WJR, operating from the Chesaning site would comply with the Commission's Rule 3,610 relative to mileage separation and Rule 3.685(a) relative to minimum field intensity over the entire principal community to be served. City grade service would be provided throughout the city of Flint from Chesaning and there would be no significant difference between the minimum signal of 86 dbu afforded from the Clarkston site and the minimum signal of 84.5 dbu from the Chesaning site. There is no evidence showing that any area within the city of Flint would receive a signal of less than 77 dbu (the principal city signal required by the Rules) from either the Clarkston or Chesaning sites, nor is there shown to be any significant shadowing from either site.[5] Accordingly, the antenna system proposed by WJR at the Chesaning site will meet the requirements of Rule 3.685(b), since there are no surrounding buildings or objects, or major obstructions between the site and Flint, which would cause shadow problems.

Studios

18. Before making findings relative to the new WJR studios, it is first necessary to resolve a conflict between the parties as to the exact nature of the WJR proposal which we may properly consider. In its modification application filed December 16, 1954, WJR stated that the studios of WTAC-TV had been leased with an option to purchase. It stated that it would expand the studios as needed to provide the proposed programming, but it did not specify the nature or extent of such expansion. On January 7, 1955, WJR filed an Opposition to the then-pending

joint petition of Trebit and Butterfield to Reopen the Record. As an exhibit to that opposition, WJR attached a plan of the WTAC studios, showing, without detail, certain proposed expansion. It also stated that in the event it should be needed in order to present its proposed programming, it would further expand the WTAC studios or construct a

new building. Incident to the current hearing, WJR offered an exhibit showing, in some detail, a proposed expansion of the WTAC studios which differed from the plan submitted as an exhibit to its pleading of January 7, 1955. WJR contends that the instant comparison should be made on the basis of its studio proposals submitted at the hearing; its opponents argue that it should be limited to the expansion shown in its exhibit of January 7, 1955, which exhibit was before the Court of Appeals when it rendered its Decision of May 24, 1956. Additionally, WJR's opponents maintain that, because the budget submitted by WJR

5/ Our finding relating to shadowing is based on the testimony of WJR's engineering witness. Trebit urges on us a contrary finding as to shadowing assertedly due to buildings within Flint. WJR's engineering witness testified the shadow effect from buildings would be minimal and no testimony was offered to rebut him. When consideration is given to the distances of the transmitter sites from Flint, we believe such fact to be apparent. There is no evidence in the record as to what areas would be affected and what factors, other than transmitter distance and antenna height, have been considered in alleging that undesirable shadowing effects would arise. Nor is there any evidence as to what signal intensities would prevail in the alleged shadow areas. In the absence of a showing of the factors upon which the shadowing effects from the two WJR sites, caused by buildings in Flint, could be evaluated we find no basis for the finding urged on us by Trebit. To give comparative consideration to proposals in this regard, we set forth in Appalachian Broadcasting Corp., 11 RR 1402, 1414, 22 FCC 43, 54, the factors which would have to be established. We further stated there, for the reasons fully set forth therein that "Due however to our limited present knowledge of the art, the accuracy of such evaluation as to the differences in quality of service that would in fact be rendered...would be extremely questionable even if each of these factors were known."

as an exhibit to its modification application did not specifically designate sums to be used for the expansion of the WTAC studios, WJR should not be allowed to submit for comparison a proposal showing any expansion of the said studio.

19. The modification application itself did not specify the changes to be made in the WTAC studios, and no details of that plan were submitted prior to the pleading of January 7, 1955. Even that pleading did not purport to present the final WJR studio plans, for it stated that further expansion of the studios would be made if needed. Thus, before the Court at the time it rendered its decision was the assertion in the modification application that the WTAC studios would be expanded, and the plans submitted as an exhibit to the pleading of January 7, 1955, which plans by the terms of the pleading itself, were subject to change. The Court addressed itself to this question by the following language:

> The Commission added: "Moreover, WJR states that the studios will be expanded if needed to adequately present its programs." It may be that a hearing would substantiate the Commission's conclusions that the two studio buildings are not significantly different. Until then, however, that conclusion is baseless. It certainly cannot be supported by WJR's naked promise to repair whatever deficiencies may appear. These comparative contests must turn upon concrete proposals tested through the hearing process, not upon facile and untested afterthoughts.

Prior to the Court's decision there was no legal necessity for WJR to finalize its studio plans. Subsequent thereto WJR was required to prepare final studio plans as a proposal in the instant hearings. Consequently, the instant comparison must properly be based on WJR's hearing proposals. Inasmuch as the cost of the proposed modification is well within the financial resources WJR has shown to be available to it, and the modification application stated that studio modifications would be made, the fact that the detailed budget, submitted as an exhibit to the application, does not contain a specific item covering such cost is without significance. A factual comparison of the leased studio and the studio proposed originally follows.

20. The building housing the former WTAC-TV studios is one story and is more than 20' high with a false ceiling over much of its area. It is located on Lapeer Road, within the city limits of Flint. Its overall dimensions are 102' x 122'. WJR proposes an addition to the building having overall dimensions of 29' x 122'. The dimensions of the studios in the modified proposal are:

Studio A - 61'8" x 49'6" (height varies from 17'10" to 19'2")[6]

Studio B - 39' x 28' (height varies from 17'2" to 17'10") (not yet completed)

Studio C - 24' x 12'9" (height varies from 18'6" to 19'2")

There are the following rooms: Engineering laboratory (30' x 11'6"); control room for Studio B (10' x 8'); sponsor's booth (11' x 8'); film processing room (15'11" x 13'8"); scenery storage and workshop (28' x 58'); workroom (28' x 12'); news and news film storage room (20' x 13'7"); darkroom (10'4" x 8'3"); projection room (20'10" x 14'3"); announcer's room (9'11" x 6'9"); stockroom (14'3" x 5'8"); film editing and storage room (27'2" x 12'); 2 client's conference and screening rooms (each 15'9" x 12'); 2 dressing rooms (14'6" x 7'10" and 14'6" x 7'9"); 7 general offices (ranging in size from 15' x 9' to 25' x 14') lobby (21'4" x 18'9"); lavatories; mailroom (12'9" x 10'); boiler room (14'6" x 12'9"); and 10 programming department offices, five being 12' x 10'1" each, the other five being 11'9" x 10'1" each. The originally proposed building had a sponsor's viewing room, the presently proposed building does not. Whereas the original studio would have had 4 dressing rooms, the acquired building has 2. The WTAC building presently has little outward resemblance to the structure proposed in the original comparative hearing. The building has no garage for the WJR mobile unit, though one was provided in the original proposal. The record does not disclose the character of the neighborhood surrounding the WTAC studios nor available transportation facilities.

6/ There is a slight fall in the roof from the center of the building to the outside, resulting in variance in the height of the roof. The height listed for Studio B assumes that the addition to the building would also have this slight fall.

[6378]

The following is a comparison of the main studio proposals of the applicants:

	WJR		Trebit	Butterfield
	Original	Modified		
Studio A (sq. ft.)	2900	3043	1672	3120
Studio B (sq. ft.)	1768	1008	1520	587
Studio C (sq. ft.)	320	306	none	none
Total Studio Space (sq. ft.)	4988	4357	3192	3707
Scenery Storage and Workshop (sq. ft.)	1416*	1624	3800	2170**
Master Control Room (sq. ft.)	851	964	560	120
Studio Control Rooms (sq. ft.)	945*	88	82	78
Film Projection Room (sq. ft.)	240	297	357	150
Engr. Lab. & Workroom (sq. ft.)	840	663	1071	72
Announcer Room (sq. ft.)	56	66	120	48
Clients' Room (No.)	2	2	0	1
Sponsors' Rooms (No.)	2	1	0	0
Dressing Rooms (No.)	4	2	2	2
Offices & Other Rooms*** (No.)	20	24	21	13
Garage	1-4 units	0	0	0

* WJR Exh. 11 shows that the space allocated to the scenery and equipment room is 20' x 40' x 16' rather than 20' x 24' x 16' as shown in WJR Exh. 114. Also, WJR Exh. 11 shows that the studio control rooms should not include the 4' x 28' space labeled "Sponsors" which was included in the measurements shown in WJR Exh. 114. Exh. 114 also gives the measurements of these rooms as 20' x 32' x 16' whereas the control rooms are trapezoid in shape.

** 900 sq. ft. of this area would be limited to a 10' ceiling height.

*** Other than lobby, basement and rest rooms[7/]

[7/] This table is from WJR's Proposed Findings, p. 62. Calculations using the dimensions testified to by WJR's witness, Faust, do not in all instances produce the exact figures shown by WJR for its modified proposal. However, the differences are insignificant.

[6379]

22. A comparison of the studio and technical equipment proposed in the WJR original and modification applications shows the following:

	Item	Original	Modification
a.	Transmitter studio equipment	$ 15,366.00	$ 15,366.00
b.	Transmitter film equipment	7,281.00	7,281.00
c.	Transmitter camera and network	18,350.00	17,559.25
d.	Transmitter lighting equipment	615.69	615.69
e.	Technical test equipment (all locations)	5,189.00	12,834.25
f.	Flint studio switching equipment	13,649.00	12,949.05
g.	Flint studio cameras	37,730.00	38,103.25
h.	Flint film cameras	22,920.00	22,920.00
i.	Flint film projectors	10,421.75	11,418.75
j.	Flint studio audio equipment	13,626.00	5,652.80
k.	Flint studio general and color equipment	83.75	22,459.00
l.	Flint lighting equipment	3,674.30	3,040.09
m.	Remote equipment	12,022.85	91,576.00
n.	Materials and installation	30,000.00	30,000.00
o.	Furniture, etc.	2,500.00	2,500.00
p.	Shipping charges and contingencies	7,000.00	7,000.00
q.	Detroit field cameras	42,084.00	39,137.85

Item	Original	Modification
r. Detroit film cameras	$ 22,920.00	$ 22,920.00
s. Detroit switching equipment	13,649.00	(included in q)
t. Detroit lighting equipment	615.69	615.69
u. Detroit film projectors	10,421.75	10,421.75
v. Detroit audio equipment	5,050.00	(will use equipment on hand)
w. Detroit Sync. generator	4,516.75	(included in q)
x. Installation and contingencies	25,000.00	15,000.00
y. Spare tube kits	-	3,032.43
	$324,686.53	$392,402.85

23. In its modification application, WJR stated that there was no change in its plans as to its transmitter building except as to location. During the hearing it stated that terrain differences in the sites caused it to redesign the building from a two-story split level to one story. The transmitter studio facilities compare as follows:

Facility	WJR		Trebit	Butterfield
	Original	Modified		
Transmitter studio (sq. ft.)	143	150	none	none
Transmitter projection room (sq. ft.)	85	135	none	none
Transmitter film vault (sq. ft.)	40	44	none	none

[6380]

24. There has been no change in WJR's plans regarding its Detroit studio.

Programming

25. WJR has changed its primary network affiliation proposal from DuMont to CBS. The result has been a substantial increase in network programming and a substantial decrease in film programming. It proposes to retain all the local live programming previously proposed and to basically maintain the same percentages for educational, discussion, religious, agricultural, etc. programs as previously proposed.

26. The following is an analysis of the programming in the original and modified WJR applications:

[6380]

Type	Original	Modified	Change
Entertainment	% - 69.86	% - 69.56	% - 0.30
Religious	4.28	4.28	0
Agricultural	2.48	2.48	0
Educational	4.07	4.07	0
News	7.55	7.55	0
Discussion	4.07	4.07	0
Talks	7.69	7.99	+ 0.30
	100	100	

Total broadcast hours are 110.35 in both proposals.

Class	Original	Modified	Change
Network Commercial	% 9.95	% 39.34	% + 29.39
Network Sustaining	17.41	1.36	— 16.05
Recorded Commercial	34.14	13.56	— 20.58
Recorded Sustaining	4.97	12.21	+ 7.24
Wire Commercial	0	0	0
Wire Sustaining	0	0	0
Live Commercial	21.85	21.17	— 0.68
Live Sustaining	11.68	12.36	+ 0.68
Total Live	% 33.53	% 33.53	% 0
Total Commercial	65.94	74.07	+ 8.13
Total Sustaining	34.06	25.93	— 8.13
Spot Announcements	224	224	0
Non-Commercial Spot Announcements	57	57	0

[6381]

The hours for live programs were decreased between the original and modified proposals from 37.35 to 37.05, and recorded hours from 42.45 to 28.30. Network hours were increased from 30.15 to 45. Recorded programs were changed from commercial to sustaining in order to maintain the same "program balance" as originally proposed. The decrease in recorded commercial time was accomplished by eliminating all film programs whose source was not developed by the fall of 1954, and by reclassifying some of the remaining programs to sustaining.

27. WJR had proposed 30-1/4 hours of Dumont programming. The modified proposal provides for 3 hours of DuMont programming and 42 hours of CBS. As indicated above, total network time increased from 27.36% to 40.7% with a decrease in network sustaining time from 17.41% to 1.36%. The decrease in network sustaining is occasioned by the fact that CBS offers few sustaining programs and these come on Sunday when WJR wishes to present its own live programs. DuMont sustaining programs which WJR retained include New York Times Youth Forum; Johns Hopkins Science Review and Georgetown University Forum.

28. In its Decision (9 RR at 256) the Commission noted that WJR proposed the following DuMont programs "other than the usual entertainment programs":

Title		
This Week in Religion	Sunday	5:00-6:00 p.m.
New York Times Youth Forum	Sunday	6:00-7:00 p.m.
Georgetown University Forum	Sunday	7:00-7:30 p.m.
Youth on the March	Sunday	10:30-11:00 p.m.
Pentagon Washington	Monday	8:00-8:30 p.m.
John Hopkins Science Review	Monday	8:30-9:00 p.m.
Author Meets the Critic	Thursday	10:30-11:00 p.m.
Life is Worth Living	Friday	8:30-9:00 p.m.[8/]

As set forth at paragraph 27, supra, the modified proposal includes three of these programs. They total 1-1/2 hours New York Times Youth Forum having been reduced to 1/2 hour by WJR.

29. In its modified program schedule WJR included local programs scheduled during CBS option hours. This action was based on the belief that, as a basic optional station WJR would not be ordered for the complete CBS program schedule. This has resulted in a program with fewer CBS programs in network option time than

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8/ Except for Life is Worth Living, these programs were not presented by DuMont in October, 1954. WJR was advised in June of 1954 that Life is Worth Living would not be available to it.

are available. WJR has scheduled a total of 5 hours per week of non-CBS programs during the evening option hours: Tuesday, 8:00-9:30 p.m.; Thursday, 8:30-10:00 p.m.; Friday, 8:00-9:00 p.m.; and Saturday, 7:30-8:00 p.m. and 9:30-10:00 p.m. The CBS 8:00-8:30 p.m. program on Tuesday, Red Skelton, was then sustaining, all the others were commercial. It has also scheduled 2-1/2 hours of local programs during CBS Sunday daytime option hours; 1-1/2 hours during Saturday daytime option hours; and a total of 10-3/4 hours during the Monday through Friday option time. Thus, 19-3/4 hours of the 63 option hours are filled with non-CBS programs (local, DuMont or recorded).

30. WJR's conclusion that a number of the CBS commercial programs scheduled during option hours would not be ordered for WJR was based on the fact that they were not carried by WJIM-TV, the CBS affiliate which WJR would replace and that WJR believed WJIM would have carried these programs had it been able to secure them. These programs total 11-1/2 hours.

31. The 2-1/2 hours of CBS programs during Sunday daytime option hours not scheduled by WJR were sustaining programs, as were the Red Skelton Show on Tuesday, 8:00-8:30 p.m., and Winky Dink and You, Saturday, 10:30-11:00 a.m. WJR testified that it did not discriminate against CBS sustaining programs, but wished the time in which they were presented for local shows. The CBS program Valiant Lady was replaced by local Farm News, Monday-Friday, 12:00-12:15 p.m., and Beat the Clock, Saturday, 7:30-8:00 p.m., was replaced by the local Make Way for Youth.

32. In addition, 3 hours of CBS commercial programs during nighttime option hours were not proposed by WJR because they were

carried by WKNX-TV and not by WJIM-TV. They include Meet Millie, Tuesday, 9:00-9:30 p. m., Climax, Thursday, 8:30-9:30 p. m.; Four Star Playhouse, Thursday, 9:30-10:00 p. m.; I Remember Mama, Friday, 8:00-8:30 p. m.; and Topper, Friday, 8:30-9:00 p. m. In addition, WJR would not present the CBS program Halls of Ivy on Tuesday, 8:30-9:00 p. m. at which time it proposes to present The Goldbergs.

33. As hereinbefore set forth, the modified schedule was prepared in order to retain WJR's originally proposed live programs, although the live programs were shifted, as necessary, elsewhere in the schedule. The original draft of the program schedule proposed in the modification application was prepared by Mr. Faust who was employed by WJR in the late summer of 1954. No further survey of the area to be served was made. Upon checking the number of spot announcements in the modified proposal, the figure was very close to the 224 originally specified and therefore the same number was used in the modified proposal.

[6383]

34. In its original proposal, WJR set forth 30 non-network programs other than entertainment and news programs. All these programs are retained in the modified proposal and three additional programs have been added: A Service Club quiz program; Teen Canteen, a record and high school news program; and Youth Forum. In 12 of the 30 programs no change has been made. In 11 others the only change is in the time of the program. These include: Mott Foundation for Adult Education, scheduled to commence at 1:15 p. m. rather than 12:30 p. m.[9]; Michigan State College Farm Developments, scheduled to start at 6:30 p. m. rather than 5:30 p. m.; One Moment Please to begin at 5:30 rather than 5:55 p. m.; Flint Spotlight, scheduled to commence at 7:00 p. m. rather than 7:30 p. m.; Junior Town Meeting, scheduled to commence at 7:00 p. m. rather than 8:00 p. m.; Crossroads-Michigan is to begin at 8:30 p. m. rather than 8:00 p. m.; Let's Get Around, scheduled to commence at 7:00 p. m. rather than 9:30 p. m.; This Is Flint will be from 2:30 p. m.

to 3:00 p.m. on Sunday rather than from 5:00 p.m. to 5:30 p.m. on Saturday; The Hobby Shop will begin at 5:35 p.m. rather than 5:30 p.m.; TV Camera Club is scheduled to start at 6:45 p.m. rather than 6:15 p.m.; and Make Way for Youth will start at 7:30 p.m. rather than 8:00 p.m. In the 7 remaining programs the following changes are proposed:

(1) Symphony at Work. The classification was changed from "recorded" to "live" because it will, as originally proposed, use locally produced films of symphony rehearsals. The initial misclassification was the result of error.

(2) In Our Opinion. Changes in time of presentation from 12:30 p.m. to 1:30 p.m. on Sunday, and in classification from commercial to sustaining.

(3) Your Government. The time of commencement is changed from 1:30 p.m. to 2:00 on Monday and Tuesday and the format is changed by making it a discussion rather than a talk program.

(4) Understanding Our World. The program has been changed from live to recorded, because the University of Michigan, which was and will be involved, wants WJR to use a film series which it is preparing.

(5) Wings Over Michigan. Has been changed in time of presentation from 10:00 p.m. to 10:30 p.m. Wednesday to 10:30 p.m. to 11:00 p.m. Thursday, and in classification from live-commercial to recorded-sustaining in order to use outside film on occasion.

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[9] Except as otherwise indicated, the changes in the time of presentation do not effect the day or days on which the programs are scheduled.

(6) Know Your America. Has been cut from 15 to 10 minutes and the time of commencement changed from 6:45 p.m. to 5:35 p.m. on Monday, Wednesday and Friday.[10]

(7) Music Has A Story. Changed in time of presentation from 1:00 p.m. to 1:30 p.m. on Saturday to 7:00 p.m. to 7:30 p.m. on

Thursday and classification changed from recorded to live sustaining because a canvas has disclosed sufficient local interest to produce the program without the use of outside film.

35. There are 10 non-network entertainment and news programs which have undergone the following changes:

(1) Koffee Klatsch, Monday-Friday, 10:00-10:30 a. m. has been eliminated.

(2) Children's Theater has been reduced from 1-1/2 to 1 hour.

(3) Women Today has been changed from "news" to "talk" in order to include interviews and information of a general nature which could not be included in a program limited to news.

(4) Cartoons has been changed from commercial to sustaining.

(5) Swingshift Cinema has been changed from commercial to sustaining.

(6) Man In the House was originally proposed as a film series on do-it-yourself projects. The program time was reduced from 15 to 10 minutes, the classification was changed from recorded to live, in the belief that it could thereby be more closely associated with community interests and the program was changed from commercial to sustaining.

(7) Dinner Date With Music changed to 5 - 15 minute programs per week instead of 6 - 10 minute programs each week.

(8) Sports Arena was reduced from 30 to 15 minutes and changed from a syndicated filmed sports show to a live talk program.

(9) Western Theater changed from commercial to sustaining.

(10) Barn Dance reduced from 1 hour to 1/2 hour.

36. Other changes in programming, other than minor changes in time, include:

10/ Two other film programs, not included in the above 30, have been changed from commercial to sustaining.

Sunday: New York Times Youth Forum changed from 6:00 p.m. (1 hour) to 12:30 p.m. (1-2 hour); deletion of Dumont sustaining shows Youth on the March and This Week in Religion; deletion of 3 DuMont evening entertainment shows; deletion of Sunday Theater (recorded commercial 7:00-9:30 p.m.) and Sunday Music Hall (recorded commercial, 1:00-2:00 p.m.); and replacement by 5 hours of CBS entertainment shows (including Omnibus and You Are There) in addition to This Is Flint (live sustaining, 1/2 hour entertainment) and 1/2 hour of recorded entertainment.

Monday-Friday daytime (to 5:30 p.m.): substitution of CBS Strike It Rich (commercial entertainment) for Home Beautiful, Child Care and Charm (all recorded commercial entertainment or talk); substitution of Gary Moore (CBS commercial entertainment) for a live entertainment program; shift of midday news from 12 noon to 1 p.m.; substitution of 3-1/4 hours of CBS commercial entertainment for a like amount of programming consisting of 1-3/4 hours of DuMont entertainment, 1 hour of film and 1/2 hour of Western film; and substitution of religious film for recorded Tea Time on Tuesday and Thursday.

Monday-Friday evening (7:00-11:00 p.m.). Monday: 3-1/2 hours network sustaining including Pentagon-Washington, Johns Hopkins Science Review, Guide Light and 1-1/2 hours of boxing, plus 1/2 hour of recorded commercial entertainment, replaced by 3-1/4 hours of CBS commercial entertainment, 1/4 hour of CBS news and 1/2 hour America on Defense (recorded sustaining talk). Tuesday: 2-1/2 hours of network entertainment, 1/2 hour network discussion (Keep Posted), and one recorded program (America on Defense), replaced by 2-3/4 hours network entertainment (CBS and DuMont), 1/4 hour CBS news, and 1/2 hour recorded educational (Understanding Our World). Wednesday: 1-1/2 hours network entertainment, 1 hour recorded entertainment, 1/2 hour live educational (Understanding Our World) and 1/2 hour live entertainment (Wings Over Michigan), replaced by 3 hours CBS entertainment, 1/4 hour CBS news and 1/4 hour talk (sports). Thursday: 3 hours network entertainment and 1/2 hour recorded entertainment, replaced by 2-1/4 hours of CBS entertainment, 1/4 hour CBS news and 1 hour of recorded entertainment. Friday: 3 hours of network entertainment, 1/2 hour network religious and 1/2 hour recorded entertainment, replaced by 2-3/4 hours of network entertainment, 1/2 hour live entertainment, 1/4 hour of CBS news, and 1/2 hour live entertainment. Saturday: Children's Bible Hour (recorded sustaining, religious) in lieu of For Children Only (recorded entertainment); substitution of 1 hour network entertainment for a similar program; Music Has A Story (recorded sustaining, educational), replaced by Western Film; Films of the Nations, replaced by Teen Canteen (live commercial entertainment); This is Flint; replaced by Youth Forum (both live); Dinner Date With Music, replaced by The Sportsman's Club (talk); 2 hours of network entertainment and 1 hour of Barn Dance (live), replaced by 2 hours of network entertainment, 1/2 hour of Barn Dance and 1/2 hour of Army film.

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37. As previously proposed WJR, though it would not serve Detroit, will originate programs from the Detroit studios.

38. We are pressed to make findings relative to areas of similarity between the two WJR proposals, such as revenues, operating costs, number of employees, as well as rigid adherence to the percentage of programs to be presented by classification, and to infer therefrom that the modified proposal is unrealistic and a mere sham designed to minimize the changes effected by the modification. The findings themselves would be irrelevant, for the inference is unwarranted. Insofar as the administrative similarities are concerned, these figures, when submitted by an applicant, represent no more than reasonable estimates and, unless the basis for the estimate has significantly changed, there would be no valid reason for modifying them. The similarity in program classification is neither a subject for credit nor criticism.

Timing of WJR Modification Application WTAC-TV Studios

39. The Commission originally granted WJR a construction permit on May 14, 1954, at which time WJR proposed to construct new studios as detailed in the Decision of May 14, 1954. These new studios, insofar as they were instrumental in the implementation of the WJR program proposals, formed a portion of the preference awarded WJR on the programming criterion. We find, on the basis of the evidence herein, that such studio proposal was made in good faith and that circumstances and conditions as hereinafter set forth persuaded WJR at a time subsequent to the award of its construction permit to abandon such proposal.

40. WTAC-TV was a Flint UHF station, licensed to Trendle-Campbell Broadcasting Company, which suspended operation in April of 1954. Allen Campbell of WTAC-TV telephoned Mr. Kramer, vice president of WJR, shortly before WTAC-TV went off the air, informing him of the contemplated suspension of WTAC and proposing that WJR consider taking over the WTAC facilities. This telephone call was the first awareness WJR had of the availability of the WTAC studios. Within a few days after receiving Campbell's call, Kramer advised Mr. Patt, president of WJR, of the availability of the WTAC property. Patt visited the studios on May 19, 1954, and received a favorable impression. On May 20, at a special meeting of the WJR Board of Directors, Kramer recommended that negotiations be undertaken to lease the real estate and purchase or rent the equipment because the WTAC studios could be obtained at less than the market price and would enable WJR to get on the air at an early date. The Board adopted a resolution approving the commencement of negotiations to obtain the studios at least for temporary use if a proper price could be agreed upon.

41. On June 1, 1954, WJR officials met with Campbell to further investigate the proposed transaction, and negotiations continued through

June. On June 16, 1954, at another special meeting of the WJR Board of Directors, the Board authorized and directed the executive officers to negotiate a 10-year lease with Charles E. Pemberton and wife, the owners of the building in which the WTAC studios are located, at a rental not to exceed $875 per month; to purchase from Trendle-Campbell certain of its leasehold improvements and other facilities at a cost not to exceed $40,000; and to acquire from RCA such equipment as might be useful and suitably priced at a total outlay not to exceed $750,000. At the special meeting there was discussion of the fact that the creditor situation in which Trendle-Campbell Broadcasting Corporation found itself afforded an unusually favorable opportunity to acquire the WTAC-TV facilities; and of the various problems attending television activities and general business prospects. On July 8, 1954, William G. Siebert, secretary-treasurer of WJR, reported to Patt that an agreement had been reached with Mr. Pemberton, and on July 30, 1954, a written lease for the studio building was executed. The lease, cancelable on one year's notice, provided for rental payment of $865 per month with an option to purchase for $125,000. On August 10, 1954, WJR issued a press release relative to its acquisition of the WTAC studios.

42. The Commission finds that as of July 30, 1954 when it executed the studio lease WJR did so with the intention of making the leased premises its main studio. This finding is supported by the press release referred to, by the substantial costs of capital improvement involved, and by the provision in the lease of an option to purchase at any time.

TRANSMITTER CHANGES

43. From and after the granting of its television permit the evidence shows that for a period of nearly two months WJR moved forward with its construction undertaking at the Clarkston site, and that this work was then suspended but the Clarkston transmitter site was not actually abandoned until a date nearly four months[11] from the date of the grant. On May 14, 1954, upon the release of the Commission's Decision, WJR had issued a press release stating that it planned to start

construction within 60 days. The construction permit required that construction be begun on or before July 12, 1954 and be completed by January 12, 1955.

44. On May 19, 1954, several WJR officials met with representatives of the Flint Citizens' Committee who urged them to move the WJR transmitter north of the city of Flint, arguing that from its then-proposed location its signal would cover both Flint

and Detroit which would result in WJR's serving Detroit more than Flint. Mr. Patt, on behalf of WJR, told the Committee that he felt that the transmitter was properly located to reach the maximum number of people; that WJR did not propose to change its site, and that it proposed to be a Flint station in every respect.

45. At a special meeting of the WJR Board of Directors on May 20, 1954, the Board ratified the prior purchase of the Clarkston site for $11,241. It also authorized the opening of a Flint bank account for "WJRT Division." On June 5, 1954, an order was placed for a tower and its erection at Clarkston. On June 7 a signed contract and a check for the equipment down payment of $200,000 was delivered to RCA. A property line survey of the Clarkston site was completed June 9, 1954 at a cost of $1340, and elevation studies of the site were completed on June 10 at a cost of $637. Microwave interference problems, possibly created by Michigan-Wisconsin Pipe Line Company equipment, were explored by Mr. Jones, WJR's chief engineer. On June 15, a blueprint of the Clarkston property line survey was mailed to WJR's architect. On June 16, 17, 22 and 23, Patt and Kramer conferred with Mr. Keachie of RCA and urged early delivery of the RCA equipment to the Clarkston site. Soil test bearings at Clarkston were completed on June 22 at a cost of $664, and elevation studies between Clarkston and Flint and Clarkston

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11/ See paragraph 56 infra.

and Detroit were completed on June 24. An oral arrangement was made on July 1 to retain national sales representatives for WJR operating from Clarkston. The grading and building of a roadway at Clarkston was completed on July 3 at a cost of $6,542. By July 6 a construction field shed was erected at Clarkston at a cost of $450. On July 2 approximately 3 tons of steel were shipped from Houston to Clarkston, and on July 6 work was started on the installation of tower foundations at a cost of $965. As of the time work was suspended on July 8, as discussed infra, there had been no assembly of the tower and the Houston steel remained unused.

Network Negotiations, Transmitter and Programming Changes

46. On the basis of the record a finding cannot be made that WJR proposed in the hearing which led to its grant a network affiliation which it did not intend to effectuate. The evidence is to the contrary. It is equally clear that supervening events caused a change of intention on the part of WJR. Although WJR has been a long-time radio affiliate of CBS, its programming proposals at the time of the Commission's decision of May 12, 1954, specified a DuMont network affiliation. The DuMont affiliation was first proposed in October of 1952, because WJR assumed CBS would not affiliate with it operating from its then-proposed Waterford Hill transmitter site. During the period from October 1952, when DuMont was first proposed, to May 1954, when the Commission awarded its grant, WJR gave cursory attention to DuMont's progress. Although WJR was not satisfied with the network's rate of growth, it was not

so displeased that it had determined to attempt to affiliate with another network by May, 1954. At approximately the time the Commission released its decision, WJR reviewed its network proposals, and on May 17, 1954, Mr. Kramer discussed with WJR's Washington counsel the legal problems incident to obtaining additional programming from the other networks.

47. During the Convention of the National Association of Radio and Television Broadcasters in Chicago, May 23-27, 1954, Patt and Kramer spoke with Mr. E. B. Lyford, then DuMont's director of station's relations, and agreed that they should confer in New York to discuss the affiliation. During the same convention Patt and Kramer heard rumors to the effect that DuMont network was in a precarious condition and its future uncertain. At a meeting of the WJR management on June 1, 1954, there was a discussion of the rumors about DuMont, but it was decided to proceed with plans to affiliate with DuMont and to construct at the Clarkston transmitter site.

48. On June 8, 1954, Patt and Kramer met with Lyford in New York, and told him that September 1, 1954 was WJR's target date for completion of construction at Clarkston, but that early October might be more realistic. Lyford informed them that Canadian station CKLW-TV, which expected to be on the air in late August, 1954, had asked for a DuMont affiliation for the Windsor-Detroit area, but that he preferred to affiliate with an American station and that he would affiliate with WJR if it could be on the air by October 1. Patt told Lyford that he would be informed of WJR's progress and that WJR officials would see him at a later date, at which time they might be able to predict the WJR starting date with greater certainty. Lyford promised to keep the affiliation open.

49. During this conference Patt and Kramer questioned Lyford about DuMont's fall program plans. They were surprised to learn that Station WJBK, Detroit, which had a supplementary DuMont affiliation, had first call on professional football game telecasts and the Bishop Sheen program "Life is Worth Living." Lyford said that it was too early to tell what programs would be sponsored and mentioned only two or three programs which had any certainty of being sold. He explained that because of "cable problems" many programs were delivered to affiliates a week or so later by film or Kinescope recording.

50. As a result of the meeting of June 8, 1954, Patt concluded that affiliation with DuMont would be equivalent to independent operation. The following day he and Kramer consulted Gordon Gray, an official of WOR-TV, New York, a non-network station, as to the problems of independent operation. In June he also discussed DuMont's prospects with executives of KFEL-TV, Denver, and WGN-TV, Chicago, both DuMont affiliates. On June 9 Patt telephoned

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Washington counsel and discussed the problem of moving WJR's transmitter site in the hope of interesting one of the other networks in affiliation. Counsel expressed concern as to the delay incident to such a move and, apparently under the misapprehension that Patt contemplated a move toward the south, as to the probability that WJR's opponents would utilize such a move as support for their argument that WJR wished to serve Detroit rather than Flint. Patt also recounted to the Board of WJR at its June 16 meeting, supra, his June 8 talk with Lyford and stated that DuMont appeared to be an undependable source of programming and that attempts should be made to supplement the DuMont programming with programs from one of the other networks. While the Directors considered the DuMont problem a serious one, there was no action taken to abandon the planned DuMont affiliation or to change the proposed transmitter operation from Clarkston. The Board instructed Patt and Kramer to do what they could to supplement the network service and authorized them to proceed with construction at the Clarkston site and to take delivery of equipment, matters previously mentioned.

51. Some time in June, and after the Board meeting of June 16, Patt and Kramer initiated efforts to interest CBS and NBC in affiliating with WJR. They hoped to obtain some of the programs offered by these networks and attempted to secure all they could. Before consulting the networks, Patt, on June 17, wrote a memorandum to Messrs. Leydorf and Jones of WJR's engineering department asking them to mark out on

an overlap map the site of a "Kalamazoo transmitter . . . located nearly halfway between Kalamazoo and Grand Rapids." By June 18 Patt had prepared a rough draft of a visual presentation to CBS depicting WJR as a station which would serve Flint, Saginaw-Bay City, Lansing and the area lying between Flint and Saginaw Bay, including the region of Michigan known as the Thumb region. At that time WJR considered that it might replace WKNX-TV as the CBS affiliate in the Saginaw area. Patt directed an advertising agency to prepare brochures for presentation to CBS and NBC to assist in persuading either of those networks to affiliate with WJR at the Clarkston site. These were prepared with the objective of obtaining the best possibly type of affiliation, basic "must-buy" if possible, and at the least a supplementary affiliation which would permit WJR to broadcast any programs which the network's basic affiliates in the area did not choose to transmit.

52. The CBS brochure was completed on July 5. It was used by Patt and Kramer on July 7 and 8 as the basis of conferences in New York with Jack Van Volkenburg, president of CBS, Herbert Akerberg, CBS vice president for station relations, and William Lodge, vice president in charge of engineering for CBS Television. Van Volkenburg evidenced some interest in the WJR proposal, but Akerberg and Lodge were strongly opposed to the affiliation. However, Akerberg agreed to ask his Advisory Committee on Affiliations to study the WJR proposal and to report back to Patt

and Kramer the following week. At this meeting there was no discussion relative to a transmitter site other than Clarkston. WJR did not specify to CBS the type of affiliation it was seeking, but made every effort to secure as many programs as possible, and it did not request any supplemental type of affiliation. The only commitment CBS made was that if WJBK-TV, the CBS Detroit affiliate, did not carry a CBS program, and the advertiser was interested in WJR, CBS would have no objection to selling WJR's facilities to that advertiser.

53. On the same New York trip, Patt and Kramer also visited NBC and spoke to Harry Bannister, vice president in charge of station relations, and other NBC officials. The NBC brochure had not yet been completed, but possible NBC affiliation was discussed. Bannister informed Patt and Kramer that the overlap between WJR operating at Clarkston and WWJ-TV, the NBC Detroit affiliate, was far too great and suggested the possibility that WJR might move its transmitter site north or northeast of Flint, in which case NBC possibly would be interested. Patt asked Bannister to withhold final decision for one week, at which time the NBC brochure would be available. Patt and Kramer also called on officials of ABC, and obtained similar reaction to their proposal.

54. While on this New York visit, Patt and Kramer conferred again with Lyford of DuMont. Before the meeting, they had read an article in Variety of July 7 to the effect that DuMont had only one national sponsor firmly committed to a full contract: this was Admiral, sponsor of Bishop Sheen's program Life is Worth Living which DuMont had committed to WJBK-TV, Detroit. The article served to confirm their fear that the DuMont network was declining rather than growing. Patt's and Kramer's recollections of what was said to Lyford at this meeting are not in complete accord. Kramer recalls that Lyford was told that WJR intended to halt construction in order to generally appraise the situation; Patt believes that Lyford was not told that construction would be halted until later when the construction was actually stopped. Patt believed that, if they had assured DuMont that WJR would be on the air by fall, they could have had a DuMont affiliation at that time. However, for the reasons noted, WJR did not press for the DuMont affiliation.

55. Immediately after the meetings with the network officials, Patt and Kramer discussed the problems facing WJR and came to the conclusion that construction at Clarksburg should be suspended pending a decision as to the course to be pursued. Although stopping of construction had been previously considered, this was the first time it was

been reduced, and there are not as many offices, observation rooms, d dressing rooms and other conveniences. Changes in the transmitter studio are minimal. There would be no change in the Detroit studios or the mobile unit for local remote programming. Thus, the WJR proposals for studio and technical equipment have not been materially altered, the modified main studio proposal being adequate to permit effectuation of the programs proposed to be originated from the Flint studios, the transmitter and Detroit studios still being available to it, and the required equipment for effectuation of its proposed local remote programming being unchanged.

4. In appraising the modified programming proposal, we first consider the contentions of Trebit and Butterfield that the present programming proposal of WJR is not advanced in good faith.

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These contentions rest in the assertions that the proposal was deliberately juggled to make a show of retaining basically the same amount of live programming and the same amount of programming as to type; and the assertion that the network option privileges would prevent WJR from programming local shows during certain of the option hours as proposed. As reflected in our findings, in adjusting its schedule to reflect the change in networks, WJR considered the fact that under the contemplated CBS affiliation it would be a basic optional station and under normal practices would not be ordered for the complete CBS schedule. In appraising the hours which would be available for local programming during network option hours WJR also considered the CBS programs carried by WJIM-TV, the present affiliate which it would supplant, the CBS sustaining programs, and the CBS programs carried by Station WKNX-TV. On the basis of these studies, local programming was scheduled for approximately 31% of the network option hours. The basis used appears reasonable and no evidence was adduced placing it in question. Recognizing that rescheduling of local programs within time segments may be required to accord previous week, and of their discussions with national sales representatives. Patt agreed with Kramer's conclusions that affiliation with a major network was a practical necessity that neither CBS nor NBC would affiliate with WJR at Clarkston; and that CBS, NBC or ABC would affiliate with WJR if the transmitter was moved to a point nearer Flint, thus eliminating duplication of Grade A coverage over Detroit. Kramer recommended, and Patt agreed, that WJR should take immediate steps to move the transmitter to a point roughly within a 5-mile radius of Davisburg, Michigan (somewhat west of Clarkston and almost due south of Flint). Kramer's recommendation was contingent upon the assumptions that such a move would be accepted by the Commission without the necessity of extensive litigation, and that a major network would agree to grant a primary affiliation. This memorandum was circulated to other Board members immediately after its preparation.

60. Between July 13 and 16 Patt and Kramer revisited the four networks. They first went to CBS where they strenuously urged an affiliation at Clarkston. When they were told that CBS would not consider such an arrangement, they presented a map showing overlap with CBS affiliates if WJR operated from a proposed

"Site No. 1" at Davison, Michigan (northwest of Clarkston and due east of Flint). Mr. Akerberg indicated that this map showed severe overlap with WJBK-TV, but agreed that the Affiliation Advisory Committee would study it.

61. They next called on DuMont where they told Lyford that they had halted construction activities at Clarkston. They advised Lyford that they were disappointed in DuMont's proposed programming for fall, that WJR was considering affiliating with another network, and that it was unlikely that they would be on the air by fall as had been anticipated. Lyford said that, under the circumstances, DuMont would affiliate with Canadian Station CKLW for a one-year period. WJR wished to keep the

matter open at DuMont as long as possible, and requested that DuMont affiliate with CKLW on a month-to-month basis. Lyford refused, but indicated that, if WJR were on the air at the end of a year, affiliation might be possible. On July 21, 1954, Lyford wrote Kramer that DuMont was affiliating with CKLW.

62. Patt and Kramer also met with NBC officials and showed them their formal presentation. NBC expressed no interest in affiliating with WJR at Clarkston. Similarly, at ABC they were told that the overlap between ABC's Detroit station and WJR at Clarkston was too severe for affiliation.

63. On July 22, 1954 WJR's Washington counsel advised Patt that a transmitter site move required a modification application and would entail delay. Counsel pointed out that the then pending petitions for reconsideration raised questions with respect to the Clarkston site and he felt that the filing of an application to change the site might be construed by the Commission as an improper attempt to influence the outcome of the case.[12] He recommended that WJR should not file the modification application until after the Commission acted on the petition for reconsideration.

64. On July 23, 1954 Patt visited CBS, and pressed for the Clarkston site with the possibility of a directional antenna. He also attempted to interest CBS in the Davison site, paragraph 60 supra, the primary purpose of his visit being to learn the recommendation of the CBS Affiliation Advisory Committee relative to Davison. He was told that CBS was not interested in affiliating with WJR either at Clarkston or Davison. When Patt departed he left with CBS a letter outlining a possible CBS affiliation at Owosso-Chesaning, west of Flint.

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[12] Patt believed that if WJR had "confessed" to the Commission it was wrong in choosing the Clarkston site, Trebit, which was contending its own transmitter site proposals to be superior, would have charged it with attempting to improve its case.

65. During July Patt flew to California and made a further study of independent station operation. He concluded that operating with a DuMont affiliation or as an independent station WJR would lose a half-million dollars or more a year for a period of three to five years.

66. In the period August 11-14 Patt again visited CBS to obtain its reaction to his proposals of July 23, paragraph 64, supra. CBS was not interested in affiliating with WJR operating from Davison or from Clarkston with a directional antenna. However, Mr. Shurich of CBS indicated that it might be interested if WJR's transmitter was located somewhere in the general Owosso area in that CBS was having trouble clearing time on WJIM-TV, the CBS outlet in Lansing, which station was primarily an NBC affiliate. Shurich said CBS would give the matter further consideration.

67. On August 19, 1954, counsel, in response to Patt's telephone request of August 17, forwarded appropriate portions of the application for modification of construction permit (FCC Form 301) to Patt, Siebert and Jones. In their telephone conversation, Patt and counsel had again discussed the question of filing a modification application, counsel telling Patt that he was averse to filing at that time because he felt that it would involve further litigation, although he conceded that WJR had economic problems which perhaps outweighed the considerations of the advice not to file an application for modification of permit. The WJR Board of Directors held a special meeting on August 17 to discuss network affiliation and transmitter site.

68. About August 6 or 7 Jones had gone to Chicago to consult Mr. Lappas, an expert in transmitter site selection. Lappas was employed early in August and instructed to seek a number of sites near Davison, Owosso and Chesaning, which would meet CAA requirements. Primary considerations in the selection of the areas of exploration were that the sites should provide a high signal intensity over Flint and that there should be a minimum of overlap with major network affiliates. WJR arrived at its decision to explore these areas as a result of its discussions with the networks, supra.

69. Patt again visited CBS on August 24-26 and was told that if WJR chose a site in the general Owosso area which would provide a Grade A signal over Flint, a good signal over Lansing, and minimize the overlap with WJBK-TV, the CBS affiliate in Detroit, to something on the order of the overlap that WJBK was then receiving from WJIM, Lansing, CBS would be interested in affiliating with WJR in replacement of WJIM. Mr. Akerberg of CBS explained that WJIM was carrying all four networks and was not clearing live for any of the network hours, but was carrying many network programs on delayed kinescopes. Patt left this meeting with the belief that if WJR could

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minimize overlap with the CBS affiliates in Detroit and Kalamazoo it would be likely to receive a CBS affiliation.

70. Patt also called on ABC during this late August trip to New York. While WJR would have preferred to affiliate with ABC at Clarkston to affiliating with CBS or ABC at some other site, ABC was not interested in the Clarksburg affiliation in view of the overlap with its owned and operated affiliate WXYZ-TV, Detroit.

71. Patt wrote Akerberg on August 31, enclosing maps and analyses of a site (Chesaning) nine or ten miles north of the original Owosso site shown CBS. Patt pointed out that although it was impossible to entirely eliminate the overlaps with WJBK because WJR had to place a 77 dbu signal over Flint, the overlap would be about 10% of the area within WJBK's Grade B contour. Akerberg telephoned Patt early in September and told him that if WJR filed for the Chesaning site he would recommend that CBS affiliate with the station.

72. On September 8, 1954, Patt, Kramer, Moore and Siebert held a meeting in Detroit, and Patt informed his associates of Akerberg's communication regarding Chesaning, paragraph 71, supra. It was decided to move the site and file the modification application when the Commission had acted upon the then pending petitions for reconsideration.

73. On September 15 Patt and other WJR officials met with members of the Flint Citizen's Committee. Patt told the Committee that WJR had decided to adopt their recommendation made in May that the transmitter be moved north of Flint. He pointed out that by moving the site WJR could secure a CBS affiliation. The Committee stated that, since WJR was moving the transmitter site in accordance with its recommendations, the Committee would withdraw its petition for reconsideration then pending before the Commission. Patt stated that, although he had no objection to the petition being withdrawn if that could be accomplished without reflection upon WJR, he thought that the petitions would be decided within a short time and he did not want it to appear that any action on the part of WJR was attempting to influence the Commission's decision. Patt told the group that announcement of the change of site would be made after the Commission had decided the petitions for reconsideration and a site had been found which was free of air hazard problems. He asked that the Committee refrain from making the news of the site change public, although he realized that the information would probably come to the attention of Trebit and Butterfield. News of the proposed move was not published at that time in the Flint newspapers.

74. About September 9, 1954, Kramer discussed with A. Donovan Faust, newly appointed as operations manager of WJRT,

the change in programming which would be necessary as a result of the shift in basic network affiliation from DuMont to CBS. DuMont had agreed to a supplementary affiliation if WJR moved its transmitter north of Flint. It was decided that WJR would attempt to retain the same local live programming. Patt instructed Faust to study the programming in the WJR application granted by the Commission to determine whether the local programming was suitable for the newly proposed service area. Faust was of the opinion that the concept of the local programming was sufficiently broad. From September 9 Faust reviewed the program proposals, and he made examination of the replacements which would be made by the CBS programming and how the schedule could be rearranged to accommodate them. Patt asked Faust to prepare a list of CBS programs carried by WJIM-TV, Lansing, which WJR would replace as a CBS affiliate and a list of CBS programs carried by WKNX-TV, Saginaw. Faust completed this list on September 18.

75. Patt, Jones and Faust met with counsel in Washington on September 21 and 22 for the purpose of working on the engineering and programming portions of the application form. It was Patt's intention to utilize this meeting to place the form in shape for immediate filing at a time to be subsequently determined. On September 21 Patt instructed Faust to prepare a draft of a new program proposal retaining all the local live programs which had been previously proposed and to include CBS programs carried by WJIM-TV but not those carried only by WKNX-TV. Faust was also instructed to retain the same program balance as originally proposed.

76. On September 21 Faust drafted a program schedule which was the basis of the programming discussion with counsel the following day. In preparing this draft Faust deleted all DuMont programs no longer being offered and all DuMont participating and cooperative commercial programs, while retaining other DuMont commercial programs remaining in the time period originally proposed; listed WJR local live programs at the time originally scheduled; listed CBS programs carried by WJIM-TV; listed the remainder of the CBS programs except those carried by WKNX-TV and not by WJIM-TV; and listed the film shows at their originally scheduled times, but dropped those whose source of programming had not developed. This created a program schedule containing, in some instances, two programs at the same time. In resolving this conflict Faust considered the desirability of the conflicting programs. If the conflict was between two desirable programs, an attempt was made to find a comparable time for each. If the conflict was between a local live and a network program, the local live program was moved to

a comparable period, but, if no comparable time was available, the local live program was retained in its time period and the network program was scheduled at another time. This resulted in the scheduling of some local live shows in network option hours.[13/] This was based on the belief that as a "basic optional" affiliate of CBS, WJRT would not be ordered for the full network schedule and that it was the licensee's responsibility to reject network programs wherever it felt there would be a greater interest in local live programs.

77. This draft of the proposed program schedule was the basis for the schedule filed with the modification application. The conflicts in scheduling were resolved in subsequent conferences with Mr. Mitchell, WJR's program director, and minor alterations were made to accord with changes in CBS and DuMont programming as they occurred and to create a program balance as close as possible to that originally proposed. The final proposal, as submitted with the modification application, was prepared by Faust and Mitchell and approved by Patt and Kramer without change in late November. Faust testified that he could have completed the final draft within "a couple of weeks" of the rough draft of late September had he been so instructed by Patt.

78. While Patt was in Washington on September 21-22 he learned that WJR had obtained an option on the Chesaning property, and on September 24, a consulting engineer, Mr. Jules Cohen, was retained to prepare the engineering portion of the application. Cohen was told not to proceed until two matters had been resolved: final determination of the tower height to be specified; and completion of Mr. Lappas' work on the air hazard problem referred to in paragraph 68, supra. It was understood that Mr. Cohen would be in a position to prepare the engineering portion

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[13/] As a basic optional station WJRT's network agreement specifies the network option hours as 10:00 a. m. to 1:00 p. m.; 2:00 to 5:00 p. m.; and 7:30 to 10:30 p. m.

of the application expeditiously when instructed to do so. As will appear in paragraph 80, infra, the two contingencies created further delays in the preparation of the application.

79. At the meeting in late September, Patt and counsel had discussed waiting to file the modification application until 30 days after action by the Commission on the then pending petitions for reconsideration, because of the possibility of appeal within that time. The application was actually filed on December 16, 1954, 10 days after the Commission had released its opinion and order.

80. WJR encountered delay in securing air hazard clearance of its proposed tower. Patt learned on or about November 1, 1954 that, while Lappas was confident that WJR could secure approval of its Chesaning site, he believed that approval might depend on reducing the tower height below 1000'. On November 15, Patt sent a memorandum to Jones and Faust wherein he disclosed that WJR had authorized Lappas to file a formal request with the Air-Space Sub-committee for approval of a 990' tower at Chesaning. Patt stated that Lappas believed that the 990' request would be approved within 20 days of filing, and, on the basis that the Commission would

receive notification of approval by November 29 or 30, he felt WJR should take all necessary steps to complete the modification application by the end of November so that all necessary information could be forwarded to Washington counsel who was to prepare the final draft of the application. On December 16, 1954, when the modification application was filed, WJR had still not received formal approval of the Chesaning tower, although it had informal assurance such approval would be forthcoming.[14/]

[14/] Although the Kansas City Air-Space Subcommittee on January 20-21, 1955, recommended approval of a tower not to exceed 999' at Chesaning, it was necessary to move the proposed site 800' and to amend the modification application to avoid aeronautical problems. As so moved the application was recommended for approval by the Air Coordinating Committee Subcommittee on Air-Space in Washington on March 1, 1955.

Conclusions

1. This proceeding, under the Court's remand, is not a comparative proceeding ab initio. Rather its scope and purpose is to receive evidence as to the matters raised in the petition of Trebit and Butterfield for rehearing. These matters go to the character and fitness of WJR as a licensee and a determination as to whether the changes proposed by WJR in its modification application materially affect the decisional basis of the Commission's preference of the WJR application. In the light of such evidence, the question to be resolved is whether the public interest would be better served by setting aside the grant to WJR of the construction permit here involved and its award to one of the other applicants. The changes in the WJR proposal requiring rehearing were limited by the Court's order to programming, studio building and transmitter site.

Studio and Programming Proposals

2. In our decision of May 12, 1954, WJR was awarded a preference on the basis of its studio and equipment proposals. This conclusion was based on the facts of its proposing a new and modern studio building in Flint, designed especially for television; its transmitter studio; a completely equipped studio in Detroit; and a custom-built mobile unit to be based at Flint and utilized for local programming. The preference accorded rested not on the more elaborate nature of the studio and equipment proposals as stated by the Examiner in his supplemental Initial Decision, but rather upon their relationship to the emphasis placed on remote broadcasts and local live programs by WJR, and the effectuation thereof. (See paragraphs 10, 21, 35 and 36 of the decision conclusions, and paragraph 9, memorandum opinion and order FCC 54-1496.)

3. The present proposal of WJR includes all the studio and technical equipment originally proposed. The modified proposal would somewhat, although not substantially, enlarge the size of one and reduce the size of two of the studios to be utilized at Flint. Overall floor space has

been reduced, and there are not as many offices, observation rooms, d dressing rooms and other conveniences. Changes in the transmitter studio are minimal. There would be no change in the Detroit studios or the mobile unit for local remote programming. Thus, the WJR proposals for studio and technical equipment have not been materially altered, the modified main studio proposal being adequate to permit effectuation of the programs proposed to be originated from the Flint studios, the transmitter and Detroit studios still being available to it, and the required equipment for effectuation of its proposed local remote programming being unchanged.

4. In appraising the modified programming proposal, we first consider the contentions of Trebit and Butterfield that the present programming proposal of WJR is not advanced in good faith.

These contentions rest in the assertions that the proposal was deliberately juggled to make a show of retaining basically the same amount of live programming and the same amount of programming as to type; and the assertion that the network option privileges would prevent WJR from programming local shows during certain of the option hours as proposed. As reflected in our findings, in adjusting its schedule to reflect the change in networks, WJR considered the fact that under the contemplated CBS affiliation it would be a basic optional station and under normal practices would not be ordered for the complete CBS schedule. In appraising the hours which would be available for local programming during network option hours WJR also considered the CBS programs carried by WJIM-TV, the present affiliate which it would supplant, the CBS sustaining programs, and the CBS programs carried by Station WKNX-TV. On the basis of these studies, local programming was scheduled for approximately 31% of the network option hours. The basis used appears reasonable and no evidence was adduced placing it in question. Recognizing that rescheduling of local programs within time segments may be required to accord with changes in network programming and scheduling, we find no reason for questioning the ability of WJR to fulfill its local programming commitments substantially as proposed because of network option hours provisions. No evidence was adduced to support the charge that retention of the locally produced programs by WJR under the modified proposal is for hearing purposes only. Evidence as to the past broadcast record of WJR would indicate the contrary. (Paragraphs 44-46, Decision of May 12, 1954).

5. As detailed in the findings, the principal changes in the WJR programming have to do with the reduction of DuMont and film programming and the addition of CBS programming. The local programming, other than changes too minor to be decisionally material, remains unaltered. Minor changes in time scheduling have been made in a number of the local programs. The hours reflected in the new schedule are no less desirable than those originally proposed. Other changes involve correction of an original mis-classification; one change in program format which leaves the basic content of the program unchanged; and several changes in program source which similarly leaves the basic content of the programs unchanged. The changes in the network (other than as they bear upon a matter to be discussed infra) and film programming are without significance to our decision. As reflected in the findings of our original decision and herein, the applicants place little reliance upon film programming other than for entertainment programs. Film programs were to be obtained from the usual sources available to television stations and the type of film programs proposed should be available from such sources. There was no showing on the original record, as there was no showing on the instant record, that the network or film programming proposals of the applicants were such as to favor one over the others; the Commission believes that on this record the proposed WJR substitution of certain network programs for previously proposed film programs has no adverse effect

upon WJR's programming proposal. Thus the substitution of network for film programs by WJR for 13.34% of its total broadcast time is without significance. WJR had originally contended that its proposals would bring a new network service to Detroit, and this contention is of course no longer valid. Our Decision, however, of May 12, 1954, did not rely on this point. (Paragraph 31, conclusions) Accordingly, the change from the DuMont to the Columbia Broadcasting System network is of no significance in this regard. Nor can we attach other significance to this change. It is a matter for sound discretion of a permittee to determine that a network affiliation is desirable in the operation of its facility and from the standpoint of the viewers, and to elect the alternative of modifying a network proposal found after hearing to be impractical due to circumstances outside its control rather than the alternative of so-called "independent operation." This change serves only to point up the impracticability of expecting an applicant to be able to give absolute assurance that some several years after filing of its application it will effect the exact operation originally proposed. Cf Appalachian Broadcasting Corp., et al., 11 RR 1327, 1420.

6. As we pointed out in our original decision, WJR's programming preference rested on its proposals for local live and remote programs. Under the modified proposal, although the area to which this programming is directed is somewhat changed, the focal point of that area, Flint, remains the same. WJR has testified that the areas and population within the contours of both its original and modified proposal are essentially homogeneous. There is no record evidence to contradict this view. Review of the record evidence as to the planning of WJR, Trebit and Butterfield and of our findings based thereon as set forth in our decision of May 12, 1954 discloses this same approach by all applicants. Trebit's planning as set forth in its Exhibits 7-G and 7-H was confined to organizations in the immediate Flint area. WJR's planning and contacts (WJR Exhibit 43, Tr. 372, 373, 648, 649) show that WJR also confined its planning principally to Flint and Genessee County organizations. The limited contacts of Butterfield were also confined to Flint

and Genessee County (Tr. 1525-49), the membership of its program advisory board also being limited to Flint citizens (Tr. 1563, 1564). Our conclusions accordingly in the area of recognition of community needs were predicated on the basis of the needs and desires of the Flint community (Paragraphs 17-19, 32, 35, 36, Conclusions). Nothing in the proposed modification affects the factors leading to the preference accorded WJR in the important area of programming. Thus the preferences originally found warranted with respect to WJR, "in light of its program proposal which would include a substantially greater amount of local live programming, as well as remote programs, and which will be implemented by means of its clearly superior studio facilities and equipment," remain.

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Transmitter Sites

7. WJR has moved its transmitter site nearly 45 miles, an act which has altered the population it would serve. Under the doctrine of Hall v. FCC, 237 F^{2}567, which rules as competent the evidence of projected service contours, it is appropriate for us to examine the extent of that alteration and to compare the service to that proposed by Trebit and Butterfield.

8. Whereas the original WJR proposal would have encompassed 3,620,660 persons within its Grade A contour and 4,302,550 persons within its Grade B contour, the comparable figures under the modified proposal are 865,387 and 1,325,545. This diminution must be considered in the light of the services available to the populations involved.

9. As set forth at paragraph 13 of the findings of fact, the WJR modified proposal would bring a first Grade A service to slightly fewer persons than would the original proposal. It would bring a second or third Grade A service to significantly more persons than would the original proposal. Again, the diminution of population to be served with a Grade A signal under the modified proposal due, in large measure,

to the elimination of the Detroit area population from the modified proposal, concerns almost entirely a population residing within the Grade A contours of 3 or more existing stations. A similar comparison on the basis of the Grade B contours shows that the Chesaning proposal would bring a second Grade B service to a somewhat greater number of persons than would have received such service from the Clarkston site, and a third Grade B service to slightly fewer persons than would have been so served under the original proposal.[15] As in the Grade A comparison, the great bulk of the diminution of Grade B service concerns populations and areas now receiving three or more Grade B services, the vast majority of such areas now receiving five or more Grade B signals.

10. Thus, the vast majority of the population which would have received a signal under the original proposal, but which would not receive a signal under the modified proposal, is already well served by multiple existing stations, and the loss to such population of the prospective WJR service would be of comparatively little moment. On the other hand, the modified proposal would bring service to somewhat greater populations presently receiving little television service than would have been brought by the original proposal. In our view, the modified service proposal of WJR is at least equally conducive to the public interest, insofar as service coverage is concerned, as was WJR's original proposal.

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[15] Neither site would bring a first Grade B service to any area, nor would the proposals of Trebit or Butterfield.

11. As between the WJR modified proposal and the proposals of Trebit and Butterfield, Trebit would bring a first Grade A service to about 10,000 more persons than would WJR and about 4,000 more persons than would Butterfield; WJR would bring a second Grade A service to approximately 11,000 more persons than would Trebit, and to nearly 70,000 more than would the Butterfield proposal; and WJR would encompass

within its Grade A contour more than 135,000 additional persons now within two other Grade A contours than would Trebit, and more than 325,000 such persons additional to the Butterfield coverage. Over-all, including persons now within four or more Grade A contours, WJR would bring Grade A service to 865,000 persons, Trebit to 929,000 persons, and Butterfield to 3,612,000 (more than 2,650,000 of whom reside in the Detroit area).

12. Thus, Butterfield would bring a Grade A service to considerably greater populations than would either WJR or Trebit, but it would bring such service to fewer persons now within the Grade A contours of two or less existing stations than would Trebit and considerably fewer such persons than would WJR. Trebit would bring Grade A service to slightly more persons than would WJR, but it would bring such service to fewer persons not now within the Grade A contours of 2 or more existing stations.

13. No such wide disparity exists as would constitute a ground for a preference on the basis of population to be served. Butterfield's large numerical superiority of population within the Grade A contour is of relatively little consequence due to the fact that the majority of such persons are already well served by a number of existing television stations. WJR, on the other hand, would bring a Grade A service to many more people presently receiving few or no signals of such intensity. Trebit lies between the other two, it would serve more persons overall than would WJR, but fewer persons than the Butterfield proposal, and it would bring a first, second or third Grade A service to more people than would Butterfield, but fewer in the aggregate than would WJR.

14. Both our Decision of May 12, 1954 and the Court's Decision of May 24, 1956 devoted attention to the transmitter sites of the three applicants insofar as they complied with Sec. 3.685 of our Rules. Sec. 3.685(a) requires that a specified minimum field intensity be provided over the entire principal community to be served. The WJR modified proposal, although providing a somewhat lower field intensity over Flint

than would the original proposal, more than meets the minimum requirement. From the standpoint of service rendered, this slight reduction in signal strength over Flint is without noticeable effect and has no significance.

15. Sec. 3.685(b) of the Rules deals with the selection of transmitter sites. In essence, it provides that the transmitter should be located at the most central point at the highest elevation available. As we recognized in our original decision this subsection is merely a guide or standard and is not to be regarded as a mandatory rule. Applicants must frequently compromise in their selection of site, considerations of distance being balanced by considerations of height, the applicant keeping two primary objectives in view: the transmission of the required minimum signal intensity over the principal city to be served, and the prevention of as much shadowing within that city as possible. Here, another factor entered into WJR's decision - the availability of a network service. Such a consideration is not improper. This record discloses that the WJR modified site is satisfactory under both tests. WJR transmits more than the required minimum signal intensity over Flint, and there is no significant shadowing to be expected in the city. We conclude, as before, that the proposals of all three applicants comply with the requirements of Sec. 3.685 of our Rules, and there is no basis of preference among them on that ground.

The Timing of the WJR Modification Application

16. It is clear on this record that at the time of the Commission's Decision of May 12, 1954, WJR intended to abide by its proposals made during the original hearing. Shortly before that Decision WJR became aware of the availability of the WTAC studios, but it had taken no steps to acquire them. It was beginning to be apprehensive as to the future of the DuMont network and, about the time of the Commission's Decision,

was beginning to consider the possibility of securing supplemental network service, but, at that time, intended to proceed with its network studio and transmitter proposals. The modifications of its plans developed subsequent to this time.

17. WJR first became aware of the availability of the WTAC studios around April 30, 1954, and after Mr. Patt's visit to those studios on May 19, 1954, it became actively interested in negotiating for them. The meeting of the WJR Board of Directors on May 20, 1954, authorized the acquisition of the studios if they could be obtained at what WJR regarded as a proper price, though it is not clear that the intention was yet manifest to acquire them for more than temporary use. Negotiation continued through June and, by June 16, WJR had become sufficiently familiar with the details of the situation for its Board to authorize the specific terms under which it would take over the studios. These terms were communicated to Mr. Campbell of WTAC on June 23 and an informal agreement was entered into with him on July 8 or 9. The lease for the studio, however, was not consummated until July 30, 1954, at which time we believe it apparent they were regarded as being for permanent use.

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18. The time elements relating to the programming and transmitter changes are different. About the time of the Commission's grant of May 12, 1954, WJR was concerned with the prospects of the DuMont network, apprehension which was heightened by rumors heard at the NARTB convention on May 23-27, and was considering a supplemental affiliation with another network. However, on June 1, 1954, the WJR management determined to proceed with construction at Clarkston in anticipation of a DuMont affiliation. WJR was aware that it might be necessary to move its transmitter site to the north in order to interest any other network, but its initial efforts were directed toward interesting CBS, NBC or ABC in affiliation at the Clarkston site. Thus, although as early as mid-June the WJR Board had discussed the possibility of moving the transmitter

site and the WJR engineering staff had been instructed to undertake studies of alternative sites, WJR's approach to the networks on July 7 and 8 still was with respect to a proposition of affiliation at Clarkston, and the formal sales brochures prepared by an advertising agency for presentation to the network officials were based on WJR's operating from Clarkston. It is clear that on June 21, 1954, when WJR filed its opposition to the petition for reconsideration, its plans and efforts were directed toward construction at the Clarkston site with DuMont affiliation. That it was attempting to secure supplemental network affiliation was not material to the matters before the Commission on the petitions for reconsideration.

19. On July 9, having received an initially unfavorable network reaction toward affiliation at Clarkston, WJR halted construction at that site. This, however, was not an abandonment of that location, as evidenced by subsequent efforts to interest the networks in a Clarkston operation.

20. By August 24-26, when WJR was advised by CBS that if it chose a site in the general area of Owosso an affiliation was a definite possibility, WJR was willing to make a move necessary to secure such affiliation, and when CBS informed WJR in early September that the Chesaning site was satisfactory the transmitter site move became a certainty. Simultaneously therewith, the necessity for the programming changes here involved arose.

21. It was not until the filing of its December 1, 1954 application that WJR gave any indication to the Commission of the contemplated changes and the specific changes were not revealed until the filing of its December 16, 1954 application. WJR has consistently contended that its reason for filing no pleadings subsequent to June 12, 1954 in the reconsideration matter, giving information of perfected or possible changes, was to avoid the charge that it was attempting to improve its position comparatively. Our findings and conclusions herein show that WJR was justified in believing that the changes, real or contemplated at any given stage of the time sequence between June 30 and December 6, could have been so

considered. As we view the matter, however, WJR considered that it had another position to maintain, one upon which it acted under advice of counsel. WJR throughout this period was a permittee. (The Enterprise Company, FCC 58-351, 24 FCC, 271, 17 RR 48.) The Rules of the Commission provide for the information which permittees must submit and when it shall be submitted. The Rules also provide the mechanics and process for securing approval of changes in authorizations sought by permittees. In accordance therewith, WJR filed its Forms 701 on December 1, 1954, and December 16, 1954. That these Rules are now recognized to be less self-contained than the Commission itself at that time believed them to be should not deprecate WJR's motives in relying solely upon them on advice of its counsel. Our findings show that WJR's filing of the December 1, 1954 forms was at a time earlier than required in order to obtain an extension of its construction permit. Had WJR at that time determined upon changes which would have visited a significant adverse effect upon its service to the public, a question of abuse of Commission process could have been presented through its failure to bring more specifically to the Commission's attention such changes. However, as herein concluded, the changes proposed by WJR were neither inimical to the public interest nor decisionally determinative herein, and it was not unreasonable for WJR to regard itself as governed by the Commission's Rules relating to permittees as set forth above and as further discussed in the paragraph following.

22. Under more recent decisions of the United States Court of Appeals for the District of Columbia the Commission has been found to be in error in its concept as to limiting further hearings in the orderly administration of adjudicatory proceedings before it. Anthony Wayne Broadcasting Co. v. FCC, 12 RR 2043; Enterprise Company v. FCC, 13 RR 2033; Butterfield Theatres, Inc. v. FCC, 13 RR 2175; Southland Television Company v. FCC. The Commission, until the Court of Appeals handed down its opinions, had not recognized that a permittee, emerging from a comparative hearing, remained subject to further

proceedings as a result of exercise of rights arising out of his permittee status during the pendency of a petition for rehearing of, or an appeal from, a Commission decision. Previously (and as of the time of the events discussed herein) the position of the Commission was set forth in *Independent Broadcasting Co.*, 6 RR 1390, and cases therein cited. See also *Television City, Inc.*, 14 RR 463 (July 18, 1956), reversed by the Commission (November 9, 1956) in *Television City, Inc.*, 14 RR 466a. The Commission's Memorandum Opinion and Order of April 15, 1955, which considers the modification application of December 16, 1954, further evidences the erroneous concept then held by the Commission.[15a] Thus, in retrospect, while counsel for WJR may have been overzealous to protest WJR's grant from being subjected to further hearings, and in so doing given insufficient consideration to the role of the Commission, we cannot say that the position on which it relied was greatly different from that of the Commission at the time. Under these circumstances, we see neither concealment nor poor judgment as variously contended by the parties of a nature which would reflect adversely upon WJR's character as a permittee within the scope of this proceeding. Moreover, in light of what we have said in this and the preceding paragraph, were some onus to attach to WJR our opinion would remain the same for another reason. Our decision of May 12, 1954 set forth in the findings of fact the excellent past broadcast record of WJR. It had maintained an even more rigid advertising code than is

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[15a] That the position, though incorrectly, was not arbitrarily taken under the Communications Act is evidenced by the reasoning of Judge Danaher in his dissent in *Enterprise* (text, *supra*): " . . . It seems to me there are two distinct safeguards contemplated in the statutory scheme. One is found in Sec. 319 (c) which authorizes the Commission before authorizing a station license to take account of 'cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the [construction] permit'. The Commission must exercise its judgment as to whether or not such new cause or altered circumstances 'make the operation of such station against the public interest' . . . "

set forth in the industry code of the National Association of Radio and Television Broadcasters. It has made time available to civic, cultural, educational and welfare organizations without charge; and, of particular significance in a determination of its reliability, the proposals advanced in connection with its various renewal applications have been adhered to in its actual operation without substantial deviation. Thus, were some demerit to attach, in the light of its past record before this Commission, we could not conclude that WJR's reliability as found in the Commission's decision of May 12, 1954 would be substantially diminished by such demerit.

Amendment of the WJR Application

23. Trebit, Butterfield and Lake Huron contend that WJR has abandoned its original proposal and its modification application is no more than an untimely filed amended application. This argument was rejected by the Commission in its Memorandum Opinion and Order herein of December 17, 1956 for the reasons stated therein. Nothing in this record would support a modification of that order. (See also The Enterprise Company, supra.)

Competitive Effect

24. Lake Huron urges that, with WJR operating as a Columbia Broadcasting System affiliate from Chesaning, it will lose its programming from that network and as a consequence thereof, Saginaw will be deprived of its only local television outlet. The Examiner refused to accept evidence tendered in support of this allegation on the ground that it was immaterial to the issues. We are in accord with the Examiner's ruling, but on the ground that such evidence is irrelevant. As previously indicated by our said Memorandum Opinion and Order of December 17,

1956, Section 402(h) of the Communications Act of 1934, as amended, prohibits the Commission from broadening the issues on remand beyond the limits prescribed by the Court. Nothing in the Court's decision of May 24, 1956 could be construed as permitting the Commission to consider in this proceeding the matters advocated by Lake Huron.[16/]

Summary

25. Our original decision equated the three applicants on the criteria of transmitter site. The present record, which includes a comparison of the areas and populations to be encompassed by the Grade A and B contours of the applicants, pursuant to the doctrine of the Hall case, supra, furnishes no ground for disturbing that conclusion. Such advantage as might be enjoyed from one applicant's transmitter site is offset offset by advantages inherent in the sites of its opponents.

26. Our decision of May 12, 1954 found WJR to be preferred on its programming proposals, principally on the basis of its local live and remote programming. WJR would make no significant changes in these local live and remote plans, the principal alterations being in network and film programs. The network and film programs in both the original and modified proposals give no basis for preference and the substitutions neither strengthen nor weaken the WJR case. We conclude that WJR retains the programming preference accorded it in our original decision for the reasons given therein.

27. As regards the studio and equipment proposals, we originally awarded WJR a preference on the basis of its proposals insofar as they were related to the effectuation of its local programming proposal. This preference remains undisturbed. Its equipment, remote facilities, Detroit and transmitter studios, all of which formed a part of that preference remain unchanged. Its main studios are adequate for the presentation of its proposed programs and the additional facilities proposed which are not present in the Trebit and Butterfield proposals remain substantially unchanged.

28. Overall, the basis for our Decision of May 12, 1954 remains unchanged. We remain of the view that, insofar as the merits of the proposals of the three applicants are concerned, the public interest,

convenience and necessity would be best served by affirmation of the grant to WJR. This conclusion remains unaffected by the evidence adduced under issue (b) herein for the reasons stated in these conclusions.

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[16] These contentions have similarly been urged in the proceeding in Docket No. 11412. See footnote 1/ supra.

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29. Accordingly, IT IS ORDERED, This 9th day of July, 1958, that the grant of the application of WJR, The Goodwill Station, Inc., by our Decision of May 12, 1954 (released May 14, 1954), as modified by application File No. BMPCT-2689, IS AFFIRMED.

FEDERAL COMMUNICATION COMMISSION

/s/ Mary Jane Morris
Secretary

Released: July 11, 1958

[6410]

Rulings On The Exceptions to the Initial Decision [17]

The following exceptions are granted, as reflected in the decision, insofar as they are relevant, material, supported by the record, and non-argumentative:

Broadcast Bureau Nos. 1, 2, 3, 4, 5, 6, 7

Lake Huron Nos. 14, 18, 23, 25, 26, 33, 36, 42, 48, 53, 56, 60, 62, 63, & 64

WJR Nos. 2, 3, 12, 15, 21, 22, 23, 24, 25, 27, 28, & 29

Trebit Nos. 1, 3, 6, 11, 18, 21, 23, 43, & 44

Butterfield to Findings No. 5.

The following exceptions are denied as immaterial, except insofar as reflected in the decision:

Broadcast Bureau Nos. 8, 9, 10, 11, 12

Lake Huron Nos. 11, 12, 13, 15, 16, 27, 30, 32, 37, 38,
39, 40, 43, 44, 45, 66, 73, & 77

WJR Nos. 4, 5, 6, 7, 8, 9, 11, 14, 16, 17, 18, 19, & 26

Trebit Nos. 5, 7, 8, 9, 10, 14, 15, 16, 22, 24, 25, 27,
33, 34, 35, 36, 37, & 38

The following exceptions, except as reflected in the decision are denied as irrelevant to the Commission's decision:

Lake Huron Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 37, 50, 51, 52, & 55

WJR Nos. 1 & 13

The following exceptions, except as reflected in the decision, are denied as without adequate support in the record:

17/ The Commission notes that many of the exceptions in this proceeding do not comply with the requirements of Section 1.154 of the Commission's Rules. However, where possible, the Commission has ruled on so much of the exception as may be regarded as presenting a proper point for Commission consideration. Where applicable exceptions appear in more than one category of rulings.

Broadcast Bureau No. 13

Lake Huron Nos. 13, 46, 54, 57, 58, 59, 61, 69, 70,
71, 71, 75, 76, & 84

WJR Nos. 10 & 20

Trebit Nos. 17, 19, 20, 25, 26, 36, 40, 41, 42, 45, 46,
48, 49 & 50

Butterfield Exceptions to Conclusion Nos. 1, 2, 3, 4 & 5

The following exceptions are denied as argumentative, as speculative, for seeking conclusionary material in the findings of fact, or for lack of specificity, except as reflected in the decision:

Lake Huron Nos. 10, 20, 21, 22, 24, 28, 31, 74

Trebit No. 8

Butterfield Exceptions to Findings Nos. 1, 2, 3, 4

Except as reflected in the decision, the following exceptions are denied for reasons set forth in the text of the decision:

Lake Huron Nos. 17, 19, 34, 35, 47, 49, 65, 67, 68, 70,
78, 79, 80, 81, 82, & 83

Except as reflected in the decision, the following exceptions are denied as having requested the elimination of material relevant and material to the decision or as requesting the addition of material adequately reflected in the Initial Decision:

Lake Huron Nos. 29, 39, & 41.

[Received FCC August 20, 1958]

PETITION FOR RECONSIDERATION OF STAY DENIAL AND/OR ACCELERATED CONSIDERATION OF PETITION FOR REHEARING

Comes now W. S. Butterfield Theatres, Inc., hereinafter referred to as Butterfield, and represents to the Commission as follows:

1. On July 25, 1958, Butterfield and Trebit Corporation filed two documents in the above-entitled proceeding. The first was a "Petition for Rehearing" addressed to the Commission's Decision and Order of July 9, 1958 (released July 11); the second was a "Motion for Stay" addressed to said Decision and Order.

2. The Petition for Rehearing presented three questions of substance which the Commission was requested to consider and/or reexamine as follows:

> "Point 1. WJR abandoned its application which was heard comparatively with those of petitioners. Since it neither did nor can amend its application in the manner presumably intended here, it is in default. Failure to dismiss the WJR application as in default is gross error prejudicial to the rights of petitioners.
>
> "Point 2. The Commission's decision of July 9, 1958 fails to accord petitioners the comparative consideration which is mandatory under the Communications Act and the decisions construing that act.
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> "Point 3. The record in this proceeding must be reopened to consider post-hearing evidence which raises the question of whether or not WJR can or
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>
>
> will carry out the essential program plan which represents the cornerstone of the so-called WJR modification application."

3. Points 1 and 2 of said Petition for Rehearing relate to questions of law, presented by facts now of record in this proceeding;

Point 3 relates to new material, to wit: changes in the program service of WJRT which result from its inability to secure the network program service of Columbia Broadcasting System, Inc., and which will make necessary the reopening of the record and the taking of further evidence.

4. The Motion for Stay was predicated upon the reported, but then unconfirmed, failure of WJRT to secure the network program service of CBS, with resulting wholesale changes in its program service. Said motion requested "that the Commission's July 9 Order be stayed pending further hearing on newly discovered evidence that WJRT cannot and will not operate its proposed TV station in the manner proposed in the proceeding upon which the grant is based."

5. On August 1, 1958, and presumably without consideration of WJR's Opposition (filed on the same day) in which WJRT's inability to secure the network service of CBS was admitted, the Commission entered its order denying said Motion for Stay. The reasons given for such action were as follows:

> (1) "That the motion is based on the allegation that Trebit and Butterfield believe that the network programming of the Columbia Broadcasting System proposed by WJR will not be available to it, but that such allegation is based on industry rumors and the wording of a story in a Flint newspaper, and that no actual facts in support of the said allegation are presented;"
>
> (2) "That no allegation is made that WJR cannot or will not present its proposed local programming;"
>
> (3) "That no allegation is made nor any facts presented that the public interest will not be served or that petitioners will suffer any irreparable injury by the orderly consideration of the matters alleged in the said petition for rehearing in the normal course of Commission business."

6. On Monday, August 4, 1958, a leading trade magazine, Broadcasting, published a photograph of John Patt, president of WJR, and Oliver Treyz, president of ABC-TV, taken at, or subsequent to, the signing of a contract in which WJR, The Goodwill Station, Inc. agreed that Station WJRT would become a primary affiliate of American Broadcasting-United Paramount Theatres, Inc. and carry the television network service made available by said company. An article accompanying said photograph indicated that the network affiliation between WJRT and American was announced Thursday, July 31, 1958--one day earlier than the Commission's action denying Petitioner's Motion for Stay for the reasons described in Paragraph 5 hereof. The article accompanying said photograph further indicated that WJRT "is scheduled to go on the air about October 1." This material from Broadcasting is attached hereto as Exhibit A.

7. The Commission's said order of July 9, 1958 was adopted by a majority vote of the quorum required by section 4(h) of the Act, with only Chairman Doerfer and Commissioners Hyde, Bartley and Lee participating (the latter dissenting). Commissioners Craven, Ford and Cross have, at each stage in this proceeding which occurred during their respective tenures in office, abstained or disqualified themselves from participation. They, and each of them, will therefore be unable to participate in the disposition of the matters herein dealt with. (WIBC, Inc. v. FCC, U.S. Ct. of App. for D.C. Cir., Case Nos. 14,035 and 14,231, June 16, 1958.)

8. No meetings of the Commission are scheduled to be held during the month of August, 1958, and on September 12, 1958, Chairman Doerfer will absent himself from the United States on official business and will not return until an undetermined date subsequent to November 1, 1958. As a consequence, no legal quorum of qualified commissioners will be present and no official action can be taken in this proceeding during the period of Chairman Doerfer's absence.

9. It is manifestly clear that the Commission's action of August 1, 1958, denying said Motion for Stay was based upon a mistake of fact.

Both the admissions of WJR, and contemporaneous facts beyond WJR's admissions, now demonstrate that WJRT cannot and will not broadcast the programs of the CBS network, and that it must make extensive changes in its program schedule.

10. It is also clear, as charged in Point 3 of the Petition for Rehearing, that both the record showing concerning WJRT's program, and the Commission's findings upon that subject in its July 9 order no longer have any basis in fact. Points 1 and 2 aside, additional evidence must be taken in accordance with Point 3 before a valid grant can be made to WJR in this proceeding. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); W.S. Butterfield Theatres, Inc. v. FCC, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956); McClatchy Broadcasting Co. v. FCC, 99 U.S. App. D.C. 199, 239 F.2d 19 (1956), cert. denied 353 U.S. 918 (1957); Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (1949); Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (1949).

11. No action on the Petition for Rehearing filed July 25, 1958 has as yet been announced by the Commission and Butterfield has no information concerning the intended date of such action. Prompt disposition of the questions presented by said petition is necessary in the public interest and for the orderly disposition of this proceeding.

WHEREFORE, the premises considered, Butterfield respectfully prays:

1. That the Commission reconsider its denial of the Motion for Stay filed July 25, 1958, and enter its Order granting said motion;

2. That said stay be continued in effect until the entry of an Opinion and Order on the Petition for Rehearing filed July 25, 1958, or until the conclusion of any hearing held pursuant thereto, whichever is later; and

3. That said action be taken at the earliest practicable date, and, in any event, prior to the absence of Chairman Doerfer on September 12, 1958.

Respectfully submitted,

W. S. BUTTERFIELD THEATRES, INC.

By /s/ D. M. Patrick
/s/ Lester Cohen
/s/ Parker D. Hancock

Hogan & Hartson * * *
Its Attorneys

August 20, 1958

EXHIBIT A

Reproduction from August 4, 1958 issue

of Broadcasting Magazine:

PRIMARY AFFILIATION of WJRT (TV) Flint, Mich., with ABC-TV was announced last Thursday by John Patt, president of the station, and Oliver Treyz, president of ABC-TV. WJRT, on ch. 12, is scheduled to go on the air about Oct. 1. It is owned by Goodwill Stations Inc., owner of WJR Detroit (longtime CBS Radio affiliate). At contract signing in picture above are Messrs. Patt and Treyz (l to r seated) and (l to r standing) Worth Kramer, vice president of WJRT, and Ralph Hatcher and Bob Coe, of ABC-TV station relations.

Page 46 • *August 4, 1958*

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee dissenting; Commissioners Craven, Ford and Cross not participating.

1. The Commission has before it for consideration a petition for rehearing of its decision of July 9, 1958, filed by Lake Huron Broadcasting Corporation, intervenor in this proceeding, as well as pleadings filed in response thereto.

2. It is noted that Lake Huron has directed its petition not only to this proceeding but also to Docket No. 11412, a Sec. 309(c) protest proceeding arising out of the modification of the WJR construction permit. The text of the petition does not distinguish which allegations are directed to the Commission's decision in the instant proceeding, which to the decision in Docket No. 11412, or which to both.

3. The question of consolidating the two proceedings was determined by the Commission in its Memorandum Opinion and Order of January 23, 1957, wherein it expressly denied such a request by Lake Huron. The instant pleadings seek to explain such an apparent disregard of the Commission's order denying consolidation by stating that matters in the two decisions are interrelated, that the two decisions are to some extent cross-referenced, and, that its action in the instant petition was in the interest of brevity. It further points out that it filed 15 copies of its petition for utilization in this proceeding and an additional 15 copies for utilization in the protest proceeding.

4. The Commission normally would not be disposed to ignore allegations material to the disposition of its proceedings for purely technical errors in the mode of presentation. However, the instant

petition incorporates one of the very evils the Commission attempted to avoid when it denied Lake Huron's petition to consolidate on the ground that it would lead to confusion and misunderstanding "inimical to an orderly disposition of both cases." A careful perusal of the subject petition leaves the Commission in some doubt as to which decision or portion of decision the various arguments are addressed. Sec. 1.191(d) of the Commission's Rules, promulgated pursuant to that portion of Sec. 405 of the Communications Act of 1934, as amended, which provides that "Rehearings shall be governed by such general rules as the Commission may establish," states " . . . Each such petition [for rehearing] shall state with particularity in what respect the decision, order, or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any findings of fact must specify the pages of record relied on." Clearly, the Lake Huron petition, which does not even state with particularity to what decision its various parts are directed, fails to comply with the above rule.

5. Moreover, the subject petition raises no relevant arguments which have not been previously presented to the Commission, and alleges no new facts other than the establishment of auxiliary studios in Flint by two non-local television licensees, a consideration neither relevant nor material to the issues in this proceeding. These allegations furnish no valid reason for a waiver of the Commission's Rules in order to entertain the subject petition.

6. Accordingly, the Petition for Rehearing filed on August 11, 1958 by Lake Huron Broadcasting Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris
Secretary

Adopted: September 8, 1958
Released: September 10, 1958

[6443]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee dissenting; Commissioners Craven, Ford and Cross not participating.

1. The Commission has for consideration a petition for rehearing of its decision of July 9, 1958, filed jointly on July 25, 1958, by Trebit and Butterfield, together with pleadings filed in response thereto.

2. A summary of the proceeding to date is contained in paragraphs 1 through 10 of our decision of July 9, 1958, and will not be here repeated.

3. The subject petition rests on three principal contentions: (1) that the WJR modification actually represents an untimely filed amendment to the original application and should not have been treated as eligible for comparative consideration with the applications of Trebit and Butterfield; (2) that the decision of July 9, 1958 failed to accord petitioners' proper comparative consideration on the issue of WJR's character and good faith as evidenced by the timing of the filing of its modification application; and (3) that the record should be reopened for the taking of evidence as to whether WJR will be able to present the programming of the Columbia Broadcasting System as proposed in its modification application.

4. The first contention is bottomed on Sec. 1.106 of our Rules which provides that applications will not be designated for comparative hearing with previously filed applications unless tendered for filing the day preceding the day on which the previously filed application was designated for hearing, Sec. 1.140 which sets forth the procedure to be followed after an application is designated for hearing, and Sec. 1.311 which provides that applications may be amended, subsequent to their designation for

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hearing, only for good cause shown.[1] Petitioners' argument is that the WJR modification application was, in fact, no more than an amendment of its original application which, under the above-cited Rules, was untimely filed and ineligible for comparative consideration with the applications of Trebit and Butterfield.

5. The Commission first considered this argument in a Memorandum Opinion and Order of December 17, 1956, wherein it pointed out that the comparative hearing was originally resolved in favor of WJR by the decision of May 12, 1954, whereas the modification application was not filed until December 16, 1954. Thus, at the time WJR filed its modification application it was a permittee, not a mere applicant, and it would be improper to apply to it Rules which are directed only to the conduct of applicants.

6. The theory of petitioners' present argument is that WJR abandoned its original application prior to the Commission's decision of May 12, 1954; consequently, that WJR should have been required to amend its original application at the time it abandoned its proposals, at which time such amendment would have been untimely under the Rules. This theory, however, is premised on the contention that, prior to May 12, 1954, WJR determined that it would not carry out its original proposals. As set out in our decision of July 9, 1958, petitioners have failed to establish this as a fact, and the record supports our finding therein that, as of May 12, 1954, WJR intended to perform all material aspects of its original proposal.

7. Petitioners' second contention is that the decision of July 9, 1958 fails to accord them proper comparative consideration on the issue of WJR's character and good faith in light of the timing of the filing of its modification application. As we understand the argument, petitioners do not contend that the Commission failed to consider the timing of WJR's modification application, but complain that the Commission failed to weigh the matter comparatively.

8. Petitioners misconstrue both the scope of the Court's remand of May 24, 1956, and that portion of the Commission's decision bearing

upon the timing of WJR's modification application. As regards the Court's remand, we here note that the Court directed the Commission to "conduct further hearings on the question of differences between WJR's original and modified proposals and [to] reconsider its grant to WJR in the light of the difference thus disclosed." The Court also stated, "The significant changes in the WJR proposal, so far as now

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1/ The cited Rules have been amended subsequent to the filing of the WJR modification, but the nature of the amendments does not got to the thrust of petitioners' argument.

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material, related to transmitter site, programming and studio building." Thus, this portion of the Court's decision directed a revaluation of the merits of specific aspects of WJR's proposals and was susceptible to an objective comparative determination as to which of the proposals was best designed to serve the public interest. In addition, the Court in footnote 7 of its decision further stated: "We do not, however, express any opinion as to whether under Federal Communications Commission v. WOKO, Inc., 329 U.S. 223 (1946), WJR's late revelation of its changed situation reflects upon its character and fitness as a licensee. That is one of the questions to be dealt with by the Commission, upon a consideration of all the evidence in the reopened hearing we order herein." As pointed out by the Supreme Court in WOKO, supra, it is within the discretion of the Commission to determine how the alleged misrepresentation affects the applicant's qualifications to serve the public. Thus, the Court of Appeals directed the Commission to make a subjective determination of whether WJR's conduct so detracted from its character and fitness as to make it unworthy of the reliance which the Commission necessarily places on its licensees. Accordingly, the Commission in its decision of July 9, 1958, directed its conclusions respecting the implications of the filing of WJR's modification application principally to the effect such facts had on the Commission's determination as to the reliability of WJR's proposals. Moreover, as set forth in our decision of July 9, 1958, even if some demerit were to attach to WJR the effect thereof on that applicant's comparative reliability would not be such as to substantially diminish that reliability as established by WJR's excellent record of operation in the public interest.

9. Finally, petitioners contend that the record must be reopened for the taking of evidence relative to WJR's ability to present the CBS programming it proposed in its modified application. Petitioners' allegations relative to WJR's network programming are based on industry rumors and the wording of an advertisement in the trade press by a television licensee not a party to this proceeding. However, it is unnecessary for us to determine whether the nature of petitioners' allegations is sufficient to properly raise this question of fact, for WJR in its Opposition to Petition for Rehearing, filed August 1, 1958, concedes that a primary CBS affiliation is no longer available to it. The WJR Opposition also states that it will present the network programming of the American Broadcasting Co. in lieu thereof.

10. Two questions are raised by this change in network programming: whether the change is of such materiality as to require reopening of the record in order to secure evidence on which to base a revaluation of the applicants; and whether WJR violated any duty to bring the change to the attention of the Commission prior to the issuance of the decision of July 9, 1958.

11. In its original decision in this proceeding, the Commission accorded WJR a programming preference based on its local live programming and its proposals relative to remote programming. It refrained, as it has consistently refrained, from awarding any preference based on network proposals. (WSAV, Inc., 10 RR 402, KTBS, Inc., 10 RR 811, Television East Bay, 14 RR 1). This policy has been based on two observations made by the Commission in its long and intensive

experience with the broadcast industry. First, insofar as concerns the public interest aspects of their programming, there is little to distinquish between the three national television networks. Obviously, as must be in any endeavor so dependent on artistic considerations, differences can be discerned in the quality of individual programs or program series, but such differences lie largely in the taste of the individual viewer. Insofar as the Commission may properly concern itself, the quality of the programs offered by each is essentially equal. The second consideration is the great and constant change in the program fare offered by the networks. The reasons for such change are not here material, but it is sufficient to note that the programming offered by the networks and available to individual affiliates is in a continuous state of flux. The Commission is always aware that an applicant's network programming proposals, no matter how sincerely made, may be impossible of precise effectuation when the station actually commences operation. The change herein referred to is solely a change in program source and not in program types and classifications. Such a change, wholly in programming source, is one that must be expected in a protracted proceeding. For the foregoing reasons, the Commission has a policy, in the absence of unusual circumstances not here present or material, of declining to accord a comparative preference because applicants may have proposed different network affiliations.

12. As hereinbefore noted, the Court of Appeals in its remand of May 24, 1956, regarded the changes in WJR's programming as among the changes of sufficient significance to warrant the Commission's conducting further hearings. However, the situation at that time can be readily distinguished from the present situation. As noted by the Court, the original change in WJR's programming involved not only a mere substitution of networks, but a "sharp curtailment" of the previously proposed film programming. The Court viewed this as of particular significance because "unlike network programs, over which perhaps the licensee has relatively little control, films are the free and

independent selection of the licensee and are, therefore, as much a part of and a measure of his responsibility to the public and the Commission as are the live programs he produces."

13. Further, at the time of the remand, there was some question as to whether WJR contemplated material changes in its local programming proposals. Petitioners offer nothing to indicate that WJR cannot or will not now present the local programming which formed the basis of the programming preference given it by the Commission. There is nothing in the record or pleadings to indicate

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that WJR will not effectuate its local programming proposals, and the history of this proceeding indicates that that applicant has been diligent in its efforts to retain its original local programming proposals.

14. For similar reasons, the instant case can be distinguished from the Plains Radio Broadcasting Co. v. FCC, 175 F2 359, strongly relied on by petitioners. In that case the Court based its decision on the fact that there was no evidence as to the "type of programs . . . propose[d], absent the [originally specified] network affiliation." Here, there is no suggestion that there will be any change in WJR's local programming, and the Commission is advised that another network service will be substituted for that specified in the hearing. In view of the fact that the Commission is well aware that ABC furnished programs of the same type as those CBS programs which WJR had proposed to present, this is not a case where it would be necessary for the Commission to attempt to reach a decision in the absence of material facts respecting the proposal of one of the applicants.

15. There remains to be considered whether, as alleged by petitioners, WJR has been remiss in not bringing the matter of its change in network plans to the attention of the Commission prior to its decision of July 9, 1958. Petitioners assert "on information and belief" that WJR has for some time been aware that it could not obtain a

primary CBS affiliation. They do not, however, state the basis for this allegation other than industry rumors and inferences which might be drawn from advertisements of potential competitors of WJR published in the trade press. WJR, on the other hand, alleges that it did not become aware of the unavailability of a primary CBS affiliation until after the Commission released its decision of July 9, 1958. We do not believe that petitioners have advanced facts sufficient to warrant a reopening of the record, for their allegations amount to no more than mere suspicion without the benefit of any actual facts to lend substance to their charge.

16. If petitioners offered evidence of changes in the WJR proposal which affected the basis of the Commission's decision, we would be justified in reopening the record to examine such changes. However, the passage of time incident to the adjudication of a proceeding of this type creates a likelihood that changes will be required in some aspects of virtually all applications, and for the Commission to reopen a record to consider all such changes, regardless of their decisional significance, would completely defeat the Commission's basic function. There must be a point at which administrative decisions may be regarded as final in the absence of facts tending to alter the actual ground or reason for the decision.

17. On August 20, 1958, W. S. Butterfield Theatres, Inc. filed a petition requesting reconsideration of our Order of August 1, 1958, which denied a Motion to Stay our Decision of July 9, 1958, filed on July 25, 1958, jointly by Trebit and Butterfield; or, in the alternative, for accelerated consideration of the instant petition for rehearing.

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In view of our action herein, that portion of the petition requesting reconsideration of the order denying a stay must be denied.

18. Accordingly, IT IS ORDERED, That the joint petition for rehearing filed by Trebit and Butterfield on July 25, 1958, BE DENIED.

19. IT IS FURTHER ORDERED, That the petition for reconsideration of stay denial filed by Butterfield on August 20, 1958, BE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris
Secretary

Adopted: September 8, 1958
Released: September 10, 1958

[6699]

[Received FCC March 31, 1953]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

[6712]

TV ALLOCATION AND APPLICATION HISTORY

* * * *

[6714]

50. With respect to the Detroit Board of Education's proposal, the Commission held that the removal of Channel 12 from Flint was not warranted in order to provide a fourth VHF service to Detroit. (Paragraph 479 - Sixth Report)

51. The Commission also denied the request of the Bay City Board of Education to move Channel 12 from Flint to that city and concluded as follows:

> "We are of the view that the assignment of VHF Channel 12 to Bay City to be reserved for non-commercial educational use is not warranted since it can be accomplished only by deleting Channel 12, the only VHF assignment in Flint**." (Paragraph 492 - Sixth Report)

(For reference to above findings re allocation matters see Sixth Report and Order in the matter of amendment to Section 3.606 etc., Dockets

8736, 8975 et al, Paragraphs 471-498 inclusive.)

52. Butterfield did not participate in the rule making proceedings leading to the final allocation as set forth in the Sixth Report and Order. At the conclusion of these proceedings and with the lifting of the "freeze", Butterfield filed for one of the Flint UHF channels, was designated for a comparative hearing but later amended to Channel 12 and was consolidated into this hearing. Butterfield also filed application for a UHF assignment in Battle Creek, Michigan, but later amended its application to specify a Grand Rapids UHF channel. That application is still pending. (Sixth Report, Tr. 1961-1963, and Stipulation)

SITE CONSIDERATIONS

53. WJR - Waterford Hill. The site originally selected by WJR was located on Waterford Hill, 3 miles north of the Pontiac Municipal Airport. This site was surveyed in June 1952 and was acquired in July 1952. It is situated on a point 22 miles distant from the nearest edge of the city of Flint and 30.5 miles to the most distant point in the city of Flint. It is 21 miles to the nearest edge of the city of Detroit and 34 miles from the outside edge of that city. The Waterford Hill site is 110 feet higher than the elevation of Detroit and 110 feet lower than the elevation of the city of Flint.

54. According to the testimony of WJR's Chief Engineer who is its

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Vice President, and who selected the site, WJR's choice of the Waterford Hill site was predicated upon maximizing the population to be served. Other considerations which went into the selection of this site according to this witness were mileage separations of co-channel and adjacent channel stations, avoidance of any airway problem and selection of a high elevation. But no consideration was given to loss of service because of adjacent channel interference.

55. Section 3.685 (b) provides that "In general the transmitting

antenna of the station should be located at the most central point at the highest elevation available." On cross-examination the WJR witness admitted that the Waterford Hill site was centrally located with respect to Detroit and Flint but was not centrally located with respect to the city of Flint, the Flint metropolitan area or the Flint trade area. Under his interpretation of Rule 3.685 (b), he said he considered the element of central location as a "suggestion" or as advice to be employed in site selection, not as a requirement, and believed that the rule was met if a site was selected which was higher than any other locations even if the other locations were closer to the city so long as operation from the site provided at least a minimum signal over the city to be served. Moreover, he testified that his interpretation of the rule was a compromise as between desirable elevation and the objective of maximizing the population to be served. He agreed, however, since the Commission had adopted iso-service contours rather than population counts as a method of determining service, that any compromise of Rule 3.685 (b) which might be construed related to area rather than population. In considering high elevations for WJR's site it was admitted that there were other sites closer to Flint which were higher than Waterford Hill but that they were not chosen because of possible airways problems. It should be noted that Waterford Hill also presented a hazard to air navigation and never was approved by Airspace.

56. In its selection of an appropriate site WJR also alleges that it considered the possibility of service to Zone II, but rejected this factor on the ground that maximizing of population to be served was more important. In the Sixth Report the Commission has recognized the differences in concentration

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of population and larger cities in the United States, has established Zones I and II and has provided different operational criteria for these zones. Zone II is the area which is more sparsely settled and has a lower concentration of cities than does Zone I. Consequently the Commission's rules permit wider co-channel spacings for VHF allocations and antenna heights of 2,000 feet above average terrain in order to provide adequate TV service in the Zone II. The dividing line between Zones I and II traverses the State of Michigan at the 43.5 degree parallel or approximately 5 miles north of Saginaw. (Paragraphs 115-124, 142-165 - Sixth Report, Rules 3.610 - 3.614, Tr. 97, 98)

57. From either Waterford Hill or its new site WJR will not provide a Grade A signal to Zone II. (Tr. 47-78, 89 - WFDF Ex. 3 and 4S)

58. WJR elected to go forward with its engineering presentation based on the Waterford Hill site despite the fact it had knowledge that there was serious difficulty with Airspace because of opposition by the city of Pontiac. After the engineering testimony had been completed, WJR petitioned for leave to amend and to specify a new site in the vicinity of Butterfield's site. The Examiner heard oral argument on the petition for leave to amend and granted same on a finding that good cause had been shown. Trebit and Butterfield appealed to the Commission and requested reversal of the Examiner's decision. The Commission on January 29 denied the Trebit and Butterfield petitions for review and reversal of the Examiner's ruling and on March 9, 1953, issued its Memorandum Opinion and Order setting forth reasons therefor.[6/]

59. WJR's New Site. In its argument and pleadings requesting leave to amend to change site, WJR took the position that the new site did not change the theory of its case or materially affect its previous testimony as to site selection. Its objective to place an A signal over Detroit and to maximize the population to be served remains as part of its case. The new WJR site is located in Oakland County approximately 11 miles north of Pontiac and is some five (5) miles closer to Flint than its Waterford Hill site. It is 16.8 miles

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[6/] Trebit believes the decision permitting WJR to amend its site constitutes prejudicial error seriously affecting its right to a fair hearing and hereby reserves all of its rights on appeal. Accordingly, the various petitions filed by Trebit opposing WJR's amendment, the transcript of oral argument and the Examiner's and the Commission's Memorandum Opinions and Orders are incorporated herein by reference and are made a part hereof.

from the near edge and 24 miles from the far edge of the city of Flint. This site is 27 miles from the closest edge and 40 miles from the far side of Detroit. (Tr. 406, 407-418, 2016, 2017)

60. Butterfield's Site. Butterfield's proposed site, originally selected for UHF operation, is located in Oakland County in approximately the same area as the amended WJR site and has been approved by Airspace and the Commission. It is 15 miles from the closest edge and 22 miles from the far edge of the city of Flint. It is located 29 miles from the closest edge and 42 miles from the farthest side of Detroit. From its proposed site, Butterfield will cover both Detroit and Ann Arbor with a Grade A or better signal.

61. The Butterfield consulting engineer testified that he had recommended this site among several others within an area of one or two miles. He selected these sites as being the best "around that section". He indicated that there were other available sites closer to Flint which were satisfactory even though lower in height but that Butterfield was unable to purchase enough property at these points. In response to a question as to whether he thought the site selected was the best for service to Flint and its environs, Butterfield's engineer stated it was best for the whole general area and that Butterfield's was "a wide service proposal." Service to Zone II did not enter into the considerations of Butterfield's site selection - they "were not concerned with it". Aside from the mileage separation no consideration was given to possible adjacent channel interference with Toledo. Although Butterfield's operation from its proposed site will provide a Grade A signal over all of Detroit, the engineering witness stated that

this was an incidental factor; that his instructions from Butterfield's management were that they did not care about Detroit and, therefore, coverage of Detroit did not enter into the selection of the site. (Tr. 13, 14, 80-99)

62. When asked as to his interpretation of Section 3.685 (b)of the Rules, this witness stated that the elevation chosen for a site was more important than a "central" location and that the word "central" meant central as to the general coverage proposed. In his opinion a site such as proposed for Butterfield with maximum power and antenna power is "as centrally located as a minimum power" installation "located within one or two miles of Flint." This interpretation does not appear to square with his other testimony to the effect that he believed that in choosing a site the factor of distance from the city to be served must be taken into account as well as the factor of height. Nor does his theory appear to have been applied in the selection of the site for Butterfield's Grand Rapids proposal. (Tr. 339, 97)

63. Butterfield's President testified that prior to filing an application for Flint a study was made of Flint and its immediate environs. As a result the said area was determined to be that north of Pontiac and south of Saginaw. He then instructed Butterfield's consulting engineer to select the best location with the maximum height of antenna and maximum power to serve the area lying between Pontiac and Saginaw. On the basis of these instructions Butterfield chose a site which is 15 miles south of the closest edge of Flint and which covers all of Pontiac and Detroit with a Grade A or better signal but will not render a Grade A signal to Saginaw. He said that he had given similar instructions to his consulting engineer for the selection of the site for Butterfield's proposed installation at Grand Rapids. In the latter city, however, Butterfield is proposing a 472 foot tower at a site less than 5 miles from the center of Grand Rapids. It was stated that in the case of

Grand Rapids it was impossible to obtain a higher elevation because of an aviation problem with CAA. However, it was developed that the Commission has approved a 972 foot tower for the Versluis, Muskegon, Michigan station at a site which is as close to Grand Rapids as Butterfield's site is to Flint. The Butterfield 472 foot tower at Grand Rapids, a larger city than Flint, will adequately cover that city and its immediate environs according to this testimony. This witness stated that in the choice of Butterfield's Flint site no consideration was given to the fact that Ann Arbor will receive a Grade A service but that the company was pleased that the station would provide such service to Ann Arbor as well as to Detroit. He was not displeased at the idea of Grade A coverage to Detroit and indicated that it may be an advantage. (Tr. 197, 1942-44, 1958, 1959, 1967-69, 1979 and 1980)

64. Trebit's Site. Trebit's site was chosen through the joint efforts of its management, executive chief engineer and officials of WFBM-TV, as well as its consulting radio engineer and legal counsel. Considerations which went

into the selection of Trebit's site were those prescribed by the Commission's rules plus an intimate knowledge of the community, its trade area and sphere of influence, the parent company's experience in television operations, availability of network service and the advice of its consulting engineer as to adequacy of signal intensity to properly serve the market.

65. Preliminary investigations and surveys for Trebit's site were begun in 1951. At the outset consideration was given to locating the transmitter at the site of WFDF's AM transmitter which is approximately 5 miles southeast of the city of Flint. Adequate land is available to accommodate the TV antenna but because of engineering advice that new site south of Flint would have to sacrifice service to the Flint trade area, a site to the west of Flint was next considered but was

dropped because of airways problems. Also a site was surveyed at a location midway between Flint and Saginaw but that was discarded because of advice from Trebit's consulting engineer that it would not render sufficient signal strength to the city of Flint and the southern portion of Genesee County.

66. The site finally selected and proposed in this application is located at the approximate center of Genesee County and the Flint trading area and is but 4.4 miles north of the closest edge of Flint and 11.1 miles from the far edge of the city. This site was acquired in February of 1952 and has received approval from Airspace as not being a hazard to air navigation.

67. Trebit's general manager stated that his study of the Flint market prior to Trebit's purchase of WFDF, plus his operating experience in serving the Flint market and trade area since 1948, was one of the main factors that entered into the choice of Trebit's transmitter site. This view is further supported by Trebit's merchandising and promotion campaign over the years, which has uniformly been directed to areas to the northeast and west of Flint, including Saginaw and Bay City. Furthermore, it was his experience that even though WFDF serves areas to the south of Genesee County it had never been able to sell radio time in these areas and that in considering possible TV rates for this proposal he could not count on sales in this area for revenue because it was not in the Flint market. Similarly, in considering a site for television, Trebit's general

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manager took into consideration the possible availability of network service and it was his belief that it was necessary to locate to the north of Flint to avoid any conflict with existing network affiliates in the Detroit market. (Tr. 910-916, 927-932, 973, 1134-1145, 1235)

68. The testimony of Trebit's consulting engineer as to the interpretation of Section 3.685 (b) of the Commission's Rules is at odds with

other engineering testimony in this record. It was his opinion that "most central point" is the center or post office of the city to which the channel is assigned. He bases his opinion on the Commission's allocations and the fact that when mileage separations are measured between a given transmitter site and a city which has no pending application, the Commission's Rules require that the distance be computed to the coordinates of the city post office. Since it is obviously impossible to locate a station on top of the post office, some deviation in actually selecting a transmitter site is required. He was of the opinion, however, that the degree of departure from the rule would require specification of a site at the nearest high point of elevation from the center of the city rather than a high point at a location farther away. (Tr. 245-247)

69. At one stage of the proceedings (in considering the "other signals" exhibit - WFDF Ex. 3S) the Examiner asked that a study be undertaken by Trebit's consulting engineer of pending applications to determine the distance from the center of the city of the sites specified in said applications. Results of this study show that of 14 pending applications two of the Bay City applicants proposed sites located 7.5 and 8 miles from the center of that city, one applicant proposed 6.5 miles from the center of the city of Toledo and the remainder of the 14 were within 5 miles of the center of the respective city to be served. All computations were based on the geographical coordinates of the post office as being the center of the city. Trebit's consulting engineer also stated that in his experience in preparing television applications he had never considered a site farther away than 10 miles from the center of a community. (Tr. 134, 135, 197, 198, 324)

70. The efficacy of Trebit's transmitter site with respect to Flint's trade area and its environs is further supported by the testimony of several of

the witnesses for the business, trade and public service groups mentioned in paragraph 32 above. Although not qualified as engineering experts, these witnesses were familiar with the site locations and the predicted coverage contours of the respective proposals and were unanimous in their opinions that Trebit's site was the most efficiently located to give the best coverage to Flint's trade area and its environs. (Tr. 997, 1005-1007, 1012, 1014, 1048, 1049, 1066)[7/]

ENGINEERING FACTORS

Transmitter Facilities

71. Each of the applicants herein proposes operations with maximum facilities permitted by the Commission's Rules, 316 kw of effective radiation power from antenna heights approximately 1,000 feet above average terrain. Each will use a transmitter and antenna and associated equipment which is acceptable to the Commission, and the transmitters will be housed properly in buildings to be erected for that purpose. All of the applicants will meet the minimum requirements of the Commission's Rules and Regulations as regards the technical installation of transmitting facilities. (Tr. 39, 87, 109, 112, 329, 841, 1998 - WJR Exhibits 68 and 10, WFDF Exhibits 1, 7A, 7B, Butterfield Exhibits 1, 4 and 9)

Comparative Coverage - The City of Flint, its Metropolitan and Trade Areas

72. Trebit from a site located approximately 4.1 miles north of the city will render a signal intensity of 109 dbu to the closest edge and a signal of 99 dbu to the farthest edge of the city of Flint. Butterfield

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[7/] In this same connection, the Retail Merchants Division of the Flint Chamber of Commerce passed a resolution, dated February 5, 1953, commending WFDF for its program service to the community and stating that a transmitter site located to the north of Flint "would best serve the established trading area so vital to Flint merchants". This resolution (WFDF Ex. 7U-2) was presented through the Executive Secretary of the Flint Chamber of Commerce but was excluded from evidence because of objections of other counsel. This resolution along with a resolution from the Junior Chamber of Commerce (WFDF Ex. 7U-1) commending WFDF for its excellent programs, which was similarly excluded by the Examiner, were offered as formal expressions of the views of these organizations which had been properly adopted. Trebit believes the Examiner erred in his rulings on the admissability of these documents and noted an exception to same. (Tr. 989, 990, 995)

operating from a site 15 miles from the south edge of Flint will render an 88 dbu signal over the far edge of Flint. WJR at its new site located approximately 17 miles from the south edge of Flint will provide a signal intensity of 93 dbu at the edge of Flint closest to its transmitter and a signal of 86.5 dbu over the outer edge. (WFDF Ex. 1, WJR Ex. 68, Butterfield Ex. 1)

73. The Trebit proposal will provide a high order of field intensity over all of the Flint metropolitan area ranging from 105 dbu to 83 dbu, the lowest degree of signal strength. Trebit will place a signal ranging from 105 dbu to 73 dbu over all of the trade area. Butterfield and WJR will not deliver a Grade A signal to all of the Flint composite trade area. Trebit will provide city service (77 dbu) to Saginaw and Bay City, the latter lying within Zone II and will cover most of the "Thumb" area within its Grade A field intensity contour. WJR and Butterfield will not cover either Saginaw or Bay City with Grade A service. Moreover, their total Grade B coverage rendered to the "Thumb" area is just about equal to Trebit's Grade A coverage in this direction. Trebit's Grade B service will cover all but a very small portion of the "Thumb" area. (WFDF Exs. 1, Fig. 8, 4 and 4S)

74. A comparison of the respective signals to the Flint metropolitan area indicates the following:

With respect to Butterfield, Trebit will render a greater signal strength to 465 square miles or 71% of the area. With respect to WJR, Trebit will render a greater signal strength to approximately 495 square miles or 75% of the area.

75. A comparison of respective signals to the Flint composite

trade area indicates the following:

With respect to Butterfield, Trebit will render a greater signal strength to 1,540 square miles or 64% of the trade area. Trebit will provide a greater strength to approximately 1,650 square miles or 69% of the trade area than will WJR. (Tr. 178, 179, WFDF Exs. 5A and 5S)

76. The marked superiority of Trebit's proposal for service to Flint, its metropolitan and trade areas, was further demonstrated by a comparison of the iso-service contours of the three proposals. Studies were presented showing

the relationship between the proposed signal intensities, the percentage of receiving locations and the percentage of time the signals are receivable at the locations. Said studies were based on Figure 6, Appendix B of the Commission's Television Rules and Section V, A of Appendix B of the Commission's Third Notice. The trade area employed in these studies is the composite Flint trade area, WFDF Ex. 6. In determining the relative iso-service contours, operation with 316 kw from 1,000 feet above average terrain and uniform terrain was assumed for each of the applicants and the areas were determined in accordance with the Commission's Rules. These assumptions were employed to insure equal treatment to all of the proposals. Any deviations that might exist would be of a minor character and would not affect the results shown below by more than one-tenth of one per cent. (Tr. 158-168, 180-197, 236-245, Paragraph 85 Sixth Report)

The results of these studies are summarized below:

77. Summary for WJR

Metropolitan Area - In 6.5% of the metropolitan area, which includes none of the city of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 93.5% of the metropolitan area, 97.8% of the receiving locations get a minimum of

Grade A field intensity 90% of the time.

Composite Trade Area - In 9.8% of the trade area, which includes none of the City of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 90.2% of the trade area, 92.5% of the receiving locations get a minimum of Grade A field intensity 90% of the time.

78. Summary for Butterfield

Metropolitan Area - In 11% of the metropolitan area, which includes none of the city of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 89% of the metropolitan area, 98.2% of the receiving locations get a minimum of Grade A field intensity 90% of the time.

Composite Trade Area - In 12.5% of the trade area, which includes none of the city of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 87.5% of the trade area, 94.3% of the receiving locations get a minimum of Grade A field intensity 90% of the time.

79. Summary for WFDF

Metropolitan Area - In 53% of the metropolitan area, which includes all of the city of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 47% of the metropolitan area, 99% of the locations get a minimum of Grade A field intensity 90% of the time.

Composite Trade Area - In 16.6% of the trade area, which includes all of the city of Flint, 99% of the receiving locations get a minimum of Grade A signal 99% of the time. In the remaining 83.4% of the trade area, 97.4% of the receiving locations get a minimum of Grade A field intensity 90% of the time.

80. Comparative Summary. It is obvious that substantially more of the receiving locations in the composite trade area will receive Grade

A service 90% or more of the time if the Trebit application is granted than will be the case if either the Butterfield or WJR applications is granted. In more than half of the metropolitan area, 99% of the receiving locations will get Grade A or better service 99% or more of the time if the Trebit application is granted, as compared with comparable service to only 11% of the area if Butterfield is granted and only 6.5% of the area if WJR is granted. In addition, 99% or more of the receiving locations in the remaining half of the metropolitan area will get better than Grade A service more than 90% of the time if the Trebit application is granted. Of the utmost significance is the fact that 99% or more of the receiving locations in the city of Flint will receive better than a Grade A service 99% or more of the time if the Trebit proposal is granted. Neither of the other applications would provide service of comparable quality to the city of Flint.

Comparative Coverage - Areas and Populations

81. It was stipulated by the parties that the predicted Grade A and Grade B contours of the WJR, Butterfield and Trebit proposals, as shown in Butterfield Exhibit 1 and WJR Exhibit 68 (revised figures), as well as comparative figures as to areas and populations covered by the three proposals, are accurate within certain limits. In computing the areas, the method prescribed by Rule 3.684 (e) was followed. In computing the populations, the 1950 census data was used and the results include all cities regardless of size. The figures

do not take into consideration the adjacent channel interference encountered by the WJR and Butterfield proposals which will be discussed below.

82. Trebit takes the position that the population figures have no relevance in this proceeding since the Commission has adopted for television, iso-service contours rather than populations as the method of determining service. Moreover, there is no known method of

method of relating percentages of location served to population distributions. The WJR engineer agreed with the foregoing position. (Tr. 21, 54, 55, 72)

83. The areas receiving coverage from the three proposals are as follows:

	Grade A	Grade B
WJR	6320	10800
Butterfield	6514	11340
Trebit	6320	11640

(Tr. 20, WJR Ex. 68, Butterfield Ex. 1)

Adjacent Channel Interference

84. To show the adjacent interference problem with Toledo assignments on Channels 11 and 13, the ratio of zero db as prescribed by the Sixth Report was employed.[8/] The use of this ratio is supported by the Commission's Third Notice and the Ad Hoc Committee reports. Using this ratio, WJR and Butterfield, because their transmitter sites are closer to Toledo than is Trebit's, will lose a substantial portion of their Grade B coverage and some Grade A coverage from an operation on Channel 11 at Toledo. Trebit will lose some Grade B coverage from a Channel 11 operation in Toledo but none of its Grade A coverage. Except for a small fraction, the Grade B coverage lost by Trebit occurs in the city of Detroit and the Detroit metropolitan and trade areas.

85. Butterfield and WJR operating as proposed will cause the existing station on Channel 13 at Toledo to lose substantial areas within its Grade B coverage. The station on Channel 13 at Toledo will suffer no loss of its Grade

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8/ In discussing adjacent channel interference in Paragraph 157 of the Sixth Report, the Commission stated: "We believe the record supports a 0 db adjacent channel interference ratio."

A or B coverage because of the Trebit operation. WJR and Butterfield operating as proposed will cause an operation on Channel 11 at Toledo a loss of Grade A service and a substantial loss of Grade B service. An operation on Channel 11 at Toledo will suffer no loss of Grade A coverage because of Trebit's operation and will not lose as much of its Grade B coverage as will result from WJR's or Butterfield's operation.

86. The foregoing predictions with regard to the Toledo Channel 13 operation are based on the actual site, height and power of WSPD, Toledo. In the case of the Toledo Channel 11 application a site in the center of Toledo (the post office) and the maximum power and antenna height was assumed. This is a reasonable assumption since three of the pending applications for Toledo Channel 11 specify maximum power and antenna height. All but one of the Toledo applications specify sites in the same general area and of the respective sites none is more than 6 1/2 miles from the Toledo Post Office. Even using the actual sites proposed by the Toledo applicants, there would be no displacement of the contours as predicted in this showing. (Tr. 138-158, 197-199, 232-236, WFDF Exs. 4 and 4S)

87. WJR in similar showings based on the 0 db and -6 db adjacent channel interference ratios attempted to depict the interference situation between Trebit's proposal and an operation on Channel 13 at Cadillac, Michigan. One set of predictions is based on the use of a 1,000 foot tower height and 316 kw from a site located at the Cadillac Post Office and the other from a site 8 miles closer to Flint for a proposal based on 316 kw at an elevation of 1,400 feet. When offered at the hearing, Trebit objected to these predictions on the ground that they were based on a non-existent application and, therefore, were of no probative value. Since the record was closed, an application has been filed for a new station on Channel 13 at Cadillac, Michigan, specifying 302 kw from an antenna 1,439 feet above average terrain at the approximate location chosen for WJR's studios. Had the Cadillac application been pending at the time of hearing, Trebit would have included it in its study of adjacent channel interference. Moreover, we

recognize that there is little difference in the actual application and WJR's presentation and, therefore, would have no objection

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to the Cadillac application being considered in connection with adjacent channel interference. It should be borne in mind, however, that the overlap between Trebit's proposal and the Cadillac proposed operations will result only in a substitution of service, whereas the WJR and Butterfield adjacent channel situation will result in the loss of service to both Toledo operations on 11 and 13. In effect, the WJR or Butterfield adjacent channel problem with Toledo will bring about the substitution of their coverage for the coverage of the two Toledo stations in an area which looks to Toledo rather than Flint for television service.

Other Signals

88. There was also presented, for comparative purposes, a showing of other TV signals in the areas proposed to be served by the three applicants. The data employed was compiled from the Commission's files of existing stations, outstanding construction permits and pending applications on file as of February 13, 1953. Coverage for existing stations, construction permits and non-conflicting applications was computed from the actual site, height and power as specified in each case. In cities where there were two or more applications for one channel, a site was assumed at the coordinates of the city post office and the maximum power and height specified by the applicants. In the case of pending applications for construction permits to increase the power or height of an existing station, the values stated in the application for same were used. (Tr. 128-138)

89. A line drawn from east to west across the part of the State of Michigan shown in WFDF Exhibit 3S, the "Other Signals" exhibit, through the southern most point of the city of Flint indicates a plethora of Grade A coverage of the area to the south of Flint from other licensed stations, construction permits and pending applications, while in the

area to the north of this line there is a scarcity of Grade A signals.

90. Neither WJR nor Butterfield will provide Grade A coverage in Zone II. Approximately one-fifth of Trebit's Grade A signal will extend into Zone II. Only three other permittees or applications will provide a Grade A signal to Zone II in this area, two of these to a far less degree than will

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Trebit. This data validates the Commission's establishment of different operating criteria for Zones I and II and its prediction that there will be a scarcity of signals in Zone II and an abundance of signals in Zone I. (WFDF Exhibit 3S, WJR Exhibit 70)

White Areas

91. Operating as proposed the applicants will cover the following areas which will not receive coverage from any other station, or proposed operation:

	Grade A (Square Mile Coverage)	Grade B (Square Mile Coverage)
Trebit	1990	148
Butterfield	1380	62
WJR	1300	55

(Butterfield Exhibit 3S)

THE APPLICANTS

Trebit

92. The call letters WFDF represent the initials of Mr. Frank D. Fallain, the founder of the station and an employee of Trebit. The station has been in operation in Flint for more than 30 years, 20 of them under the call letters WFDF. Trebit purchased Station WFDF in 1948 and Mr. Lester W. Lindow has been its general manager since that time. Up until approximately one year ago, the stock of Trebit was owned half by WFBM, Inc. and one-half by Mr. Arthur M. Treanor of Saginaw, Michigan.[9] WFBM, Inc. now is the sole stockholder of Trebit.

It has given Mr. Lindow an option to purchase five per cent of its stock in Trebit. WFBM is the licensee of AM and television stations at Indianapolis, Indiana, and an AM station at Evansville, Indiana.

9/ Mr. Treanor sold his interest because of a desire to engage in a business other than radio broadcasting. He stated in the application for transfer of control that in disposing of his interests to WFBM, Inc., he did so with the knowledge that "I am assuring the people of Flint and the Flint area of a very superior type of management, one which will continue to serve the public interest of that community (Flint) in an able and consistent manner." (BTC-1245)

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PROPOSAL FOR TV

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Rates, Revenues and Promotion

167. WJR estimates revenues for the first year of operation at $800,000.00. The one-time hourly Class A rate proposed by WJR is $450.00. Mr. Kramer testified that this rate was decided upon after checking the current (not the starting) rates of other television stations. Also taken into consideration was the fact that WJR would have a large potential circulation which would include Detroit. Mr. Patt, in later testimony, stated that the $450.00 rate was primarily based on circulation in the Detroit area. He stated that WJR believed that Detroit would be a plus factor in national and regional sales. Under those circumstances he thought that WJR could get a higher rate than other television stations in Flint because of its Detroit coverage. Mr. Patt also testified that there is a possibility that WJR may have two rates. It was his opinion that his station would be able to get substantially higher national rates than any other TV station located in Flint. In response to a question from the Examiner as to his attitude, if a department store in Flint or a national advertiser such as ESSO wanted to purchase

time, Mr. Patt stated that it would be "first come, first served."

168. In computing its revenue for the first year on the basis of a $450.00 Class A one hour rate, WJR estimated it would sell 35% of its commercial time in the first six months and 80% in the second six months.

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Detroit advertisers were checked as to these rates and WJR indicated that it would sell time to Detroit advertisers. (Tr. 520, 522, 551, 573-579, 580, 597, 1892-1900)

169. WJR will advertise its programs in the Detroit newspapers and expects that its logs will be carried by Detroit newspapers. When asked what would be the position of WJR should its station carry the baseball games of the Detroit Tigers and whether that would be of sufficient interest in Detroit, Mr. Patt stated that in his opinion it would be of interest and that WJR would promote the games by paid advertising and by as much newspaper publicity as could be secured on the sports pages and elsewhere. WJR would not refuse to sell time to a Detroit advertiser if he desired to buy it and in estimating the revenue, the possible sale of time to Detroit advertisers was taken into consideration. (Tr. 572, 580, 1905-1908)

Operating Costs

170. WJR estimates its operating costs for the first year at $530,000.00. WJR arrived at this estimate through information contained in an article by Mr. J. Herold published by RCA and entitled "Pattern for TV Profit". According to Mr. Kramer the article shows certain classes of stations employing a certain amount of people with an estimated cost of certain amounts. Taking into consideration these various groups in the Herold article, WJR arrived at a rule of thumb for computing costs by allowing $10,000.00 per employee. WJR, therefore, estimated its first year of operation to cost $530,000.00 by the simple expedient of multiplying its staff of 53 by the figure shown in

the Herold article. Mr. Kramer also testified that in addition to the Herold article, he used the information which "all of us had gathered in our various visits to existing television operations." No attempt was made, however, to break down any of the other costs which are indispensable to any television operation such as film purchases, depreciation and talent and other incidentals. Moreover, Mr. Mitchell, WJR's proposed TV program director, had no notion of costs for film or personnel. Mr. Kramer finally conceded that if additional funds were needed they could be supplied by WJR.

171. On cross-examination, Mr. Kramer admitted that none of the stations contained in the article by Herold contemplated a situation such as found here wherein two studios are maintained 60 miles apart and remote equipment is employed to the extent proposed by WJR. Moreover, he admitted that there was no other operation discussed by the Herold article which would be comparable to WJR's. The dubious validity of this method of predicting costs is apparent when it is considered that none of the WJR witnesses had any idea of how many employees would be required to produce its programs.

Network

172. WJR which is now a CBS AM affiliate, specified CBS in its original application but in its amendment of November 17, changed to Dumont. According to Mr. Kramer, the change to Dumont was made upon WJR's consideration that by using Dumont network it would provide a new and unique service to the listeners of Detroit. Dumont programs are presently carried by the existing stations in Detroit, (WJBK and WXYZ), on a part-time basis. Mr. Kramer also testified that in his opinion Dumont's program service is inferior to Columbia Broadcasting System, NBC, or ABC. The reason he chose Dumont was one of primary availability since the other networks had affiliates in Detroit. In this respect he agreed that under Commission Rule 3.658(b),

he could not obtain any network but Dumont. Mr. Kramer further stated that if other networks were available he would attempt to get one of them in preference to Dumont. Later testimony by Mr. Patt, WJR's President, substantially confirms the latter part of Mr. Kramer's testimony. He testified that WJR specified Dumont program service because it is the only one not currently affiliated on a full-time basis in Detroit, and that WJR by carrying Dumont could offer something different. He also added that in the future WJR would consider the possibility of improving its service by finding a network which would offer more business or better programs and that if it was offered WJR would certainly take up the offer. He gave as his unqualified opinion, however, that a network affiliation with WJR was mutually exclusive with such an affiliation by any Detroit station. With respect to the fact that the WJR and Butterfield sites are located so as to cover the Detroit

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area with a Grade A signal, Mr. Patt seriously questioned whether many national advertisers would be interested in paying twice to reach substantially the same area. He conceived that a certain amount of duplication would not be objectionable but the overlap in question would be too great. He could not state definitely whether WJR will try to carry CBS later. (Tr. 429, 545, 547, 585-590, 1892-1908)

Programs

173. Mr. Patt, President of WJR, believes that the selection of WJR's site and the considerations of coverage to the maximum population, including Detroit, is most important. He considers the area from the Detroit River to Saginaw Bay to be the same in its interests and proposes to program WJR for TV so as to appeal to this wide area. However, according to representations made by all of the WJR witnesses, any programming to Detroit would be purely incidental. When asked a question as to whether a situation might arise which would require a

decision as to whether the Detroit Tigers' baseball team or the local Flint baseball team would be carried on its television station, WJR's President (unaware that Flint has no team) testified that the choice of programs should be based on the desire of the majority of viewers. However, he insists that the Flint people would be carefully considered as to their wishes. In other matters besides baseball games, Mr. Patt also stated that he would decide the question of Flint versus Detroit programming on the basis of the number of people in the audience who would be interested in the program but that consideration would be given to the wishes of the people in the Flint area.

174. In the field of public service programming, WJR's public service director, as noted above, has conceived certain programs to be applicable to the general area. He believes that the Mott Foundation programs would be of interest to Detroit but it is shown elsewhere that these programs have been aired on AM only one time and that was in October, 1952, during the instant proceedings.[13/] He conceives the public service and educational

programs proposed would be of general interest to the area covered by WJR's proposal but that few of them will be "beamed" specifically toward Detroit or Flint. The program "Crossroads-Michigan" is cited as typical of this philosophy. It will feature the University of Detroit, Wayne University, Michigan State, etc. and Flint Junior College and purports to be of general interest to the area to be covered by WJR and about the only exception to this will be where it might be "beamed" to Flint when it is put on by the Flint Junior College. But he considers it would have a "lesser draw" than would the University of Detroit, Wayne

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[13/] Despite the fact that the Mott Foundation program was considered by WJR to be of interest to its AM listeners in Detroit and the area, no request has been made by WJR to repeat it in the future. (Tr. 1245-1275, WJR depositions)

University, Michigan State, etc. Another program prepared by the public service director and proposed by WJR is entitled "Let's Look Around". This program was obviously made up for Detroit interests but was asserted to be of local interest in Flint. This program states that it will be remotely filmed and designed to highlight unusual occupations and experiences within the "local" viewing area. It purportedly will feature tillermen of the "local" fire department, the subterranean activities in the local salt mines and the activities of a professional coffee taster and incidents in the life of a typical customs or immigration inspector. It is quite apparent that Mr. McIntyre, WJR's public service director, who is responsible for the public service portion of program presentation, knows little or nothing of local conditions in Flint. He admitted on cross-examination that he had made no check to determine whether or not any of these events or places were in Flint, and in fact as to tillermen, there are tillermen in Detroit but there are none in Flint. There are salt mines under Detroit but none in Flint. There are immigration and customs inspectors in Detroit but none in Flint. He also did not know whether there were any professional coffee tasters in Flint.

175. WJR also proposes to do several farm programs but apparently none of them will originate in Flint. The farm news which will be carried every day from 12:15 to 12:30 will be filmed in the Detroit Live Stock Yards. Also the weather program will be filmed there. According to WJR's farm director, these programs would be filmed in the morning at Detroit and transported by automobile or mobile film laboratory (which has not been provided

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in WJR's plans) and taken past the Detroit studios and past the Flint transmitter (both of which will have film projectors) into Flint studios to be telecast. (Tr. 405, 434-439, 621-625, 651-666, 669, 671, 749, 750, 759, and WJR Ex. 56)

CONCLUSIONS OF LAW

205. Each of the applicants is legally and financially qualified and otherwise meets the minimum qualifications to construct and operate the proposed television stations.

206. In the situation before us, we have mutually exclusive applications each requesting Channel 12 which the Commission has assigned to Flint, Michigan. WJR, The Goodwill Station, Inc., which operates an AM station in Detroit, Michigan, and The W.S. Butterfield Theatres, Inc., which has extensive theatre holdings throughout the service area of its proposed station, each advances a proposal predicated upon television coverage to the area lying between Detroit and Flint and which includes the City of Detroit. Trebit, the other applicant, proposes an operation which would not cover Detroit and which is directed primarily to Flint and the area to the north of that city.

207. This record establishes conclusively that the Flint area is substantially independent economically, politically, socially and culturally. The uncontroverted testimony of public witnesses who are qualified to define the interests of the Flint community and its environs as well as all available U.S. Census statistics support this view. Moreover, the preponderance of the evidence clearly indicates that the community of Flint is isolated from Detroit and the areas to the south of Flint and that the trading area of Flint and its sphere of interest lies to the north, northeast, east and west of Flint and its standard metropolitan area.

208. We believe the Commission in its Sixth Report and Order has recognized these facts by the allocation of television channel 12 specifically to Flint and through its reluctance to disturb the Flint allocation despite the efforts of interests in Detroit and other Michigan cities to remove channel 12.

209. It is in the light of the foregoing considerations that Trebit has chosen a site for its transmitter which would provide the most

efficient use of the facilities so allocated by the Commission to Flint. Trebit has chosen the site of its station with deliberate care and after weighing all

of the factors which would permit the maximum utilization of the facilities for the benefit of the Flint community. Furthermore, its proposed programs are specifically directed to the community of Flint and its environs so as to be of the greatest benefit to the Flint educational, religious and public service organizations and their counter-parts throughout the area which has heretofore been described as being within the sphere of interest to Flint.

210. The Trebit proposal will provide coverage and higher signal intensities to the City of Flint, its metropolitan and trade areas than will the operations proposed by WJR and Butterfield. Similarly, Trebit will provide a superior service to receiving locations in the Flint metropolitan and trade areas, a greater percentage of time than will either the Butterfield or WJR proposals. Neither of the other applicants would provide service to the city of Flint comparable to the quality which will be rendered by Trebit. Trebit will also give a greater signal to under-served areas in Zone II and will encompass more "white areas" than will the other proposals. The placement of Trebit's transmitter site to the north of Flint will result in less duplication of service and less loss of coverage because of adjacent channel interference than will the other applicants. In short, under any concept of the Commission's Rules and Regulations, the Communications Act or the Commission's Sixth Report, Trebit's operation will provide the most efficient utilization of Channel 12.

211. Although there has been much shadow boxing through the course of this hearing as to WJR's motives in requesting Channel 12, it became clear through the testimony of Mr. John F. Patt at the conclusion of the proceedings that WJR seeks the use of Channel 12 for

service to the Detroit area and is directly attempting to circumvent the allocations provided by the Sixth Report. WJR after making a bad guess as to the potentiality of television at a time it could have acquired a station at Detroit for the asking has literally moved heaven and earth in the allocation proceedings preceding the Sixth Report to obtain a television allocation for

Detroit and having failed now seeks to employ Channel 12 for that purpose. WJR's record in the various allocation proceedings, as well as its present effort seeking to utilize Channel 12 in Detroit, makes this apparent. It is not reasonable to assume that WJR has any valid interest in providing service to Flint in light of the fact that it has never done so in AM during the whole time it has operated WJR which provides an excellent signal to the Flint area.

212. WJR's selection of a transmitter site so as to "maximize" service in an area which is already adequately served by television to the exclusion of areas to the north of Flint which are under-served, perverts the Commission's allocation plan. From its selected site, WJR would render a signal of far less intensity than that of Trebit's to Flint and its environs; would suffer adjacent channel interference and deprive the Toledo stations of service because of adjacent channel interference. In all respects WJR's technical proposal is inferior to Trebit's.

212A. Although Butterfield has disavowed its coverage of Detroit in this proposal, but

Butterfield's site is located in the same general area as WJR's proposed site only a few miles closer to the city of Flint. The Butterfield coverage is subject to the same infirmities as WJR's in that it will provide coverage in an area which is already adequately served by television, will give and receive adjacent channel interference with Toledo and fails to provide a signal to areas which need television service. There appears to be some conflict of evidence regarding the selection of Butterfield's site. Mr. Gowthorpe, Butterfield's President, testified that a study had been made of Flint and its immediate environs and that the area was determined to be that north of Flint and south of Saginaw. After giving instructions to his consulting engineer to select the best location to serve that area, Butterfield has chosen, in our opinion, a decidedly inferior location to accomplish

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its purported objective of serving Flint and its environs. It would also appear, despite assertions to the contrary, that Butterfield, in the case of its proposal for Grand Rapids, departs from the philosophy allegedly followed in the selection of its transmitter site for Flint. In Grand Rapids, which is a larger market than Flint, Butterfield proposes to locate its operation at a site only five miles from the center of the city and states that this site is adequate to cover Grand Rapids and its environs. Mr. Gowthorpe's definition of Flint and its immediate environs is also contrary to the beliefs expressed by his television consultant who has designed Butterfield's programs to appeal to a definite area. In any case, regardless of motives, the choice by Butterfield of its proposed transmitter site will provide a less efficient service to the city of Flint, its metropolitan and trade areas and sphere of influence than will Trebit.

213. Quite apart from considerations of the comparative merits of the Trebit, WJR and Butterfield technical proposals, we believe there is a serious question presented as to whether the proposals advance by Butterfield and WJR are in keeping with the spirit and intent of the Commission's nation-wide plan of allocation for television. We do not argue that Butterfield and WJR failed to meet the minimum requirements of the Commission's Rules with respect to the placement of an adequate signal over the principal city to be served (Flint) but we do believe that if the technical proposals of the nature presented herein

by these applicants are condoned by the Commission it will wreak havoc with the allocation plan. To say the least, it would bring about a distortion of the theory of a nation-wide television service contemplated by the Commission's Sixth Report and would permit, without rule making, the employment of television facilities for the benefit of the private interests of licensees rather than the accomplishment of the Commission's objectives.

214. We believe this record establishes the superiority of Trebit's technical proposal and its proposed coverage. Moreover, we believe that this factor, standing alone, is sufficient to prefer the grant of Trebit's application and the denial of the applications of WJR and Butterfield. However, even if the marked differences in coverage were not present, we believe that the superiority of Trebit on other comparative factors would compel a grant of its application.

215. Trebit has an outstanding record of broadcast and non-broadcast activities in the operation of its station in Flint. It is clear from the record that Trebit has discharged its responsibility to the community it serves in a convincing manner. In the efforts it has directed toward preparation of itself and the community for television it has far exceeded the efforts of Butterfield and WJR. Through its closed circuit activities and the expert assistance of its parent organization, it has been working with local groups for months in the actual preparation of programs to be used for television. This is a cooperative venture and is an experiment in public relations of great benefit to the residents of Flint and the surrounding area who eagerly seek a television facility for that community. The public witnesses who testified in the hearing were most emphatic in their testimony concerning Trebit's past service to the community and its endeavors in preparation for television. These witnesses also verified the fact that Trebit's program proposals are calculated to meet the program needs of every

facet of local Flint needs and desires. In contrast, WJR and Butterfield, although they claim they will be of service to Flint groups, as well as to others within the area they propose to serve, have done little or nothing to ascertain the needs of their potential audience, either in Flint or elsewhere.

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216. Trebit will also provide better and more convenient studio facilities and a trained staff for its television operation. Butterfield, whose proposal was prepared by a television consultant, does not have any experience in television and believes it can hire people with experience. The record is silent as to the specific location of Butterfield's studios or other particulars as to its convenience to the Flint public. The management and key personnel of WJR have had no experience in television and its studio location has not been decided upon so that a comparison cannot be made here either.

217. Trebit proposes a well-rounded program service consisting of balanced local, film and network fare. It proposes a primary NBC affiliation which it has every reason to believe is available. In discussions with NBC officials, consideration was given by these network officials to Trebit's proposed coverage and the proposed coverage of NBC's Detroit affiliate and on the basis of these discussions Trebit has been assured of an NBC affiliation. Trebit's local programs are those which it has already worked out with Flint organizations and in many instances have been the subject of actual closed circuit telecasts.

218. WJR admits that its proposed coverage necessitates an affiliation with the Dumont network which it considers inferior to the other networks. Despite the fact it will cover Detroit with a Grade A or better signal and will maintain studios in Detroit as well as Flint, it goes to great lengths to resist any suggestion that it will program for Detroit. WJR assertedly is of the opinion that it has no responsibility to the large audience it will serve in Detroit. This is in

contradiction of its theory of "maximizing" the population to be served in the location of its transmitter. It has done little or nothing in the way of ascertaining the real needs of local groups in the Flint community. Its idea of determining local needs was to send a task force to Detroit for a few days to contact local people and to show them the programs which WJR's management had devised for their benefit. WJR has served the community and

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Flint for many years but except for one occasion has never carried any local Flint programs. It has made no offers to Flint organizations to carry any AM programs in the future. It is not reasonable to believe that WJR in television will have any better concept of public service to the Flint area than it has in its AM operations. We do not believe that WJR's proposal for local Flint programming can be compared with Trebit's and we further submit that Trebit proposes a far more realistic and superior program service to Flint.

219. Butterfield proposes an NBC affiliation and has advanced no other plan for network or independent operation. Butterfield's conversations with NBC officials regarding network service did not take into consideration either WWJ-TV's present or proposed operation, or the problems which would be encountered if NBC were to comply with its request for an affiliation. Butterfield will include Detroit in its Grade A coverage and will bring about a substantial overlap in service area with WWJ-TV and it is unreasonable to expect that NBC will actually affiliate with Butterfield. There is a sharp conflict in the testimony in this record as between WJR and Trebit and Butterfield on the question of whether a network affiliation can be obtained by Butterfield in light of the overlap situation. Mr. Patt and Mr. Lindow, both of whom have had extensive experience in managing operating broadcast stations and in negotiating network affiliations, take the view that Butterfield cannot secure an NBC affiliation. We are inclined to agree with Mr. Lindow

and Mr. Patt rather than with Mr. Kersta. Inasmuch as Butterfield has offered no alternative proposal in these proceedings, its program proposals cannot be considered on a comparative basis with either Trebit or WJR.

220. Even assuming arguendo that Butterfield could obtain an NBC affiliation, it is patent on this record that its proposed programs are the product of someone's imagination and have no relationship to the wishes of the local Flint public. All of Butterfield's programs were conceived in advance of contact with any one in Flint and there is no evidence in this record that they would serve the needs and desires of Flint and its environs.

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Moreover, the entire Butterfield proposal is rife with error as to costs, revenues, rates, staff requirements, etc. We think that Butterfield's efforts are directed to obtaining a television station solely as a measure to protect its theatre interests and the ill-conceived proposals advanced in this proceeding have little or no probative value in determining the actual qualifications of Butterfield to operate a television station. These proposal are the handiwork of a professional consultant who has been to Flint only twice in his life and on the basis of planning, preparation and presentation of its case, Butterfield's program plans and the other particulars contained in its proposal are inferior to those of Trebit. Accordingly, we believe that the Butterfield application must be denied.

221. The community of Flint has one daily and Sunday newspaper in which there is some community of interest on the part of a local Flint AM station. Flint also has several other weekly and semi-weekly publications. There are five AM stations in Flint including WFDF. WJR, one of the applicants herein, serves the community and has a better audience rating during certain periods than does any other Flint station. Flint also has two FM stations and construction permits have been

granted by this Commission to two applicants, one of whom is the operator of a Flint AM station. Of the motion picture theatres in Flint, seven are owned by Butterfield, one of the parties to this proceeding. In this situation where we have two AM stations which serve the market and a theatre group which owns numerous stations in Flint and throughout its proposed service area we see no reason to consider the question of concentration of media of mass communications.

222. Insofar as Trebit is concerned we believe the record shows affirmatively that the issue represented by Commission Rule 3.636(b) has been met and that the ownership by Trebit's parent organization of stations at Flint and Grand Rapids would not result in the concentration of control of television facilities in a manner inconsistent with the public interest.

223. There is also no factor present in this case involving the comparative merits of the applicants on the question of local ownership. Each of the applicants is owned by interests outside of Flint. We do think

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however, on the point of integration of ownership and management of the proposed facilities Trebit is to be preferred. The principal stockholders and officers of WFBM, Inc., Trebit's parent organization, will exercise a greater measure of participation in the activities of Trebit's day-to-day operations in television and, therefore, Trebit's management which also has had greater experience in television can be relied upon by the Commission to carry out its proposal to a greater degree than WJR or Butterfield.

224. Because of the superiority of its showing in the matters cited above, the application of Trebit must be granted and the applications of WJR and Butterfield must be denied.

Respectuflly submitted,
TREBIT CORPORATION

By Dempsey and Koplovits
Its Attorneys

By /s/ William J. Dempsey
/s/ Harry J. Ockershausen

[Certificate of Service]

[Received FCC June 15, 1954]

PETITION FOR REHEARING AND OTHER RELIEF

* * * *

III

The Commission's Decision is Replete With Error and its Decisive Findings and Conclusions are Arbitrary and Capricious.

It is our position that the Examiner's Initial Decision favoring the application of Trebit is founded upon substantial evidence based on the record as a whole and that the Commission's final decision is not based on substantial evidence but is a distorted and twisted version of the record facts to fit the ultimate conclusion reached. We illustrate below certain findings and conclusions made by the Commission in its final decision which are not supported by the evidence.

A. The Commission Erred in Awarding a Preference to WJR Based Upon Program Considerations.

The Commission's Final Decision giving a preference to WJR on the basis of superior programming is arbitrary and capricious and not founded upon facts of record. Questions of programming are interlocking with such facets as WJR's site selection, network affiliation, auxiliary and main studios, remote operations, and in fact the motives underlying its entire proposal. Accordingly, we must take into consideration the Commission's findings with respect to WJR at paragraphs 19, 22, 50, 79, 81, 82, 85, 87, 88 and the Commission's conclusions at paragraphs 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 31, 32, 34 and 35.

In order to get the true flavor of what is involved one must take into consideration WJR's past history of interests in television which have been directed solely toward obtaining a facility in Detroit. Also, we must consider the history of this application, WJR's own admissions as a part of this record, and the testimony of its witnesses which has been evasive throughout the proceedings as to WJR's real motives. It would be impossible here to detail all the various WJR machinations which are a part of this record, but the

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following points are illustrative of WJR's inconsistencies and maneuverings: (See our Proposed Findings unless otherwise indicated by record citation)

Site Selection

In its original application dated July 3, 1952, WJR proposed a site approximately three miles north of the City of Pontiac, Michigan, and some 22 miles from the nearest boundary of the city limits of Flint. Operating from a 1000 foot antenna at this location (Waterford Hill), which is only 21 miles from the nearest edge of the City of Detroit and at an elevation 110 feet higher with respect to Detroit than with respect to the City of Flint, would have rendered a better service to Detroit than to Flint. This hearing was commenced on November 17, 1952 and WJR insisted upon going ahead with testimony, despite the objections of Trebit and Butterfield, with the full knowledge that it was having difficulties with CAA because of its Waterford Hill site. It clung to this site in an effort to overcome CAA difficulties until January of 1953 when it finally amended to its present site which is some five miles closer to Flint.

The following testimony of Mr. John Patt, President of WJR, is illuminating as to WJR's motives (Tr. 407):

> "Q Who made the determination as to the selection of that original site?

"A Mr. Leydorf recommended it, that we purchase the site, after giving study, as he told me and other members of the board, to various factors which involved availability of utilities, high ground, being away from air hazards, if possible, nearness to highways, communications. Did I mention availability of utilities? And maximizing of population to be served in the area.

"Q Then do I understand as far as you were concerned the selection of the site here was based in part at least upon considerations of service to the city of Detroit?

"A Yes, that was a factor to the extent that the population of Detroit added up to a greater total of people to be served."

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In its arguments and pleadings requesting leave to amend to change site, WJR took the position that the new site did not change the theory of its case. (See transcript of argument on motion for leave to amend - page 8.)

Network Affiliation

In its original application filed in July, 1952, WJR proposed to carry the network programs of the Columbia Broadcasting System. At that time it proposed 44.9% of network programs. In an amendment filed with the Commission on October 24, 1952 it changed its program proposal to specify DuMont programs. This amended proposal, which is the subject of this hearing, calls for 27.3% of network programming. WJR and the Commission believe that WJR should be preferred because it would offer a "distinctive and unique" network service to Flint and the entire area it will serve. It is obvious from the record that WJR's position follows considerations involving Detroit rather than Flint. Because WJR's signal would provide a "Grade A" service to the entire City of Detroit, it admits that it could not propose any network which already is affiliated with a Detroit station. This explodes any pretension that the specification of DuMont programs was because of a desire

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to furnish a new and distinct program service to the area. The testimony of Mr. Kramer at pages 545-47, 585-87 and 591-95 of the record clearly demonstrates WJR's position on this point. The simple fact which can be gained from reading Mr. Kramer's testimony is that in selecting its network WJR gave no consideration whatsoever to the City of Flint or its needs or desires and that WJR's choice of DuMont was solely motivated by considerations of service to Detroit. Mr. Kramer after being evasive on the point was finally pinned down to an admission that if possible WJR would have selected any of the other networks in preference to DuMont and that in his opinion DuMont was

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fourth best as to networks. (Tr. 593-96) This is the basic consideration governing WJR's choice of network programs for Flint, Michigan; the Commission completely overlooks it in its decision. Moreover, it should be borne in mind that the Examiner had the opportunity to observe Mr. Kramer's demeanor and hear his testimony. The Examiner also asked his own questions on this subject and formed his own opinion which was the basis of his findings and conclusions in the Initial Decision. Another typical instance of evasiveness on the part of Mr. Kramer as well as Mr. Patt on the question of network proposals is found in their refusal to commit WJR on the question of whether or not an attempt would be made sometime in the future to affiliate with CBS. (Tr. 431, 607) In this connection it should be noted that WJR is one of the foremost CBS affiliates. The record indicates that it is because of the selection of the DuMont network which WJR considers a poor choice for any area but a necessary one for Detroit that it proposes such a large percentage of live programs in its application. This high percentage of local live programs is considered by the Commission to be persuasive in its preference for WJR. The Commission bases this preference on a quantitative evaluation without any attempt to show there is any basis for preference on quality. There is no justification for a holding in vacuo that a local live program is better than a network or a recorded program in any case. When, as is true here, the record proves the inferiority of WJR's programs, the Commission's error is compounded.

Trebit proposes 49.3% of the network programs of NBC and selected its network not because of any considerations involving Detroit but solely with the view of serving Flint. It is penalized by the Commission's decision when in light of all the facts of record regarding WJR's network proposal it is clear that WJR was forced to specify more live programs because of the inadequate number of hours

of network service which would be furnished by DuMont. When we add to this the fact that WJR has not committed itself on this record not to change to CBS or some other Detroit network if it is able to do so, no reliance can be placed upon WJR's program proposals.

Remote Programming

WJR in its original application specified a "Flint" studio. (Tr. 541) On November 17, 1952 the WJR application was amended to show an auxiliary studio at the Fisher Building (its AM studio) in Detroit. The specific address of the "Flint" studio was dropped and the amended application indicated that Flint studios were "to be determined". (Tr. 542) The specific address was dropped when WJR learned belatedly that the address specified was outside the City of Flint. It appears from the testimony of Mr. Kramer that the decision to specify auxiliary studios in Detroit came about at a meeting which took place in the latter part of October, 1952. (Tr. 542) His later testimony on cross-examination indicated a conflict when he testified that it had been WJR's purpose and intention all along to specify an auxiliary studio in Detroit. (Tr. 545) This is another instance in which the Examiner saw and heard conflicting testimony by WJR's principals. The record indicates that at its auxiliary Detroit studios WJR will have the same amount and kind of equipment that it proposes for its studios at Flint. (WJR Exs. 21, 21-A) The only difference between the Flint and Detroit studios is that there will be more studio space and studio non-technical equipment in Flint than in Detroit. (Tr. 483) Except for the difference in studio space, WJR can produce any kind of a program in its auxiliary studios in Detroit that it can in its proposed main regular studios in Flint. (Tr. 485) WJR in the exhibits it originally exchanged in this proceeding proposed the identical equipment for its Detroit and Flint studios, item for item. (WJR Ex. 21) During the progress of the

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hearing while the WJR Vice President in Charge of Engineering was testifying as to studio equipment, he indicated that a "debate" was then going on within the WJR management as to the equipment to be specified for the Detroit studios. After cross-examination of WJR's engineer, WJR decided to change its equipment proposals to specify remote equipment for Detroit. (Tr. 451-88, WJR Exs. 21 and 21-A)

The Commission accords WJR another preference because of its "remote" programming. In this sense, the Commission has in mind the Detroit programs which WJR proposes to do from its Fisher Building studios. In using this as a point of preference, the Commission goes beyond the proposed findings, the exceptions and the oral argument of WJR. This point of preference was never urged by WJR and to use it as the Commission does to deny Trebit is arbitrary and capricious and a denial to Trebit of a full and fair hearing. The simple facts of record are that WJR, during the hearing stage as we have indicated above, was in a dilemma as to whether it should come out in the open and propose to do programs from Detroit for its Detroit audience or whether it should deny any connection with Detroit. It is difficult to determine from the Commission's decision where any applicant might be left in a hearing involving possible service to another community. All comparable Commission precedents hold that the very fact that an applicant proposes to divide broadcast time with another city, which is already oversupplied with facilities, as is the case in Detroit, makes its proposal less worthy. In order to lend substance to WJR's proposal, the Commission proceeds to attach great weight to the program originations by WJR from Detroit - this despite the fact that WJR throughout this proceeding has ducked and avoided the very mention of Detroit and has gone so far as to be ludicrous. The following examples of the testimony of WJR's witnesses are typical of the record facts in this case and of the evasiveness of WJR's witnesses on this

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point. First, we have the testimony of Mr. Patt, WJR's President, in which he disclaims as a matter of policy any intention on the part of WJR to program from Detroit. When asked about the applicant's intention with respect to the proposal to program from Detroit, Mr. Patt responded (Tr. 411), "Well, I know we have discussed what programs might be carried from Detroit, and the only one that I can recall is 'In our opinion'". Mr. Kramer, who followed Mr. Patt, indicated that the studios in Detroit would be used for the purpose of picking up programs or portions of programs "featuring some personality of great interest, some event of great interest, which if we did not have studios in Detroit could not be available to be made or placed in our schedules." (Tr. 543)

Mr. Mitchell, WJR's Program Director, to whom other witnesses deferred as being the witness most familiar with WJR's programming, indicated in response to a series of questions by the Examiner that he could not give any accurate estimate of the number of programs which might be carried from Detroit, but indicated that WJR would use the Detroit studio as a matter of convenience for program sources out of Detroit and indicated further that it would be inconceivable to make the 60-mile trip to the proposed Flint Studios when such programs were available in Detroit. (Tr. 810-12)

Despite the Program Director's statements that the Detroit studios would be used "as a matter of convenience or when appropriate," we have the testimony of Mr. Wells, WJR's Farm Director. Among other things, Mr. Wells testified concerning the program "Farm News," which WJR proposes to carry Monday through Friday, 12:15-12:30 PM. These programs will consist of films taken in the morning at the Detroit stockyards and will consist of market reports and observations of the weather in Detroit. According to Mr. Wells' testimony, the films would then be rushed to the studios in Flint

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for transmission at 12:15 PM the same day. WJR tried assiduously to avoid the "remote" facilities to which the Commission attaches so much weight since it proposes to transport these films to the main studios in Flint, bypassing enroute the Detroit studios and the transmitter studios, both of which have equipment for showing films. WJR's proposal in this respect, as shown by the testimony below, is so incredible that it is little wonder that the Examiner suspected WJR's motives in this proceeding. Mr. Wells' testimony is as follows (Tr. 620-23):

> "Q Mr. Wells, in connection with one of the programs you discussed, you proposed for television, you said you are going to carry some direct weather information from the Weather Station?
>
> "A Yes.
>
> "Q Did you plan to have a camera at the Weather Station?
>
> "A No.
>
> "Q Just a line?
>
> "A Yes.
>
> "Q This is the Detroit Weather Station?
>
> "A Yes, sir. Interpreting the information they give on a large map from a local standpoint, a map that would have the

national picture superimposed upon it.

"Q In connection with the pictures of things happening in the stock yards in Detroit, you wouldn't go outside to the stock yards, as I understand your testimony, with the man with the camera are taken? (sic)

"A No sir. We would have a photographer, a cameraman, who would go down there and in cooperation with Bliss Bowman, who is in charge of the United States Department of Agriculture Livestock office, I am sure we could make our decisions based on his judgment as to which particular shipper would make an interesting program who has certain stock coming in, and picking out different breeds, different ones on different days, so it would have an overall general interest to livestock men.

"Q Would you expect that someone on the staff of the TV station would go with the cameraman and direct him in taking the pictures?

"A Yes.

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"Q Do I understand correctly that your engineers have advised you that it would be more practical after the films are taken and presumably processed to drive from Detroit where you would have studios past the transmitter where you would also have film cameras, into Flint, to put it on the air?

"A No, that would be feasible.

"Q Did you plan to do it that way?

"A Yes.

"Q Would you do it that way unless it was an emergency that required it?

"A If the time element permitted it, I think it would be the thing to do, to take it into the main studios in Flint.

"Q Do you think it would be a bit of a difference to the listeners whether the film were put on the film cameras at the transmitter site or the Detroit or Flint studios?

"A No, I think from a programming standpoint, however, it would be a better way to handle it.

"Q You think the drive up to Flint and back for the man who takes the pictures, and the next morning again, would be justified?

"A I do. I drive that a good many times.

"Q Just for the purpose of putting it on the film equipment at the studio rather than either of the other two places that you would have available?

"A Yes. It would only be an hour and 15 to 20 minutes each.

"Q Each way?

"A Yes."

III

B. The Commission erred in its application of Section 3.685(b).

In paragraphs 24 and 25 of its Conclusions, the Commission finds that there is no basis for awarding a preference to Trebit over WJR because of the location of its antenna site. This conclusion is based on a purported application of Section 3.685(b) of the Rules. It quotes as the pertinent portion of that Section the following:

> "Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the intensity of the stations' signals. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available. To provide the best degree of service to an area, it is usually preferable to use a high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served;

> in no event should there be a major obstruction in this path. The antenna must be constructed so that it is as clear as possible of surrounding buildings or objects that would cause shadow problems . . . ."

After observing, in paragraph 25, that the above Section does not prescribe:

> " . . . . a specific and definite requirement that can be determined absolutely or mathematically. Rather, it provides merely a guide, or standard, which applicants should follow in selecting sites."

the Commission then states:

> "The ideal situation for the applicant is presented where high ground, or a tall structure, is situated in the center of the principal city to be served; in such cases the selection of a site becomes relatively simple."

The above-quoted statement makes it clear that the "most central point" referred to in Section 3.685(b) is the center of the principal community to be served - an obviously correct conclusion. The Commission proceeds:

> " * * * In actual fact, however, applicants are seldom faced with such ideal conditions and must make use of the terrain features and other conditions as they find them. For example, in Flint, the only

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> high ground in the general area is to be found on a plateau southeast of the city. Thus, the applicants have the choice of locating their sites on high ground at a substantial distance from Flint or remaining close to Flint but on lower ground * * *"

There is a clear recognition by the Commission that there is an "ideal situation'" there is an equally clear implication that there is a difference between two applicants based upon which more closely approaches the "ideal". It cannot be gainsaid that if one is significantly closer to this "ideal" than the other, he should be preferred. Two questions are posed:

(1) Does Trebit come closer than WJR to the "ideal"?

(2) Is the difference significant?

Both questions must be answered in the affirmative.

It is evident that the Commission in the above-quoted language has substituted "high ground" for "highest elevation available" as used in Section 3.685(b). "Elevation" everywhere in the Commission's Rules and Regulations, and in the Sixth Report and Order, when it has reference to the elevation of an antenna, has one meaning and one meaning only - elevation above average terrain. Two antennas each at the same elevation above average terrain are equal, without regard to whether one is located on the roof of a building or on a steel supporting tower and the other on a hill or mountain. The type of supporting structure and the ground level at the point have no bearing on the computation of antenna height. Trebit and WJR each have maximum elevation permitted under the Rules, each having its center of radiation 1,000 feet above average terrain.

If elevation in Section 3.685(b) is to be interpreted, not as elevation above average terrain, but as elevation with respect to conditions which produce shadows, then the distance of the antenna from the center of Flint as well as its height above it must both be considered since shadows vary depending upon the angle at which radiation strikes an obstructing object. It is clear beyond peradventure

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that the shadow condition sought to be minimized by Section 3.685(b) is the shadow condition in the principal community because the reference point prescribed in that Section for optimum antenna location is the center of that community. Assuming that Section 3.685(b) in recommending the highest elevation available at a central location concerns itself with problem of illuminating the area to minimize shadow, it is axiomatic that the height of the center of radiation must be proportionate to the distance from the center of the principal city to be served, if the same areas of shadowing are to be maintained. It is equally axiomatic that, if the strength of the illuminating source is kept constant, the intensity of illumination will decrease as the square of the distance from the source to the central point is increased. (Shadowing is greater when a weak signal is involved than it is when a strong signal is involved. The Trebit signal at the center of Flint is over 6.9 times as strong as the WJR signal.)

The center of radiation of the Trebit antenna is 993 feet above the center of Flint and the horizontal distance from the antenna to the center of Flint is 7.75 miles. The height of the center of radiation of the WJR antenna above the center of Flint is 1,245 feet and the horizontal distance of the antenna is 20.4 miles from the center of Flint.[5] The WJR antenna is 12.65 miles further from the center of Flint than the Trebit antenna and is 252 feet higher. The Trebit antenna is closer than the WJR antenna to the center of Flint by more than 260%, it is lower by less than 21%. On the basis of the ratio of height to distance - which is obviously the most significant factor from the standpoint of shadow effects - the ratio for Trebit is 1:41 and for WJR is 1:85.

5/ The figures - 993 for Trebit and 1,245 for WJR - are corrected for earth curvature on the basis of 9/10ths of a foot per miles. The uncorrected figure for the Trebit antenna is 1,000 feet and for the WJR antenna is 1,263 feet.

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There can be no dispute that if elevation as the term is used in Section 3.685(b) means what it means everywhere else in the Commission's Rules and Regulations with respect to antenna situation, i.e., elevation above average terrain, Trebit and WJR propose to locate their antennas at the same elevation and there is zero difference between them in that regard. From the standpoint of closeness to the central point of Flint, however, WJR is more than 2 1/2 times as far as Trebit from the center of Flint and its signal only 1/7 as strong. If "elevation" as used in Section 3.685(b) is to be construed as elevation above the central point of Flint, because in the context the concern is only with shadowing in Flint, then the relation between the elevation of the antenna above and its distance to the central point of Flint must each be taken into account for shadowing effects are a function of both, not either alone. Comparing the ratios of height above the central point to distance from that point, Trebit has better than a 2:1 advantage over WJR. That this ratio advantage is substantial and significant is obvious from the fact that, for WJR at its proposed site to cut down shadowing in Fint so that it would have as little shadow effect as Trebit, it would be necessary for WJR to increase its antenna height to over 2,600 feet above the center of Flint (i.e., to add over 1,355 feet to its tower) and increase its radiation in the direction of Flint to over 15 million (15,000,000) watts (or to utilize some equivalent combination involving gargantuan power and height factors).6/ Quite apart from the obvious physical impossibility of achieving any combination which would produce this result, the Commission's Rules

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prohibit WJR from attempting to utilize any combination of power and height at its proposed site which would result in any decrease in its present shadow effect in Flint.7/

On any basis of comparison, the question of whether the base of the antenna supporting structure is on low ground or on high ground, is utterly irrelevant. The Commission's failure to consider relevant, and its reliance upon completely irrelevant factors in reaching its

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6/ The combination 2,600+ feet antenna elevation and 15+ megawatts power assumes only inverse distance attenuation, and is therefore the most conservative estimate possible.

conclusion that Trebit and WJR each comply with Section 3.685(b) "no one more than the other" is arbitrary and capricious.

III

C. The Commission's rejection of the Examiner's conclusions that substantial preference to Trebit over WJR should be awarded on the basis of six factors flowing from the selection of its transmitter site is arbitrary and capricious.

*   *   *   *

7/ That Trebit has an advantage from the standpoint of shadowing in Flint is not surprising for nothing is more certain than that WJR did not select its site to minimize shadowing in Flint, but to maximize signal in Detroit. In fact, if WJR's most desired proposal, i.e., to construct at Waterford Hill, could have been achieved, it would have located its antenna six miles further from the center of Flint, the effect being to maximize shadowing in Flint and minimize it in Detroit.

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*   *   *   *

The third factor for preference to Trebit found by the Examiner and rejected by the Commission was the effect of the overlap between the service proposed by WJR and the service provided and proposed by Detroit television stations upon WJR's chance of obtaining a superior network affiliation. It will be recalled that WJR's testimony is that it would prefer a network affiliation other than with the DuMont network because it believed the others were superior but that it recognized it could not obtain an affiliation with CBS, NBC or ABC because each of them had a basic Detroit affiliate. DuMont, carried on a secondary basis only in Detroit, was the only network with which WJR conceived it could obtain an affiliation. The Examiner's findings with respect to this matter are not only based on substantial evidence and on the application of Section 3.683(b)(2) but also upon the unequivocal admission of WJR. The Commission not merely rejected the evidence and the provisions of its own Rules and Regulations, under which because of extensive overlap a Detroit network affiliate could obtain first refusal on network programs as against WJR but because of the lack of overlap could not obtain such a refusal as against Trebit, but it also rejected the unequivocal admission of WJR with respect to this matter. The Commission's conclusion in paragraph 31 that Trebit would have difficulty in obtaining an affiliation with a network affiliated with a Detroit VHF

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station is supported by no evidence whatsoever in the record of this proceeding, was not a basis upon which WJR made any contrary contention, and must on the evidence be rejected as completely unsubstantiated entailing, as it must, a conclusion by the Commission that no network would be interested in serving the City of Flint, a conclusion contrary to all of the record evidence. The reason why Trebit's affiliation is consistent with affiliation in Detroit is because of the minimum overlap between the service contours of the Detroit stations and the service contours of Trebit's proposed station, emphasized by the facts that no Detroit station provides Grade A service to Flint and that Trebit provides no service at all to Detroit.[8] The Commission's refusal to prefer Trebit and to accept the Examiner's conclusion is tantamount to a holding that it is of no consequence to the public of Flint and its environs to receive the best rather than the worst network service. The Commission's conclusion is clearly arbitrary and capricious.

The fourth factor of preference found by the Examiner and rejected by the Commission is that WJR in programming its station will take into major account the major population segment within its station's area, with the result that the interests of Detroit would dominate and the interest of Flint be subordinate in the programming of the station, in contrast to the situation presented by the Trebit proposal in which Flint and its metropolitan area would provide the statement is in strict accordance with the Commission's conclusion in paragraph 157 of the Sixth Report. ("We believe the record supports a 0 db adjacent channel interference ratio.") The Commission's decision not to include interference ratios in its Rules was not based on any determination that interference would not exist but based upon its conclusion that interference between stations would not be a barrier to the grant of applications because of service loss by interference where the stations met the mileage separations.

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[8] The Commission suggests that Trebit will provide a Grade B service to some of Detroit. The record clearly shows that Trebit will not provide that service because of adjacent channel interference. This

dominant population segment and inevitably dominate the character of the station's programs. The Commission rejects this determination by statements to the effect that "the record demonstrates" that WJR has geared its program proposals to serve Flint and that "the record fails to support" the conclusion that programs of purely local interest in Flint will be reduced or eliminated by WJR. The Commission recites no record facts to support its generalizations on this point. The record facts are all to the contrary, as we have pointed out exhaustively in our proposed findings and adverted to elsewhere in this petition. The Commission's conclusion on this point is arbitrary and capricious.

The fifth factor of preference rejected by the Commission is that coverage of Detroit by WJR will result in a rate base for that station which would adversely affect the interests of Flint and its advertisers. For the Commission to characterize this conclusion speculative and to ignore the record facts upon which it was based is gross error. The Commission is not uninformed, or at least its files are bulging with information, concerning the economic factors in television station operation and charges for time. The cost of program material, film, talent, news, etc., rates for network service - all are directly affected by the service area of a station. WJR obviously would not, and if it endeavored to do so would not be permitted by DuMont, to fix rates for network time that would not be competitive with Detroit stations if, as it proposes, it is to be the Detroit DuMont outlet. Its rates for national accounts would obviously be fixed competitively for the Detroit market.

Its rates for Detroit advertisers interested in availabilities between its national and network programs would obviously have to be in line with Detroit charges. A Flint merchant having, as the Commission found in its decision, no prospect of obtaining any Detroit business and therefore having a

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message of minus appeal in Detroit would either have to be given a different rate, thereby creating a discrimination as against a Detroit merchant, or be forced to pay Detroit prices for Flint coverage. The overall program costs to advertisers desiring, for example, to put on a film program would have to be based on the rates for film in the Detroit area rather than the Flint area. None of these factors exists with respect to the Trebit operation because Trebit will give no service to Detroit. The Commission does not have to rely on speculation or on guesses as to future rate policy to know that Trebit cannot operate at Detroit prices when it does not reach Detroit. For WJR to serve Detroit at Flint prices comes close to business idiocy. There is no basis in the record for suggesting that WJR has ever, or will ever, be commercially foolish in the operation of the business end of its properties. The conclusion of the Commission on this point is arbitrary and capricious.

The sixth factor of preference which the Examiner found and the Commission rejected is that WJR might in the future function as a Detroit, not a Flint, station. It is clear that WJR will be required to function commercially as a Detroit station on the basis of its own proposals. It is clear that it intends to (we do not deny that it should from the site it proposes) take into paramount account the desires of the vast number of people in Detroit which it will serve in programming its station. That it will be in everything but name a Detroit station is obvious. The Commission suggests that because its "main" studio will be located in Flint and because it will provide "a minimum signal strength" over the City of Flint, it will not in fact be a Detroit station. So far as minimum signal strength is concerned, WJR will place a minimum signal over Detroit as well as Flint (and over Pontiac and other communities as well). It cannot be distinguished on this basis on the Commission's own

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theory. WJR proposes studios in Detroit as well as in Flint. That the mere designation of its Flint studio as its "main" studio is entitled to any weight is nonsense. The Commission's Rules governing television stations do not define what is meant by a main studio. The requirements of the Commission's Rules would be more than met by simply putting a sign on the studio door lettered"main". There is no correlation between "main studio" and the programming of a television station under any requirement of the Commission's Rules. The only effect of designating a particular studio as a main studio is (except where exception is made) to require the community in which the studio is located to be mentioned in station identifications. This requirement would be met by some such station identification as "THIS IS WJR-TV, FLINT, THE DUMONT STATION FOR DETROIT, WITH LOCAL DETROIT STUDIOS IN THE FISHER BUILDING." On this as well as the preceding five factors substantial basis exists which requires preference of Trebit over WJR. Failure to accord this preference by the Commission is arbitrary and capricious.

* * * *

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Respectfully submitted,
TREBIT CORPORATION
By Dempsey & Koplovitz

June 14, 1954

* * * *

[Received FCC November 5, 1956]

JOINT PETITION FOR VACATION OF THE COMMISSION'S ORDER OF OCTOBER 17, 1956, AND FOR OTHER RELIEF AND REQUEST FOR ORAL ARGUMENT

Comes now W. S. Butterfield Theatres, Inc. and Trebit Corporation, applicants in the above proceeding, and request relief hereinafter set forth:

1. This case, involving competitive requests of three applicants for authority to operate a television station on Channel 12 in Flint, Michigan, has had a long history before this Commission. Rather than reciting here the significant steps that have occurred, Petitioners attach hereto as an appendix a chronology of the facts and steps taken in this proceeding prior to the court's decision having relevance to the matters here presented. It is requested that this appendix be considered in conjunction herewith.

2. On October 17, 1956 the Commission adopted an order in the above-entitled proceeding providing for further hearings before an examiner purportedly in conformance with the decision and order of the United States Court of Appeals for the District of Columbia Circuit in the case of W. S. Butterfield Theatres, Inc., et al v. Federal Communications Commission decided May 24, 1956. Because of the decision of said court reversing the Commission in cases No. 12,666 and 12,667[1] on that date, we assert that the Commission's said order of October 17, 1956 does not constitute an adequate or proper basis for further proceedings here.

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[1] These were appeals from the Commission's action denying the joint petition of Butterfield and Trebit, filed December 28, 1954. Said joint petition is by reference made a part hereof.

I

Before taking any other action in these proceedings, the

Commission should first carry out its commitment to the court.

3. In the proceeding before the United States Court of Appeals for the District of Columbia Circuit, the Commission promised the court that, if reversed in Cases No. 12,666 and 12,667, it would vacate WJR's basic construction permit and any modifications thereof. In its brief before the court in this proceeding (pp. 82-83), the Commission stated:

> "For if the Commission's final decision of May 14, 1954, as modified by its Memorandum Opinion and Order of December 2, 1956, (Cases No. 12,527, 12,528), or its decision of March 31, 1955 denying appellants' December 28th joint petition (Cases No. 12,666, 12,667), found by the Court to be incorrect, the basic construction permit and any modification thereof or subsequent authorizations will be vacated, and the three competing applications will be reconsidered in accordance with the Court's instructions (R. 5939)." (Emphasis supplied)

4. The Commission has taken no action to carry out the aforesaid commitment and we submit that it should honor its unequivocal representation to the court before taking any further steps in this matter.

II

The decision of the court sets aside the Commission's erroneous denial of petitioners' December 28, 1954 joint petition and requires the Commission to reconsider and correctly dispose of the matters therein raised.

5. In substance, petitioners' joint petition filed December 28, 1954 pointed out that WJR had publicly (and in formal sworn statements to the Commission) conceded its inability to carry out the proposals embodied in its application for construction permit which the Commission had found to be preferable in the public interest to the proposals of of petitioners. As a consequence, petitioners requested that the Commission reconsider its original decision in the light of the admitted inadequacies of WJR's proposal and grant either Butterfield or Trebit's

application on the record then before it. (See Butterfield and Trebit petitions for rehearing of June 11 and June 14, 1954 incorporated in the prayers of the joint petition of December 28, 1954.) Failing this, petitioners pointed out that the Commission would be required to hold a further hearing in which, inter alia, WJR's character qualifications, in view of its concealment of the abandonment of its preferred proposal be considered on an evidentiary record there made. The Com-

mission rejected all of petitioners' prayers and, based on an ex parte acceptance of fact and explanation by WJR, refused to disturb its original preference. This action of the Commission the court found to be erroneous. The Commission must now correctly consider petitioners' said joint petition without accepting WJR's ex parte representations as a basis for findings adverse to petitioners. It is petitioners' belief that WJR's concessions and admissions afford ample basis for the Commission to deny WJR's application and decide as between petitioners which should obtain a construction permit. In view of the Commission's recognition that this is a case in which expedition is justified,[2] petitioners believe the Commission will want to explore this aspect of the matter before proceeding to order any evidentiary hearing with consequent delay in ultimate institution of service for Flint. Any evidentiary hearing should in any event include the issues raised by the December 28, 1954 joint petition. The issues specified in the October 17, 1956 order do not meet these issues.

III

The October 17, 1956 order is fatally defective.

6. Quite apart from the foregoing, it is otherwise clear that the Commission's order of October 17, 1956 does not afford Petitioners the relief to which they are entitled. Prior to any consideration of issues, the status of WJR as a party to this proceeding must be determined. In this connection it is urged that the original grant of May 14,

1954 cannot, under any conceivable postulate, form the basis for a valid authorization to WJR, for that permit has been abandoned of record. Not only has it been abandoned, it is incapable of successful or lawful amendment. Moreover, the so-called modification of construction permit granted April 14, 1955, being totally without meaning or standing in the comparative proceeding here involved, provides WJR with no status vis a vis Butterfield and Trebit. That these conclusions are inescapable will be demonstrated below.

7. On and prior to December 16, 1954, the date upon which WJR filed the application embodying its new proposal, there were in existence and effect regulations of general application promulgated by the Commission which

prohibited the filing of such an application or the advancement of the new proposal embodied therein at the time and in the manner selected by WJR. Moreover, said regulations, modified in particulars not pertinent here, are now in full force and effect. They are Section 1.387(b)(3), Section 1.724(b) and Section 1.365(a) of the Commission's Rules and Regulations.[3]

8. Sections 1.387(b)(3) and 1.724(b) of the Commission's Rules provide in substance that in dealing with mutually exclusive television applications, the Commission will designate for comparative hearing and treatment only those applications which are filed within a specified period of time prior to hearing.[4] It is clear that WJR's application of December 16, 1954 does not and cannot satisfy this requirement as respects the mutually exclusive applications of Butterfield and Trebit which were designated for hearing and heard with WJR's original application during the period November 17, 1952 to February 27, 1953.

9. Section 1.365(a) of the Commission's Rules establishes the procedure to be followed in amending applications. It provides in

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[2] See Order of October 17, 1956

substance that while any application may be amended as a matter of right prior to the designation of such application for hearing, it can only be amended after designation upon written petition served upon the parties of record and for good cause shown. Moreover, this regulation specifically provides that no amendment, other than one purely corrective in nature, will be considered if it is filed after public notice has been given of the issuance of an initial decision in the matter to which it relates. It is manifest that WJR's application of December 16, 1954 does not satisfy the requirements of this rule in any respect.

10. In the briefs filed with the Court of Appeals in these cases, Butterfield and Trebit made the following "Statement of Points" and submitted written argument in support thereof:

> 1. The Commission's decision of May 14, 1954, preferring WJR for grant, as modified and affirmed December 6, 1954, (Cases No. 12,527 and 12,528) was arbitrary and capricious in that it did not properly consider or evaluate

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3/ Prior to modification the pertinent requirements were embodied in Sections 1.387(b)(3) and 1.365(a) of the Commission's Rules.

4/ Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945)

> the facts of record, it did not properly consider or evaluate the significant points of difference between the parties, and it was not based upon findings and conclusions which were supported by substantial evidence.
>
> 2. The Commission's action of April 1, 1955, denying the joint petition filed by Butterfield and Trebit on December 28, 1954, (Cases No. 12,666 and 12,667) was invalid and contrary to law because:
>
> (a) It refused to give recognition to the fact that WJR, by its December 16, 1954 "modification of permit" application,

in fact abandoned the proposal originally advanced by it and upon which the hearing had been held and the Commission's decision had been reached;

(b) It refused to order a further hearing and grant other appropriate relief in the light of said abandonment;

(c) It refused to consider new questions relating to the good faith of WJR and its principals in the light of said abondonment which was accompanied by WJR's active concealment of its intentions and prosecution of its original proposal of record long after its abandonment in fact;

(d) It considered and compared on an ex parte basis WJR's new and different proposal with the proposals of Butterfield and Trebit which had been submitted at the comparative hearing.

3. The Commission's action of April 14, 1955, which granted WJR's "modification of permit" application of December 16, 1954, (Cases No. 12,752 and 12,753) was contrary to law because:

(a) It erroneously assumed that WJR was the only applicant before it with an interest in the facility at issue whereas in law and in fact its status as an applicant and "permit holder" was at that time being challenged in both administrative and judicial proceedings;

(b) It erroneously assumed that Butterfield and Trebit had lost their status as applicants for the facilities at issue in the comparative proceeding then still in progress;

(c) It was violative of the rule of the Ashbacker case and other authorities cited infra which are definitive of due process in such cases.

4. WJR has forfeited any right to participate further in the comparative proceeding before the Commission for the facilities here in issue because of the abandonment of its proposal upon which the hearing was conducted and because of the requirements of Section 1.387(b)(3) and 1.365(a) of the Commission's

Rules.

11. After oral argument by the parties, including counsel for Butterfield and Trebit as well as WJR and the Commission, the court on May 24, 1956 handed down its decision and opinion is said cases. The court found it necessary to decide only two of the appeals taken by Butterfield and Trebit, namely, Nos. 12,666 and 12,667. Its opinion stated that "We do not reach the questions in Nos. 12,527, 12,528, 12,752 and 12,753." (Slip Op. pp. 2-3). The court therefore did not deal with or decide the questions

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specified as 1, 3 and 4 in the "Statement of Points" referred to in paragraph 10 hereof but it did deal at some length and with some finality with the questions enumerated in paragraph 2 of said "Statement of Points".

12. In so doing the court, among other things, stated that "In Nos. 12,666 and 12,667 they [Butterfield and Trebit] appealed from the failure to reopen the record on account of the changed proposal. The question in the latter two appeals is whether the Commission, in refusing to reopen the record, abused its discretion. Since we answer that question in the affirmative and remand the case to the Commission to reopen the record and conduct further proceedings, we do not reach the questions in Nos. 12,527, 12,528, 12,752 and 12,753." (Slip Op. pp. 2-3). In disposing of contentions made by counsel for the Commission and WJR to the effect that the relief requested by Butterfield and Trebit would further extend an already prolonged proceeding, the court said: "Moreover, appellants should be readmitted to the contest, even if that would serve to prolong it. The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants and 'the proceedings lose their comparative character.'" (Slip Op. pp. 6-7).

13. Concerning the time and circumstances under which

Butterfield and Trebit requested the Commission's consideration of the facts as to WJR's new proposal and its abandonment of its original one upon which the comparative hearings had been held, the court said: "Delay in seeking reopening of the record is a factor to be weighed in the exercise of the Commission's discretion. Here, however, it was excusable. The only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by WJR for several months." (Slip Op. p. 4). Dealing more directly with questions concerning the time and manner in which WJR's new proposal was advanced, the court stated: "That is one of the questions to be dealt with by the Commission, upon a consideration of all of the events, in the reopened hearing we order herein." (Fn. 7 Slip Op. p. 5).

14. Although, as heretofore pointed out (paragraph 11 supra), the Court of Appeals found it unnecessary to decide the questions in Nos. 12,527, 12,528, 12,752 and 12,753, and did not decide the question presented by 2(a)

in the "Statement of Points" (paragraph 10 supra), these and other questions are definitely presented by the record already made and must be decided by the Commission. We refer particularly to the point made by Butterfield and Trebit in 2(a) and 4 of the "Statement of Points" (paragraph 10 supra) relating to WJR's abandonment of its original proposal upon which the hearing had been held and the Commission's decision reached, and WJR's conduct in advancing its new proposal on December 16, 1954 in the light of requirements of Sections 1.387(b)(3), 1.724(b) and 1.365(a) of the Commission's Rules.

15. That WJR's conduct for a period of months before, during and after the 16th of December, 1954, amounted to an abandonment of its original proposal cannot be doubted. The fact that WJR concealed, rather than revealed, its true intentions from the Commission as well

as its adversaries does not alter, but aggravates, the facts. In summary, the record discloses: That on December 16, 1954 WJR published a statement in a newspaper of general circulation in the area affected which described its television plans for the future; that on the same day WJR filed with the Commission an application embodying a new proposal; that the new proposal was so basically different from that upon which the comparative proceedings had been had as to compel the Court of Appeals to characterize it as going "to the foundation of the Commission's decision;" that subsequently to, and even before, the filing of its new proposal, WJR indicated no intention of carrying out its original proposal but, on the contrary, did everything within its power to make operative and to implement its new proposal. The abandonment by WJR of its original proposal is an abandonment both in law and in fact.

16. We have already referred to Sections 1.387(b)(3), 1.724(b) and 1.365(a) of the Commission's Rules and their application here (paragraph 7-9 supra). There can be no doubt that considered, either as a modification or amendment of its original proposal or as a new proposal, the WJR application of December 16, 1954 is prohibited by these regulations.[5] And the

Commission cannot ignore these rules and their meaning and effect.[6] This proceeding has already been in effect for more than four years and the Flint area has been deprived of service for which provision is made in the allocation plan established by the Commission's Sixth Report and Order during such period. In its opinion and decision of May 24, 1956, the Court of Appeals commented upon the length of this proceeding as well as measures which might have been properly taken by the Commission to shorten its disposition (Slip Op. pp. 5-7). It is now too late to recapture that which is irretrievably lost but it is not too late to take action required by the Commission's Rules and decisions which would facilitate the final disposition of ths proceeding in conformance with the mandate of the Court of Appeals. Both Butterfield and Trebit now have proposals which were spread on record in the hearings held during the period November 17, 1952 to February 27, 1953. The proposals made by Trebit and Butterfield for television service to Flint at that time have not been changed and each has been found qualified to carry out the proposals made by them and to provide the television service needed in the area to be served.

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[5] Huntington Broadcasting Co., 5 RR 342 and 721; Kansas City Broadcasting Co., 5 RR 1057, 1089-1092; cf. Westinghouse Radio Stations, Inc., 10 RR 878, 883-886

Prayer for Relief

The premises considered, Butterfield and Trebit respectfully pray:

1. That the Commission enter its order vacating (a) its decision herein of May 14, 1954 granting WJR's original application, and (b) its action of April 14, 1955 granting WJR's modification application filed December 16, 1954.

2. That the Commission enter its order dismissing as affording no basis for present or future grant WJR's application of December 16, 1954.

3. That the Commission enter its order dismissing, as abandoned, moot, and as no longer offering any basis for present or future grant WJR's original application.

6/ Cf. Democrat Printing Co. v. FCC, 202 F.2d 298; Jefferson Amusement Co. v. FCC, 226 F.2d 277

4. That the Commission enter its order withdrawing its order of October 17, 1956 to which this petition is addressed or to so modify said order as to conform to petitioners' December 28, 1954 joint petition and to permit prompt and effective consideration and decision of

the applications of Butterfield and Trebit which have been the subject of these proceedings for more than four years.

5. That pending action on this petition the Commission stay further proceedings herein.

6. That the Commission grant such other and further relief as may be appropriate under the circumstances.

Request for Oral Argument

Butterfield and Trebit respectfully request oral argument on the foregoing petition and prayers for relief.

Respectfully submitted,

W. S. BUTTERFIELD THEATRES, INC.

By /s/ D. M. Patrick
/s/ Lester Cohen
/s/ Parker D. Hancock

Hogan and Hartson * * *
Its Attorneys

TREBIT CORPORATION

By /s/ William J. Dempsey
/s/ Harry J. Ockershausen

Dempsey and Koplovitz * * *
Its Attorneys

November 2, 1956

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Appendix

1. This proceeding involves the mutually exclusive applications of WJR, Trebit, and Butterfield, each requesting a permit for a new television station to be operated on Channel 12 in Flint, Michigan. The applications were heard in a consolidated proceeding on specified issues.[1] The hearing before an Examiner was held during the period November 17, 1952 to February 27, 1953. On April 30, 1953, the Examiner released an Initial Decision granting the application of Trebit and denying the applications of WJR and Butterfield.

2. Following exceptions and oral argument, on May 14, 1954, the

Commission released its Decision which reversed the Examiner, granted the application of WJR and denied the competing applications of Trebit and Butterfield.

3. The Commission found that each of the three applicants met the minimum statutory qualifications as to legal, financial, and technical ability. In reversing the Examiner and granting the application of WJR, the Commission compared the proposals of the three applicants with respect to the following criteria: (1) the location and height of the transmitting antenna proposed; (2) the coverages of the proposed stations; (3) the proposed program services; (4) studio facilities and equipment; (5) staffing plans; (6) integration of principals in the day-to-day operation of the stations; (7) preparation for television; (8) local identity with and interest in Flint; and (9) diversity and concentration of control of the media of mass communications. With respect to each of these aspects of the proposals submitted by the competing applicants, the Commission rejected certain preferences which had been urged or awarded certain preferences to the applicants on the basis of its interpretation of the record which had been compiled during the hearing.

1/ The issues call for a determination of the following: (1) the legal, technical, financial and other qualifications of the applicants; (2) the program service proposed by each applicant and whether it would meet the needs of the communities and areas within their Grade A and Grade B contours; (3) whether the installation and operation of the proposed stations would comply with applicable Commission Rules; (4) whether the proposed stations would constitute hazards to air navigation; and (5) on a comparative basis, which applicant should be preferred.

4. The Commission held that WJR should be preferred to Butterfield because of what it considered to be WJR's superiority with respect to the following criteria: (1) proposed programs; (2) studios and equipment; (3) broadcast experience; (4) integration of its principals in the day-to-day operation of the proposed station; and (5) preparation of program plans. With respect to WJR and Trebit, the Commission held

WJR superior with respect to the following criteria: (1) proposed programs; (2) studios and equipment; (3) integration of principals in the day-to-day operation of the station; and (4) diversification and control of the media of mass communications. Butterfield and Trebit were granted preferences in certain areas but on issues as to transmitter sites, areas and population to be served, and network proposals, the Commission equated the proposals of the parties.

5. Thereafter, Trebit and Butterfield filed petitions for rehearing. By its Memorandum Opinion and Order of December 6, 1954, the Commission modified its Decision of May 14, 1954, but denied the petitions for rehearing and affirmed its grant to WJR.

6. There followed a series of events which radically departed from the procedures normally applicable to comparative hearings conducted before the Commission. On December 16, 1954, WJR published a statement in the Flint Journal which described its television plans for the future. On the same day, WJR filed an application for the modification of the construction permit which the Commission had awarded it after the comparative hearing. These made it clear that WJR actually planned to have an entirely different operation than that which had been the subject of the hearing and the basis for the Commission's Decision. Thus, WJR conceded its inability or unwillingness to effectuate the proposals upon which it had been preferred, and abandoned its application of record.

7. By the modification application WJR sought to locate its transmitter 44 miles away from the site which it proposed during the hearing, thus materially altering the character and identity of the communities and areas to be served. WJR's new site is some 450 feet lower than that which it proposed originally. In its hearing proposal, WJR told the Commission it would provide Grade A service to 3,620,660 people, but after it obtained a

grant it submitted a new proposal which would provide Grade A service to only 865,387 persons. WJR went through the hearing with a proposal for a new and elaborate two story studio building which would cost $766,821, but its modification application revealed that it actually would employ a used one story building valued at $125,000. While WJR's proposal of record specifies a DuMont network affiliation, this was changed to CBS.

8. WJR's modification application makes substantial changes in the time devoted to various programs, and in program classifications. Similarly, substantial changes were made in other aspects of WJR's proposal. For example, the hearing record reflects that one WJR vice-president will devote 80% of his time to the station, and this earned WJR a preference on the criterion of integration. However, once the Commission decided the case in favor of WJR, it submitted a modification application which reveals that the person involved will not so act after all.

9. Thus, by this modification application, WJR abandoned its proposal on which the hearing had been conducted and proposed the substitution of a drastically different new proposal. The basic facts with respect to seven of the nine criteria which were considered by the Commission were changed by WJR. This was done subsequent to the time when the Commission had either awarded a preference to WJR or rejected a claim of superiority asserted by either Butterfield or Trebit with respect to each of these aspects of the competing proposals. Moreover, each of these matters has a direct and vital bearing on the issues specified by the Commission for the comparative hearing herein.

10. WJR decided to abandon the proposals which it made during the hearing and developed its new plans months before the administrative process at the Commission reached a conclusion. However, WJR nonetheless was simultaneously defending the Commission's Decision as to those points on which it had been preferred, and did not inform the

Commission of its new plans until December 16, 1954 when it filed its modification application.[2]

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[2] On December 1, 1954, WJR filed an application for extension of time within which to complete construction of its station. Therein, WJR indicated that a change of plans was forthcoming. This application was filed and subsequently granted December 21, 1954, without public notice or notice of any kind to Butterfield and Trebit.

Thus, although Butterfield and Trebit had petitions for rehearing pending before the Commission when WJR abandoned its proposals of record, WJR waited until after December 6, 1954 (when the Commission affirmed its grant to WJR) to inform anyone of the fact that for several months it had no longer planned to do what it had represented during the hearing that it would do.

11. In view of the new plans disclosed by WJR on December 16, 1954, Trebit and Butterfield, pursuant to Section 405 of the Communications Act, 47 U.S.C. Sec. 405, filed a joint petition with the Commission on December 28, 1954, requesting: (1) That the Commission reconsider the petitions for rehearing which previously had been denied on December 6, 1954; (2) that the Commission vacate and set aside its decision of May 14, 1954, awarding the facility in issue to WJR, and its action of December 6, 1954, denying the petitions for rehearing, and " . . . reopen the record and order a further hearing in order that among other pertinent matters, all relevant and material facts concerning the abandonment by WJR, The Goodwill Station, Inc., of its proposal upon which it was preferred in this competitive proceeding and the good faith and conduct of WJR and its principals in view of the matters set forth in this Joint Petition may be made a part of the record and considered by the Commission . . . "; (3) that the Commission forthwith stay the effectiveness of the aforesaid actions pending its determination on the Joint Petition since January 5, 1955 was the last day on which an appeal could be taken to this Court from the

Commission's actions of May 14, 1954 and December 6, 1954; and (4) that " . . . the Commission grant such other and further relief as the circumstances warrant."

12. On January 5, 1955, the Commission having taken no action on said Joint Petition, Butterfield and Trebit took appeals to the United States Court of Appeals for the District of Columbia Circuit, Cases No. 12,527 and 12,528, respectively. On January 31, 1955, the Commission filed motions to dismiss these appeals as premature, it being the Commission's position that since the Joint Petition which had been filed on December 28, 1954 and petitions for reargument filed prior thereto were still pending, Butterfield and Trebit had not exhausted their administrative remedies. WJR opposed the Commission's motions. Trebit and Butterfield filed responses to the Commission's

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motions, pointing out the procedural position in which they had been placed and the reasons for which the appeals had been taken at that time. Trebit and Butterfield requested that the Court either deny the Commission's motions or remand the ". . . proceeding to the Commission upon such terms and conditions, and with such assurances from the Commission, if any be necessary, as will ensure Appellant(s) the type and character of fair hearing required by law."

13. On March 10, 1955, the Court ordered that the appellate proceeding ". . . be stayed pending action by the Commission on the petitions pending before it. . ." and denied the Commission's motions to dismiss ". . . without prejudice to renewal for proper cause shown after the Commission has taken action on said pending petitions."

14. On April 1, 1955, the Commission issued a Memorandum Opinion and Order denying Trebit's and Butterfield's separate petitions for reargument and their Joint Petition which had been filed December 28, 1954. In so doing, the Commission proceeded ex parte and compared the new WJR proposal with the original proposals of Butterfield

and Trebit, and held that the changes were negligible and of no consequence although it simultaneously stated that the WJR modification application was not before it for consideration. Butterfield and Trebit took new and separate appeals from this latest action of the Commission, these being Cases No. 12,666 and 12,667, respectively.

15. On April 14, 1955, the Commission by further ex parte action granted the WJR application for the modification of permit, thus permitting WJR to amend the proposals upon the basis of which it had been preferred after comparative hearing by the substitution of entirely new and different proposals.

16. On May 5, 1955, Trebit and Butterfield filed a Joint Petition with the Court requesting an order directing the Commission to rescind its ex parte action of April 14, 1955 which granted the WJR modification of permit application. In this petition, Trebit and Butterfield detailed the changes in the WJR proposal which had been approved ex parte by the Commission, and requested that the status quo be restored so that a meaningful appeal based on the existing record could be had. The Commission and WJR opposed this Joint Petition.

17. On May 12, 1955, also in view of the Commission's above-described ex parte action of April 14, 1955, Trebit and Butterfield, pursuant to the provisions of Section 405 of the Communications Act, filed a Joint Petition with the Commission which was directed against the grant of the modification application and which requested that the Commission itself set aside such action and deny, dismiss or return the WJR modification application. (R. 5923-32.) WJR opposed this petition. (R. 5933-36.)

18. On May 20, 1955, after oral argument before the Court on a Joint Petition ancillary to the other appeals and which had been filed on May 5, 1955, the Court ordered that said petition ". . . be, and it is hereby, held in abeyance pending hearing of these appeals on the merits

without prejudice to any further and proper proceedings before the Federal Communications Commission or before this Court which appellants are advised to take."

19. On June 10, 1955, the Commission issued a Memorandum Opinion and Order dismissing the May 12, 1955 Joint Petition which had been filed with the Commission by Trebit and Butterfield against its ex parte action of April 14, 1955, granting the WJR modification application. In so acting, the Commission held that Trebit and Butterfield had no standing to request reconsideration of the grant of the application which so radically altered WJR's proposals of record.

20. Thereafter, on June 22, 1955, Butterfield and Trebit took separate appeals to the Court in Cases No. 12,752 and 12,753, respectively, from the Commission's above-described ex parte action of June 10, 1955. On June 22, 1955, Butterfield and Trebit each filed motions with the Court requesting that these new appeals be consolidated with the four appeals which previously had been taken and consolidated. WJR and the Commission opposed the consolidation and requested that the appeals be dismissed. On July 15, 1955, the Court consolidated the new appeals with the four which previously had been taken and held in abeyance its action relating to the dismissal of the new appeals ". . . pending the hearing of these appeals on the merits."

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[Certificate of Service]

OPPOSITION TO JOINT PETITION FOR VACATION OF COMMISION'S ORDER OF OCTOBER 17, 1956

On November 2, 1956, W. S. Butterfield Theatres, Inc. and Trebit Corporation (hereinafter Petitioners), applicants in the above-captioned proceeding, filed a "Joint Petition For Vacation of The Commission's Order of October 17, 1956, and For Other Relief and Request for Oral Argument." For the reasons set forth herein, we believe that this pleading should be denied in its entirety.

1. Petitioners contend that the Commission's order of October 17, 1956 does not constitute an adequate or proper basis for further proceedings and does not afford them the relief to which they are entitled. They urge that WJR's concessions and admissions (presumably set forth in BMPCT-2689) afford ample basis for denial of WJR's application without further hearing. However, they assert that if further hearing is considered necessary then any such hearing should include the issues raised in their joint petition of December 28, 1954. Accordingly, petitioners request that the Commission (1) vacate both its Final Decision of May 14, 1954 granting WJR's application

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and its action of April 14, 1955 granting WJR's application (BMPCT-2689) for modification of construction permit;[1] (2) enter an order dismissing WJR's modification application (BMPCT-2689); (3) enter an order dismissing, as abandoned and moot, WJR's "original application", which was granted on May 14, 1954; (4) enter an order either withdrawing or modifying its order of October 17, 1956 "to conform to petitioner's December 28, 1954 joint petition."

2. A brief statement as to the history of this proceeding as it related to the subject petition might be helpful.[2] After a lengthy comparative hearing, the Commission, on May 14, 1954, released its Final Decision (9 RR 227) granting the WJR application and denying the applications of petitioners. By Memorandum Opinion and Order released December 6, 1954 (9 RR 2604), the Commission denied petitions for reconsideration filed by petitioners and reaffirmed its grant to WJR. On December 28,

1954, petitioners filed a Joint Petition For Stay, Rehearing and Reopening of the Record, the basis of which was that WJR, in filing an application (BMPCT-2689) on December 16, 1954 for modification of its outstanding construction permit had so changed its original proposal that a further hearing should be held. The Commission,

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1/ The WJR application (BMPCT-2689) for modification of its construction permit (BMPCT-2689) was granted on April 14, 1955. However, on June 8, 1955, the Commission adopted an order, released June 10, 1955, granting protests addressed to the grant. An Initial Decision was released January 17, 1956, after hearing, reaffirming and reinstating the grant. Final Decision has not to date been issued (Docket 11412).

2/ A more extensive statement of the "long history" of this proceeding is set forth in an appendix to the subject petition.

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by Memorandum Opinion and Order (11 RR 1321), released April 1, 1955, denied the joint petition. Petitioners appealed this denial and the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case to the Commission for further proceedings "on the question of differences between WJR's original and modified proposals" and to "reconsider its grant to WJR in the light of the differences disclosed." *W. S. Butterfield Theatres, Inc., et al.* v. *F.C.C.*, 13 RR 2175. Pursuant to the mandate of the Court, the Commission on October 17, 1956 ordered that the record be reopened and remanded the proceeding for further hearing before an Examiner for the preparation of a supplemental Initial Decision in which, in light of the evidence adduced under the issues specified, the grant of WJR's application is to be reconsidered on a comparative basis with the applications of petitioners. The hearing originally scheduled to commence on November 16, 1956 was continued by the Commission to December 17, 1956

3. The thrust of petitioners' arguments is that WJR has forfeited any right to participate in further comparative proceeding for Channel 12 because of the abandonment of its proposal; that Sections 1.387(b)(3)

and 1.635(a) of the Commission's Rules do not permit consideration of the proposal set forth in the modification application as either a modification or amendment or as a new proposal.

4. We believe that the Commission's order of October 17, 1956 complies with the Court's mandate. As we understand the Court's decision, it holds that the Commission was in error for failing to afford the petitioners an evidentiary hearing in connection with the changes reflected by WJR's application for modification of construction permit. Thus, in reversing and

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remanding this case the Court instructed the Commission to conduct further hearings on the question of the differences between WJR's original and modified proposals and reconsider its grant to WJR in the light of the differences thus disclosed. The Court did not require the Commission to vacate its grant of WJR's original application. Moreover, the Court expressly denied the request of petitioners asking that the Commission be directed to rescind its order of April 14, 1955 allowing modification of WJR's construction permit.[3]

5. In our view Sections 1.387(b)(3) and 1.365(a) of the Commission's Rules have nothing whatsoever to do with this case. There is no requirement that WJR as the permittee of a television station must amend the application which formed the basis for the issuance of a construction permit in order to make changes found necessary by events occurring subsequent to a grant of its application. Once an applicant has received an authorization to construct a broadcast station certain changes in its basic proposal may be made only upon the filing and approval of an appropriate application for modification of construction permit. Some changes, however, do not require the filing of such an application. All of the changes involved in this further hearing were contained in the application to modify WJR's construction permit which has been granted by the Commission. There is, therefore, nothing in the rules relied on

by the petitioners which requires the Commission to vacate, at this time, its grants to WJR. Moreover, it should be noted that as far as we can tell all of these very points were unsuccessfully argued *in extenso* before the Court of Appeals.

6. The further hearing in this matter is not to decide whether the application for modification of construction permit should be granted or denied. That application has already been granted. Its purpose is to afford petitioners an evidentiary hearing on the changes in WJR's original proposal as reflected by WJR's modified construction permit. At the conclusion of the hearing, the Commission must decide whether these changes require a reversal of its original decision favoring WJR over Trebit and Butterfield. We do not see how this may be accomplished without considering the affect these changes have on the Commission's original evaluation of the comparative merits of the respective proposals. Until the Commission decides that the changes involved require it to reach a result different from that reached in its final decision, there is obviously no need to vacate either the grant of WJR's original application or its application for modification of its construction permit. We fail to see how, in the light of the decision of the Court of Appeals, petitioners' rights in the further hearing required by the Court have been prejudiced by the Commission's order setting this case for further hearing.

For the foregoing reasons we believe that the "Joint Petition For Vacation of the Commission's Order of October 17, 1956, and For Other Relief and Request for Oral Argument" should be denied in its entirety.

3/ Petitioners argue that the Court denied this request because it [the court] relied on a statement contained in the brief of the Commission's General Counsel to the effect that the basic construction permit and any modification thereof would be vacated if the Court found the various actions complained of to be incorrect. We can find no language in the Court's decision which indicates that the Court was relying on this statement of the General Counsel as a basis for denying the request.

Respectfully submitted,

/s/ Edward F. Kenehan
Chief, Broadcast Bureau

Thomas B. Fitzpatrick
Attorney
Federal Communications Commission

November 21, 1956

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CERTIFICATE OF SERVICE

D. Mary Trapani, Secretary to the Chief, Hearing Branch, Broadcast Bureau, certifies that she has this 21st day of November, 1956, sent by regular United States mail, U. S. Government frank, a copy of the foregoing "Opposition To Joint Petition For Vacation of Commission's Order of October 17, 1956," to:

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/s/ D. Mary Trapani

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MEMORANDUM OPINION AND ORDER

By the Commission: Chairman McConnaughey dissenting in part and issuing a statement; Commissioner Craven abstaining from participating.

1. We have for consideration a joint petition, filed by Trebit and Butterfield on November 2, 1956 together with oppositions to the join petition filed by WJR, Lake Huron, and the Broadcast Bureau to vacate our order of October 17, 1956. In that order the Commission directed that pursuant to the order of the Court of Appeals of the District of Columbia further hearings in this matter be conducted.

2. The basis of the argument presented to us by the joint petition is that WJR, in effect, abandoned its original application and is attempting to proceed on its modified application which, it is alleged, is no more than an amended application which, under our Rules, was not timely filed. This argument is without merit. Petitioners mistake the status of WJR at the time it filed its modified application. WJR was, at that time, more than a mere applicant and was not to be treated under the Rules relating to applications, but rather under the Rules relating to modification of construction permits, by which Rules its conduct was procedurally proper.

3. It should also be noted that the additional hearing to be held in this proceeding was ordered pursuant to a remand from the United States Court of Appeals for the District of Columbia. That remand contemplates a further hearing on precisely the issues set forth in our Order of October 17, 1956. On the basis of the Court's Order we are, pursuant to the provision of Section 402 (h) of the Communications Act, without power to eliminate WJR as a party to the proceeding.

4. On November 16, 1956, Lake Huron Broadcasting Corporation filed an appeal from the order of the Chief Hearing Examiner denying its petition to intervene in this proceeding. Oppositions to this appeal were filed by WJR and, by joint pleading, Trebit and Butterfield.

5. Section 309 (b) of the Communications Act provides for the intervention of "parties in interest" to a proceeding by the filing of a petition not less than 10 days prior to the date of a hearing. At the time of the initial hearings in this proceeding Lake Huron did not establish itself as a party in interest. It was not until WJR elected to move its proposed transmitter site a distance of 44 miles in the general direction of the Lake Huron transmitter, subsequent to Lake Huron's becoming a licensee thereby the facts in this case became such as to make Lake Huron a "party in interest" pursuant to Section 309 (b) of the Act. The hearing contemplated by our Order of October 17, 1956 is the first hearing in this proceeding since Lake Huron has petitioned to intervene as a "party in interest" pursuant to Section 309 (b) of the Act. Because this hearing requires a decision with respect to certain significant changes as stated by the court, in its remand, from those involved in the earlier hearing in this proceeding, we regard this as a hearing in such a changed format as to confer upon Lake Huron a right of intervention under Section 309 (b) of the Communications Act.

6. Section 402 (h) of the Communications Act provides that it shall be the duty of the Commission to give effect to the orders of the Court of Appeals "and unless otherwise ordered by the Court, to do so on the basis of the proceedings already had." As hereinbefore set forth, we regard this Section as limiting our authority to add or delete issues in our proceedings ordered pursuant to remand. However, we do not regard this Section as denying a party in interest the right of intervention granted him by Section 309 (b) of the Act in a case where such intervention will not affect the issues to be heard.

7. ACCORDINGLY, IT IS ORDERED, That the Joint Petition of Trebit and Butterfield to Vacate the Commission Order of October 17, 1956, IS DENIED.

8. IT IS FURTHER ORDERED, That the petition of Lake Huron Broadcasting Company to intervene IS GRANTED.

Federal Communications Commission*

[7079]

/s/ Mary Jane Morris, Secretary

Adopted: December 14, 1956
Released: December 17, 1956

*STATEMENT OF CHAIRMAN McCONNAUGHEY

I dissent as to the petition of Lake Huron Broadcasting Corporation to intervene and approve the denial of the joint petition of Trebit and Butterfield to vacate the Commission's order of October 17, 1956.

* * * *

[7080]

ERRATA

1. On December 17, 1956 the Commission released its Memorandum Opinion and Order in the above-entitled proceeding (Mimeo 39244; FCC 56-1249).

2. The Opinion and Order is hereby corrected in the following respect: Page 2, par. 5, line 8, eliminate "thereby" and substitute "that"; page 2, par. 6, line 4, eliminate "as hereinbefore set forth."

FEDERAL COMMUNICATION COMMISSION

/s/ Mary Jane Morris
Secretary

Released: December 19, 1956

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,527, 12,752 and 14,685

W. S. BUTTERFIELD THEATRES, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

Nos. 12,528, 12,753 and 14,691

TREBIT CORPORATION,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

No. 14,717

LAKE HURON BROADCASTING CORPORATION,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEALS FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 7 1959
Joseph W. Stewart
CLERK

Vol. II of 2 vols.

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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SUPPLEMENTAL JOINT APPENDIX

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[7095]

FURTHER PROPOSED FINDINGS OF FACT AND CONCLUSIONS

* * * *

[7100]

Proposed Findings

Explanatory Statement

19. As will be noted from the issues specified in the further hearing, the scope of this proceeding covers an inquiry into the differences between WJR's original application and its modification of permit application (MP) in the areas of (1) studio buildings; (2) transmitter site; and (3) programming; and questions going to WJR's good faith in withholding information relating to its changed proposal until after denial of the Trebit-Butterfield petitions for rehearing. In order to avoid duplication and to simplify the findings for the Examiner's convenience, Trebit and Butterfield have agreed to divide these areas and to direct their findings accordingly. Therefore, Trebit is submitting findings only on (1) studio building and (2) transmitter site, and adopts and by reference incorporates herein the findings of Butterfield on the questions of programming and WJR's good faith.

STUDIO BUILDING

20. WJR Hearing Proposal. When it originally filed its application for Flint, WJR specified a Flint studio at a specific street address.

[7100]

In its November 17, 1952 amendment, WJR omitted the specific address for its proposed Flint studio and showed it as "site to be determined".[3] In its revised cost estimates submitted with the November 17, 1952 amendment, WJR proposed that $776,000 would be spent for construction of said studios. In the hearing, WJR submitted architectural drawings and plans and artistic conceptions of its Flint studios, depicting the lavish scale of said proposal.

---

[3] WJR did not originally propose a Detroit studio. After its application had been changed to propose DuMont instead of CBS network programming, WJR in its amendment of November 17, 1952 specified a Detroit studio.

* * * * * * *

[7102]

24. In its exceptions to the Initial Decision, WJR objected to the adequacy of the Examiner's findings at paragraphs 23-25 (ID) relying on its own findings (see page 6, WJR exceptions). Again, at the oral argument, WJR adverted to the superiority of its studio proposal because it was the only applicant proposing to build "a new main studio building designed especially for television" (Tr. OA 13-14).

25. The Commission, in its Final Decision, adopted WJR's claim of superiority and gave WJR one of its most significant preferences for its proposed "elaborate", "new" and "specially designed for television" main studio building (see paragraphs 22-24, findings, and paragraphs 10 and 35, conclusions, FD and 9 RR 227, 237, 238, 260e, 260o).

WJR's Abandonment of Its Studio Proposal.[6]

26. The Commission's Final Decision was handed down on May 14, 1954. The evidence adduced at the further hearing establishes conclusively that, prior to said Final Decision, WJR had discarded its proposed new Flint studio upon which it was awarded a significant preference over Trebit and Butterfield in the original hearing. Mr. Kramer was approached by Mr. Allen Campbell of UHF Station WTAC-TV some-

time prior to April 30, 1957 with the proposition that WJR take over said studios for its Flint operation (FR 937).[7] Mr. Kramer testified that, after Mr. Campbell's offer was made to him, he related the facts concerning the availability of WTAC-TV's studios to his associates, including Mr. Patt, WJR's President, and that after the initial approach by Mr. Campbell, WJR never gave further consideration to building the studios it proposed in the comparative hearing (FR 990-96, 1039).

6/ It is realized that these findings may duplicate to some extent the findings directed to WJR's good faith. However, they are necessary here to put into proper perspective the makeweight nature of all of WJR's proposals for Flint studios and the callous disregard of the principals of WJR for frankness and honesty in dealing with the Commission and its adversaries. Moreover, this description of events fixes the studio abandonment as having taken place even before the Commission issued its Final Decision and establishes beyond peradventure the duplicity of WJR's principals.

7/ The transcript of record of the further hearing will be cited throughout as "FR".

Although he could not fix the date on which he advised Mr. Patt of Mr. Campbell's overture re the WTAC-TV studios, Mr. Kramer testified that he told Mr. Patt about the proposition the next time he was on the phone with Mr. Patt (FR 988-89). Mr. Patt testified that he and Mr. Kramer are in touch with each other by phone about every day (FR 1414). Mr. Patt was certain that Mr. Kramer told him of the WTAC-TV studio availability prior to the May 14, 1954 decision (FR 1414-15). Mr. Patt inspected the WTAC-TV studios on May 19, 1954 (FR 1415). At a meeting of WJR's Board of Directors on May 20, 1954, the proposition was formally made a matter of WJR's corporate minutes (See WJR Exhibit 92, FR 989-91). The transaction involved taking over the building and certain studio equipment formerly used by WTAC-TV. According to the testimony, WJR did not know until later that the owner of the real estate (studio building) was a Mr. Pemberton. The building itself was under lease to Mr. Campbell's group and the studio equipment was being purchased from RCA by WTAC-TV

(Mr. Campbell, *et al*) on the installment plan (Tr. 991-95). Thus, although the lease for said studio building was not signed until July 30, 1954, it appears clear that most, if not all, of the discussions were with Mr. Campbell and that the delay in WJR formally taking over the building was because of negotiations with Mr. Campbell for the used WTAC-TV studio gear (FR 990-93, 1416-17, WJR Exhibits 92, 95). That the WTAC-TV studio building acquisition was a *fait accompli* before July 30 is borne out by paragraph 7 of Mr. Kramer's letter of June 24, 1954 (Butterfield Exhibit G, page 34) and the WJR policy memorandum of July 10, 1954, indicating that WJR had arrived at decisions which would effect a saving of a million dollars, obviously referring in part to the saving which would be achieved by not building the $776,000 studios as proposed in the hearing (see page 6, WJR Exhibit 97, FR 995, 1244-51).

28. On June 11, 1954, Butterfield filed its petition for rehearing and on June 14, Trebit filed its petition. One of the major assignments of error advanced by both was the Commission's preference for WJR because of its adoption of WJR's claim of superiority for its elaborate new Flint studio building (see Part X, Butterfield's petition, page 38, and Part III, Trebit's petition, page 30). On June 21, 1954, WJR filed oppositions to said petitions. Despite the fact that WJR had long before abandoned its proposal for said studios, it defended the preference the Commission had awarded it and kept secret the fact that it was no longer "the sole applicant proposing to build new studios specially designed for television" (see WJR opposition to petitions for rehearing, paragraph 10, page 4 and paragraph 20, page 12).[8] This deception cannot be excused as an oversight. WJR's principal, Mr. Patt, was completely aware of the deception. He testified that he read all of the pleadings filed in this case within a few days after they were filed (FR 1239-40). Thus, he had knowledge of Butterfield's, Trebit's and WJR's positions. Yet he testified that he never considered

telling the Commission about WJR's change in plans and, indeed, did not officially advise the Commission that WJR did not propose to erect a new $776,000 studio until the MP application was filed in December, 1954 (FR 1458-59).[9/]

WJR's MP and Hearing Studio Proposals

29. The WJR MP application describes its changed studio proposals as follows (Exhibit F-1, MP):

> "As shown in Exhibit 21 of Docket No. 10268, applicant proposed to construct a studio building at an average estimate of $766,821 and a transmitter building at an average $179,974. There has been no change in applicant's plans with respect to its transmitter building except as to location as appears in the engineering portion of this application, but plans with respect to the studio building have changed in the following particulars:
>
> "In an effort to expedite commencement of operation of station WJRT, the studios of station WTAC-TV were leased and the equipment purchased as stated above. These studios are modern in every respect, having been constructed in late 1953. Station WTAC-TV has since surrendered its construction permit. Applicant also has an option to purchase the studio building for $125,000. It is now engaged in installing additional equipment to provide the flexibility contemplated in its original plans and will expand the studios as needed to provide the locally originated program service proposed."

In Section III of the MP, WJR showed a total cost estimate of $1,139, 271.85 as compared with its original proposal which totaled $1,852,000 (See May 14, 1954 decision). This portion of the application under the estimates for

---

8/ It is also interesting to note on page 12 WJR's comment concerning the demise of WTAC-TV on April 30, 1954 and the language "the Commission may take judicial notice of these facts and that they do not affect, in any way, any of the conclusions reached by the Commission" (emphasis supplied).

9/ WJR stated in its 701 application that it proposed to use the old WTAC-TV studios, but gave no indication that it had abandoned its plan to erect the new elaborate $776,000 studio (WJR Exhibit 100).

[7112]

TRANSMITTER SITE

* * * *

[7120]

WJR's Site-Network Acrobatics

60. Testimony adduced at the further hearing establishes that WJR specified a CBS affiliation in its 1952 original application on the supposition that since WJR was an AM affiliate in Detroit and would continue in television to serve that city with Flint's Channel 12, it would be able to secure such affiliation (FR 1006-09). WJR has been an affiliate of CBS since 1935 (FR 1006). The WJR witness, Mr. Kramer, assumes that there was a clause in the WJR-CBS AM network contract which gave WJR the right to affiliate with CBS in television. Mr. Kramer discussed in a casual way an affiliation with CBS at the NARTB convention in 1952 in conversations with Mr. Akerberg (FR 1007). There was no further contact by Mr. Kramer with CBS as to such affiliation, but he was not sure that Mr. Patt had not talked to CBS (FR 1008). At the time an affiliation arrangement was discussed with CBS, WJR had not selected its Waterford Hill site and claims it did not consider seriously the CBS affiliation, even after selection of this site. After filing its application in July, 1952, WJR claims it was still not sure of its intention to operate with CBS. In the intervening period between the filing of the application and the October, 1952 amendment, WJR claims it was studying the situation and finally decided that CBS would not affiliate from a WJR site on Waterford Hill (FR 1010).[26/] WJR arrived at its decision sometime before October, 1952 and decided that from Waterford Hill, it would propose an exclusive affiliation with DuMont and that said affiliation would provide a hearing

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[26/] This is another classic example of WJR's lack of reliability-- even when it filed this application with the Commission representing its firm proposals and plans for television service, it had its own reservations as to whether it would carry out these representations.

advantage which WJR has characterized as a "new and distinctive service" (FR 1010). This was one of the theories of its case and it believed it would be entitled to a substantial preference over its competitors because DuMont was specified (FR 1011).

61. WJR gave little or no consideration to the program fare being offered by DuMont or its status as a network after it made its hearing representations (FR 1267-68). Mr. Kramer, WJR's principal witness on the subject (and who speaks for Patt, WJR's other principal) testified WJR first learned of what it characterizes as DuMont's "failure" as a network at the NARTB convention during the week of May 23, 1954. He met with DuMont's Lyford at the convention and casually discussed DuMont's plans for future programming. Lyford told him of the difficulty the network was having in obtaining affiliations (FR 204). Kramer at that time told Lyford that he and Patt would visit the network offices at a later date (FR 205). Kramer claims he also learned through convention corridor gossip of rumors that DuMont was in a bad way--rumors that it might possibly merge with another network or sell out (FR 207). Kramer claims these rumors were disturbing and that, shortly after his return from the convention, on June 1, 1954, he met with the WJR management group to report these rumors concerning DuMont (FR 207-09). It is claimed that the management evaluated these rumors, but nonetheless, decided to proceed with construction activities and plan to affiliate with DuMont (FR 209). Thereafter, WJR claims it undertook certain activities at the Clarkston site, such as ordering certain items of equipment, surveying of property lines, making elevation studies, consulting with the RCA representative re equipment, making soil test borings, erecting a sign, grading and building a roadway, constructing a field shed and setting tower foundations. No actual construction of the authorized transmitter facilities was ever undertaken at Clarkston (FR 290-97).

62. Meanwhile, Patt and Kramer met with Lyford in New York on

June 8, 1954. Kramer claims that the parties discussed DuMont programming and learned that CKLW, Windsor, Canada was anxious to affiliate with DuMont (FR 211-14). WJR claims that no conclusions as to an affiliation were

reached at this meeting (FR 214). On June 16, 1954, there was a meeting of the WJR Board. The minutes show there was an extended discussion relative to the May 14 decision. According to these minutes, WJR's counsel:

> " . . . have expressed the belief that by reason of the nature of the original issue before the Commission and the grounds upon which the Commission's initial decision has been planted, there is a sound practicality that the grant will not be disturbed upon reconsideration and/or appeal. Both firms stated, however, that the possibility of reversal exists and that they can give no positive assurance that the grant will be affirmed."

The minutes show WJR decided to proceed with the purchase of WTAC-TV's old equipment and to formalize the arrangement for leasing the WTAC-TV studios. Singularly, these minutes do not reflect other matters, such as the DuMont network status, the discussions with Lyford and other pertinent facts, such as the contemplated site changes, decision to formally pursue the network problem with other networks, etc. --as shown below--all of which by WJR's own admission were vital to its TV operations (WJR Exhibit 95).

63. Approximately one week after the Board meeting, Patt and Kramer met with an advertising agency to have a brochure prepared for a New York presentation to CBS (FR 239-40). This project, according to the minutes, was not authorized at the June 16 Board meeting. Kramer at this point testified that WJR wanted to sell CBS or NBC as a supplementary affiliate (FR 240, 248). The brochures were presented to CBS on July 7 and 8, 1954 (FR 241). NBC and ABC were called on during this same period (FR 248). DuMont was also visited on July 8, 1954, but the brochure was not shown to that network. Kramer's

testimony is that the July 7, 1954 issue of VARIETY had, according to his interpretation of same, reported that the DuMont network was in bad shape for its fall offerings (FR 278, 287).[27] He claims he got a bad reaction to DuMont from reading the article (FR 280). He claims it confirmed the feeling he had had "for some time that DuMont was slipping rather than growing" (FR 283). At the July 8 meeting with Lyford, Kramer claims he and Patt told Lyford that WJR was disturbed by the recent offerings of DuMont, and that perhaps "construction" would be halted to take another look at the "overall picture" (FR 293, 295). Lyford told them that CKLW was pressing for an answer to its request for affiliation, but DuMont would prefer to affiliate with WJR, if WJR could meet its projected September starting date (FR 295). After their meeting with DuMont on July 8, 1954, Patt and Kramer discussed the situation and decided to stop activity at Clarkston (FR 296). Patt thereupon by phone called WJR's Chief Engineer and gave the order to start the search for a new site which would conform with the desires of CBS (FR 1019-23). Kramer claims that he and Patt in their consultations after meeting with the networks suddenly became apprehensive of a reversal of the decision because of the Citizen's Committee petition (FR 312, 314). The reasoning and logic of Kramer's testimony at this point becomes confused. He claims he and Patt had confidence that WJR's grant would be upheld insofar as the Trebit and Butterfield petitions were concerned (FR 312), but he sought to give the impression that they were concerned with the petition filed by the Citizens Committee. This testimony cannot be squared with the advice of counsel or the formal resolution of the WJR Board at its June 16, 1954 meeting participated in by Patt and Kramer (WJR Exhibit 95).

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[27] By no stretch of the imagination could the VARIETY story be construed as an indication of DuMont's demise as a network as claimed by Kramer. Moreover, reference to Butterfield findings as to DuMont's network billings, which Kramer did not bother to investigate, will show that DuMont was healthier than ever at this time.

The reason is apparent in light of the facts of this record--Patt and Kramer really did not worry about any of the pending petitions upsetting the decision at the FCC. Their concern, if any, stemmed from the ire demonstrated by the Flint group which had served notice that the City of Flint would not support WJR if it operated from Clarkston. Moreover, in view of the answer received by Patt and Kramer the previous day from CBS, i.e., that it would not give WJR an affiliation at Clarkston, it is obvious Patt and Kramer seized on the excuse of the Citizens Committee petition as a way to stall DuMont and a reason to give the Commission in its planned MP application.

[7124]

It will also become apparent from our findings below and the Butterfield findings that, if the Citizens Committee petition ever did enter into the minds of Patt-Kramer, it was not for the reasons stated in the hearing, but to lend support to WJR's site change which could be turned to advantage in winning over the Citizens Committee. This is clear from the penultimate paragraph of Butterfield Exhibit G, pages 41-42. It is made even clearer from the Kramer-Patt policy recommendation to change site--see recommendation 2 (page 6, WJR Exhibit 97).

64. Kramer returned to Detroit and on July 9, 1954 gave the order to stop activities at Clarkston (FR 286). The next day, July 10, 1954, at the request of Patt, who concurs in all respects therewith (see paragraph 28 above, findings), Kramer prepared a memorandum setting out the details of the Patt-Kramer negotiations with CBS and NBC and their joint recommendations as to a future course of action with respect to obtaining an affiliation with a major network (WJR Exhibit 97). No mention is made in this paper as to talks with ABC and DuMont. The sense of this memorandum is that WJR confirmed what it had already represented in the hearing, i.e., that, operating from Clarkston, it could not get an affiliation with any network already affiliated with a Detroit station. The conclusion reached by Patt and Kramer was that WJR's site must

be changed so as to get an affiliation with a network other than DuMont. Since WJR had already discarded its hearing proposal as to studios, the July 10 recommendations formalized the abandonment of WJR's hearing proposals regarding its site and network. Thus, with a saving of $776, 000 on studios already accomplished, an affiliation with CBS instead of DuMont looked inviting to Kramer and Patt as a way to bankroll WJR into greener pastures. That this decision was prompted by selfish desires rather than any consideration of the Commission or the public is not in doubt. According to Mr. Kramer's recommendation 3 (see page 6, WJR Exhibit 97):

> "3. Because of the assurance of profitable operation from the start, it will be unnecessary to maintain large reserves to cover apparently probable losses during the

> first two or three years of a relatively independent type operation. We, roughly then, will be spending a million dollars instead of the two million allocated to get WJR off the ground and into black ink, thus permitting this company to use the second million to acquire additional television and/or radio properties."

This memorandum is also significant to again demonstrate WJR's lack of concern for the Commission's processes and reflects its own high-handed approach to this case. It will be noted that the Commission's Final Decision of May 14, 1954 gives WJR its most significant preference over Trebit because WJR allegedly came closer to complying with the Commission's policy on diversification and concentration of control of mass media because WJR had less broadcast and television interests than Trebit. The decision also equates WJR with Butterfield on the same score. Thus, on July 10, 1954, before this proceeding had been concluded, Messrs. Kramer and Patt, WJR's principals, decided to wipe out this alleged superiority with monies gained from its broken promises to the Commission. Moreover, despite the fact that WJR is planning to expand its holdings, it has been arguing at every turn that the real basis for winning over Trebit and Butterfield is its superiority as to diversity (see

WJR reply to December 28, 1954 joint petition and its December 9, 1955 Court reply brief, pages 13-16).

65. The record contains certain other facts as to events subsequent to the July 9 and 10, 1954 actions, which WJR claims support its position. But we do not believe they are significant since all of them postdate the foregoing facts which establish the formal defection of WJR's proposal on which it was heard comparatively with Trebit and Butterfield. The facts relating to the July 13-16 network meetings are meaningless since it is clear that the purpose was to interest CBS in a new site at Davison, Michigan--the Clarkston site was never thereafter considered by WJR-CBS (see Butterfield Exhibit G, pp. 44-52; FR 320-29, 1072; see also p. 18, Patt Interrogatories). Nor is WJR's shocking refusal to do business with DuMont, when that network was desperate to affiliate, of great moment (FR 329-44). And, except for the adverse reflection on the character of Messrs. Patt and [7126] Kramer, it is meaningless here to cite their bald misrepresentation to DuMont's Lyford as evidenced in WJR Exhibit 98 (FR 329-44, 350-55). Similarly, the various incidents regarding WJR's search for a site area suitable to CBS (found on September 8, 1954) are not important (FR 365, 368).[28] These facts which are more properly related to WJR's lack of good faith in dealing with the Commission as to site, network, etc. changes are well chronicled in Butterfield's findings.

66. The foregoing, we submit, is a fair evaluation of the record facts submitted by WJR in support of its case. Even if accepted at face value, there is no question but that WJR by July 10, 1954 formally abandoned its original proposal as to site-network and had executed an about-face on the theory of its case on which it was heard comparatively with Trebit and Butterfield. There remains, however, certain other testimony and evidence of record which demonstrates that the WJR version is a tissue of half-truths and inaccuracies--calculated or otherwise--and that in point of time and fact it discarded its hearing proposal either

before the May 14 Final Decision or simultaneously therewith--if indeed it ever intended to honor said hearing proposals. In the main, these facts are contained in evidence produced by demand of Butterfield and Trebit. They are not part of WJR's direct presentation. Some of these are:

(1) The Kramer letter of May 17, 1954 establishing that WJR contemplated a change in network affiliation concurrently with or before the May 14, 1954 decision (Butterfield Exhibit G, pages 5-6). The Commission's Final Decision was released in the afternoon (3:00 p.m. releases) of Friday, May 14, 1954. According to this letter, Kramer called his counsel the following Monday morning to discuss a change in the hearing commitment.

28/ WJR seeks to establish that the date of abandonment of Clarkston coincides with the September 8, 1954 meeting with CBS at which time the network approved the Chesaning site (FR 365). But other facts developed in the further hearing, as set forth below, show that WJR contemplated moving from Clarkston immediately upon learning of a favorable decision on May 14, 1954.

to affiliate with DuMont. This incident took place a week before the NARTB convention. Kramer testified that he was satisfied with DuMont as of May 14, 1954, but suffered his first "qualms" about the DuMont affiliation at the NARTB convention (FR 1065).

(2) The letter of June 9, 1954 establishing that WJR's Patt was preparing to change site and proposed to file an MP for approval of same (Butterfield Exhibit C). This letter from WJR's counsel reflects his concern over Patt's "proposal to move your Flint TV transmitter site" as related by Patt in a telephone conversation on June 9, 1954, the day after the Patt-Kramer meeting with DuMont, which meeting as this record shows, was a sham and for record purposes only.

(3) The July 9, 1954 letter from counsel to Patt indicates that Patt called counsel on that day or the day before to report the decision to discard the Clarkston site (Butterfield Exhibit G, pages 41-42). This incident occurred at the same time that the networks turned down the WJR bid for an affiliation at the Clarkston site. The active concealment by WJR as to its change of transmitter site and network affiliation, as well as the reasons therefor, i.e., its decision, allegedly based on advice of counsel not to disclose the site-network change for fear of influencing the outcome of the Commission's decision on the pending petitions for rehearing, stems from this letter--notwithstanding other conversations revealed in this record.

(4) The direct testimony of Kramer as regards negotiations with the network is suspect. He testified that the July 8-9, 1954 discussions were for the purpose of obtaining a "supplementary" affiliation (FR 240, 248).

[7128]

His June 24, 1954 letter (Butterfield Exhibit G, page 34) show it was a bid for a primary affiliation. In his testimony on cross-examination, he corrected his earlier statements and finally admitted that WJR had sought a "basic-must buy" affiliation (FR 1013-14).

(5) Similarly, Kramer's direct testimony as to the several meetings with DuMont do not bear up under inspection. We have already shown above the facts related by Mr. Kramer in direct examination. On cross-examination, he admitted that WJR could have obtained an affiliation with DuMont if it had desired to do so (FR 1016) and that the pending petitions for rehearing did not of themselves cause the cessation of activities at Clarkston (FR 1017; see Lyford's letter giving this as WJR's reasons--WJR Exhibit 97). He also admitted that the petitions for rehearing did

not prevent WJR from going ahead with construction at Clarkston (FR 1017; see WJR 701, and MP).

67. When the above facts, plus the findings made by Butterfield (incorporated herein), are examined side by side with WJR's representations in the original hearing, there is no question but that WJR has grossly abused the Commission's processes and has acted in callous disregard of its responsibility as a licensee. It is evident:

(a) That WJR sought to use a Flint channel to serve Detroit by its original selection of a site (Waterford Hill) which was favorable to Detroit rather than to Flint, by its reluctance to change this site so as to move away from Detroit, and by its "area wide" theory of service, as well as all of its other hearing proposals (the DuMont affiliation included) which gave Detroit every break at the expense of Flint;

[7129]

(b) That WJR believed, because of its position as one of the most potent AM affiliates of CBS, it could after securing a grant wrest the Detroit affiliation from WJBK-TV, for with its powerful clear channel AM station, plus its proposed "area wide" TV service, it had more to offer CBS.[29/] WJR's revealed intention to change its proposed network affiliation before or concurrently with the Final Decision and its almost immediate bid to CBS for a primary affiliation makes this abundantly clear; (see also Patt testimony, FR 1282-83).

(c) That WJR never had any intention of affiliating with DuMont, but proposed such affiliation as a cover-up for its real intentions and to secure an advantage over its competitors in the original hearing;

(d) That WJR's fiction of good faith which it has attempted to preserve since the Final Decision, even to the point of misrepresentation to the Commission and the Court, has now been exploded.

WJR's concocted story of the events which led to its change of site from Clarkston to Chesaning and its switch to CBS was advanced by WJR right up to the middle of the instant hearing. Its protestations of good faith were disintegrated by such developments as the production of correspondence which reveal that its story is a hoax.[30]

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[29] The Commission records will show that during the original hearing, WJBK operated with Class IV facilities. It did not finally construct its new facilities (1500 kc, 1 kw night, 10 kw day) until November, 1956. Moreover, one must bear in mind that in all other respects, Storer Broadcasting Company in 1952-53 was not the giant of the TV industry it is today.

[30] One has only to compare the testimony and other evidence in the further hearing with Exhibit 72 of the rejected "direct case" which WJR sought to introduce at the commencement of this hearing to ascertain the fact that WJR has been less than candid in its version of the case, even in this further hearing.

[7291]

PETITION FOR REHEARING

Come now Trebit Corporation and W. S. Butterfield Threatres, Inc., by their attorneys, and submit this petition for rehearing directed against the decision in the above-entitled proceeding adopted July 9, 1958 and released July 11, 1958.

STATEMENT OF POINTS[1]

Point 1. WJR abandoned its application which was heard comparatively with those of petitioners. Since it neither did nor can amend its application in the manner presumably intended here, it is in default. Failure to dismiss the WJR application as in default is gross error prejudicial to the rights of petitioners.

Point 2. The Commission's decision of July 9, 1958 fails to accord petitioners the comparative consideration which is mandatory under the Communications Act and the decisions construing that act.

1/ In its decision of July 9, 1958 (released July 11, 1958), the Commission has committed numerous errors prejudicial to petitioners' rights which, on appeal, would warrant reversal. Such deficiencies, including the Commission's rulings on exceptions to the initial decision, are not waived but specifically reserved. There are, however, major aspects of the case and newmatters which petitioners believe should be presented for consideration now and which require the grant of the relief prayed for herein.

[7292]

Point 3. The record in this proceeding must be reopened to consider post-hearing evidence which raises the question of whether or not WJR can or will carry out the essential program plan which represents the cornerstone of the so-called WJR modification application.

ARGUMENT

Point 1

1. The Commission (see paragraph 29 of the conclusions of the decision) affirmed the grant of the original application of WJR, "as modified by application File No. BMPCT-2689." Thus, after a comparative hearing and an original decision thereon, the Commission permitted WJR to amend its application by the substitution of entirely new and different proposals. The Commission (see paragraph 23 of the conclusions of the decision) summarily, arbitrarily and unlawfully rejected the contentions of petitioners (1) that WJR had abandoned its original proposals, and (2) that to consider the modification of permit application as an amendment to the original application deprived petitioners of their rights in the premises.

2. At all times during the pendency of this proceeding, the Commission has had rules which provide for (1) a cut-off beyond which new proposals are not entitled to comparative consideration with previously filed applications, and (2) a procedure to be followed in amending applications.2/ The facts of this case are clear. WJR could not or would not effectuate its original proposals in such vital areas a programming,

studios, transmitter location and populations as areas to be served. It abandoned its original proposals when, after hearing and decision, it sought to amend by substituting new proposals set forth in the above-numbered modification of permit application.

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[2] Formerly Sections 1.387(b)(3), 1.724(b) and 1.365(a), now Sections 1.106, 1.140 and 1.311.

3. Such amendments could not lawfully have been accepted by the Commission. Petitioners were entitled to the protection of the rules of the Commission designed for the very purpose of preventing one applicant from securing improper advantage over others in a comparative proceeding. Thus, since WJR abandoned its original proposals, it is without a valid application entitled to further comparative consideration with petitioners. By failing to recognize these cardinal truths, the Commission has committed error which is patently prejudicial to petitioners. Huntington Broadcasting Co., 5 RR 342 and 721 (1949); Kansas City Broadcasting Co., 5 RR 1057, 1089-1092 (1950); cf. Westinghouse Radio Stations, Inc., 9 RR 323, 345 (1953), 10 RR 878, 883-886 (1955).

Point 2

4. If there is anything certain about this case, it is that it has not lost its comparative character and that petitioners are entitled to full rights as competing applicants. W. S. Butterfield Theatres, et al. v. FCC, 237 F. 2d 552 (1956). In its remand the Court directed a further hearing, inter alia, on the good faith and moral qualifications of WJR. Although evidence on this subject was taken the decision here complained of is utterly devoid of a comparative finding or conclusion on such issue.[3] It is not without significance that this issue which was present also in the protest case[4] (involving no comparative question) was treated alike in the decisions in both

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[3] The Commission improperly credited WJR with an excellent past record, assertedly offsetting any deficiencies in character qualifications

and reliability. The parties stipulated that no showing as to past records would be made and the showing apparently relied upon by the Commission does not support the conclusion reached.

[4] Docket No. 11,412.

cases. Thus, the decision violates petitioners' rights. Moreover, since the Commission has admittedly compared WJR's application as unlawfully amended with the original applications of petitioners which were clearly beyond the privilege of amendment, this hearing has lost its true comparative status contrary to law. Ashbacker Radio Corp. v. FCC, 326 U. S. 327 (1945); Johnston Broadcasting Co. v. FCC, 175 F. 2d 351 (1949); Plains Radio Broadcasting Co. v. FCC, 175 F. 2d 359 (1949); Saginaw Broadcasting Co. v. FCC, 96 F. 2d 554, cert. denied sub. nom. Gross v. Saginaw Broadcasting Co., 305 U.S. 613 (1938); Morgan v. United States, 304 U.S. 1, 20, rehearing denied, 304 U. S. 23 (1938).

Point 3

5. In its remand the Court directed the Commission to consider inter alia the significant changes in the WJR proposal relating to transmitter site and programming. The record of the further hearing establishes that WJR changed its transmitter site from Clarkston to Chesaning because of WJR's inability to effectuate its programs as originally proposed and in order to accommodate CBS. Moreover, the record of the further hearing establishes that all of WJR's present program proposals are premised on WJR's operation as a CBS network affiliate. The Commission's Final Decision of July 9, 1958 makes elaborate findings on both points and concludes that WJR has not worsened its position by changing from its originally proposed affiliation with DuMont to an affiliation with CBS.

6. Information has now come to petitioners[5] that a CBS affiliation is no longer available to WJR, which information, if correct, raises the question as to whether, without further hearing, the Commission's July

9, 1958 decision satisfies the Court's mandate. Moreover, this development raises again serious

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5/ See attached affidavit of Mr. Lindow, an officer of Trebit Corporation.

questions as to whether WJR has been remiss in not bringing these matters to the attention of the Commission in advance of its Final Decision.

7. The Commission's Final Decision after further hearing was publicly announced on July 9, 1958. The next day, July 10, 1958, there appeared in the "Flint Journal" a news story concerning the grant (see photocopy attached). In this article, WJR announced that WJRT's affiliation contract with CBS had expired and Mr. Patt is quoted as stating that a network affiliation will be negotiated upon formal notification of the grant of its application by the Commission. Although cryptically worded, the newspaper statement attributable to Mr. Patt confirms certain information regarding a reshuffling of Michigan affiliates by CBS, which has been reported in the industry for several months. In any case, it is the first factual information available to petitioners concerning any change in WJR's proposed affiliation with CBS.

8. Commencing about the first of the year, 1958, it was reported in the industry that CBS was taking steps to achieve a realignment of its Michigan affiliates and that WJRT had no place in these plans as a CBS affiliate. According to said reports, WKNX, Saginaw, Michigan, an intervenor in the further hearing, has been definitely assured that it will continue as a CBS affiliate to serve the area north of Flint. In an advertisement in the April 28, 1958 issue of BROADCASTING, Station WJIM-TV, Lansing, Michigan, which provides a signal to Flint and maintains studios in Flint, announced its primary affiliation as a basic outlet for the CBS network. It is understood that effective October 1, 1958, WJIM-TV will be a "must buy" CBS affiliate. It is asserted on information and belief that in light of the foregoing CBS network moves, as well as other changes in the Michigan CBS outlets, WJRT cannot obtain an affiliation

with CBS. It is also asserted on information and belief that WJRT has for some time been aware of these facts which have not, to petitioners' knowledge, been reported to the Commission. If such filings have been made they have not been served on petitioners.

9. Petitioners have no knowledge as to whether WJRT proposes to affiliate with some network other than CBS or whether it will operate as an independent station. The record of the further hearing contains no WJR proposal to operate independently or with any network affiliation other than CBS. One has only to review in cursory fashion the Commission's decision of July 9, 1958 (paragraphs 25 to 38) to assess the multiple changes made by WJR in its proposed programming when it changed from DuMont to CBS to establish that said changes were radical and required a re-juggling of its entire program proposal. Whatever WJRT's plans might be to operate either with some other network or to operate independently, it is obvious that the programs it proposed in the further hearing and which form the basis of the Commission's Final Decision cannot be carried out as proposed by WJR.

10. We respectfully submit any change in WJR's proposed network affiliation plans is of vital significance under any interpretation of the judgement of the Court of Appeals. As the Court held in the Plains case (175 F. 2d 359, 362-63):[6/]

> "We are not told by any findings what type of program Lubbock proposes, absent the Mutual network affiliation. Moreover, this is a comparative consideration, and the question is not whether the applicant will present a well-rounded program but whether its proposals will better serve the public interest than will those of another applicant. How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known? Perhaps a mere finding that an applicant will present a well-rounded program would suffice, if the decision related merely to the bare qualifications of an applicant for a license. But that is not the inquiry here. The Commission is making a comparison, and it says, correctly, that the comparison of the program proposals is an important criterion in that determination. Then, we think, it must make findings upon what the program proposals are.

6/ Also relied upon by the Court in this case.

[7297]

And it must receive evidence upon which to base those findings."

Prayer for Relief

WHEREFORE, the premises considered, it is requested (1) that the decision to which this petition is directed be vacated and set aside; (2) that the WJR application be dismissed forthwith as in default; and (3) in the event the Commission fails to dismiss the WJR application forthwith as herein requested, that (a) this proceeding be re-established as a comparative proceeding and conducted and dealt with according to law and regulations of the Commission and in the manner outlined herein, and (b) the record be reopened to take evidence of the unavailability to WJR of the Columbia Broadcasting System programs.

Request for Oral Argument

Oral argument on this petition is hereby requested.

Respectfully submitted,
TREBIT CORPORATION

By /s/ William J. Dempsey

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/s/ Lester Cohen

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July 25, 1958

[7298]

The following is an excerpt from THE FLINT JOURNAL dated Thursday, July 10, 1958:

Four-Year Wrangle Ends

CHANNEL 12 GRANT FINAL; MAY BE ON AIR IN AUTUMN

Channel 12 (WJRT) may be on the air in Flint within three or four months, John P. Patt, president of WJR, The Goodwill Station, Inc., said today.

With the original grant of the channel to WJR affirmed Wednesday, Patt said construction of the television station here and its transmitter near Chesaning will be resumed at once.

The Federal Communications Commission reaffirmed its grant of May 12, 1954, and denied for a second time competing applications of the Trebit Corp. (WFDF) and W. S. Butterfield Theaters, Inc.

The Commission also affirmed and made immediately effective an authority granted to WJR in April, 1955, to change the transmitter site from Clarkston -- as originally proposed -- to the Chesaning area.

The new channel will serve Bay City, Saginaw, Flint, the Thumb and the area west to Lansing. There may be fringe reception south to St. Clair Shores and Northern Detroit.

Patt said the station will complete alterations and additions to its studio building at 2302 Lapeer St. and will erect a new microwave tower to beam programs to the transmitter, which will be about 23 miles northwest of Flint. Construction will be directed by C. W. Jones, chief engineer.

A. Donovan Faust, operations manager for WJRT, will resume his duties soon, Patt said. Faust has been on loan from WJRT as director of the Flint Citizens Golden Milestone Committee.

Faust said plans for the final observances of General Motors 50th anniversary will be near completion by the time he returns to WJRT. After he returns, he said, he will continue to work with the Golden Milestone Committee until the end of the civic celebration of GM's anniversary.

The program director for WJRT will be Franklin Mitchell, who will come from WANE-TV in Fort Wayne, Ind. Mitchell held a similar post at WJR in Detroit for several years before going to Fort Wayne.

During the long litigation over the Channel grant, WJRT's tentative contract with CBS expired. Patt said network-affiliation plans will be negotiated upon formal notification of the channel grant by the FCC.

During the last four years, WJRT has maintained a nucleus staff at the Flint studios planning channel programming and public-service activities.

The Flint case dates to July, 1952, when WJR, Trebit and Butterfield put in bids for the channel. When WJR won, the other companies took the case to the U. S. Court of Appeals in Washington. When WJR applied for permission to change the site of the transmitter, Lake Huron Broadcasting Co., which operates WKNX-TV (Channel 57) in Saginaw; the Inland Broadcasting Co., which operated the now-defunct WTOM-TV (Channel 54) in Lansing, and the Spartan Broadcasting Co., which has WWTV (Channel 13) in Cadillac, intervened in the case.

WJRT is leasing a studio which was built in 1953 for WATC-TV, an ultrahigh-frequency outlet which no longer exists. The transmitter will be built on a 160-acre tract at Burt and Gasper Rds 4-1/2 miles east of Chesaning.

[7301]

[Received, FCC, July 25, 1958]

MOTION FOR STAY

Come now Trebit Corporation and W. S. Butterfield Theatres, Inc., applicants in the above-entitled proceeding and respectfully request that the Commission forthwith stay its action of July 9, 1958 in the above-entitled proceeding. In support whereof, it is shown:

1. The Commission in a decision adopted July 9th, 1958 (released July 11th), ordered "that the grant of the application of WJR, The Goodwill Station, Inc., by our Decision of May 12, 1954 (released May 14, 1954), as modified by application file No. BMPCT-2689, IS AFFIRMED".

2. By Petition for Rehearing filed concurrently herewith, and by this reference incorporated herein, it is shown that WJR will not and cannot program WJRT, if and when constructed, in the manner proposed in the further hearing herein and relied upon by the Commission in its above-referred to grant to WJR.

3. Construction, under a permit obtained in a comparative proceeding on the basis of a particular program proposal, not for the purpose of effectuating the proposal upon which the grant was based but for the purpose of providing a substantially different program service never submitted for Commission consideration or comparative valuation constitutes a flagrant violation of law.

[7302]

WHEREFORE, it is respectfully requested that the Commission's July 9th grant be stayed pending further hearing on newly discovered evidence that WJR cannot and will not operate its proposed television station in the manner proposed in the proceeding upon which the grant is based.

Request for Oral Argument

Oral argument on this motion is hereby requested.

Respectfully submitted, W. S. BUTTERFIELD THEATRES, Inc.

* * *

July 25, 1958

TREBIT CORPORATION * * *

[7304]

OPPOSITION TO "MOTION FOR STAY" AND "PETITION FOR REHEARING"

[Received, Aug. 1, 1958, FCC]

WJR, The Goodwill Station, Inc. (WJR), by its attorneys and pursuant to the provisions of Section 1.13 of the Commission's Rules and Regulations, hereby files its opposition to the "Motion for Stay" and to the "Petition for Rehearing" filed jointly by Trebit Corporation (Trebit) and W. S. Butterfield Theatres, Inc. (Butterfield) on July 25, 1958. In support thereof, it is stated as follows:

I. Relief Requested

1. The pleadings are directed against the Commission's Decision adopted herein on July 9, 1958 and released July 11, 1958. The July 11, 1958 Decision affirmed the Commission's Decision

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previously adopted herein on May 12, 1954 and released on May 14, 1954. The May 14, 1954 Decision granted the application of WJR to construct and operate a commercial television station on Channel 12 at Flint, Michigan, and denied the mutually-exclusive applications of Trebit and Butterfield for the same facilities.

2. The pleadings request the Commission to take the following actions:

(a) To vacate and set aside the July 11, 1958 Decision.

(b) To dismiss WJR's application "as in default."

(c) To reopen the record "to take evidence of the unavailability to WJR of the Columbia Broadcasting System programs" and re-establish the proceeding "as a comparative proceeding."

(d) To stay the effectiveness of the July 11, 1958 Decision pending the outcome of the above-requested further hearing.

3. Each pleading requested that oral argument be granted.

II. The Request for Oral Argument Must Be Denied

4. It is beyond dispute that Trebit and Butterfield have no right to oral argument on their joint pleadings.

5. The request for oral argument must be denied as no grounds exist and none has been advanced in the pleadings purporting to establish any reason why the Commission should execute its discretion so as to grant oral argument. Oral argument would serve only to delay needlessly a resolution of the questions presented in the pleadings.

III. The Request for a Stay Must Be Denied

6. Rule 1.191(g) provides, in pertinent part, that the filing of petitions for rehearing shall not "operate in any manner to stay or postpone the enforcement" of the decision against which the petition is directed and that a stay will be issued only "upon good cause shown." It is well established that in order to establish the "good cause" necessary for a stay, the Petitioner must (a) allege and establish that he and the public would suffer "irreparable injury" if the stay were not granted, (b) allege and establish that a stay would not be detrimental to the public interest, and (c) demonstrate that there is a reasonable likelihood that he will prevail on the merits. Matheson Radio Co., Inc., 8 FCC 430, 1941; Telegraph Herald, 8 FCC 389, 1941; Scripps Howard v. FCC, 316 U.S. 4, 1942; Texas Star Broadcasting Co., 12 FCC 707, 1948; Scripps Howard Radio, Inc., 4 R.R. 1443, 1949; Voice of Cullman, 6 R.R. 358, 1950; Houston Consolidated Television Co., 11 R.R. 529, 1954; Tri-County Broadcasting Co., 11 R.R. 614 d, 1954; Greylock Broadcasting Co. v. U.S., 97 U.S. App. D.C. 414, 1956 and Coastal Bend Television Company v. FCC, 98 U.S. App. D.C. 251, 1956.

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7. The instant motion for stay must be denied as (1) the motion does not even allege, let alone establish, that Trebit and Butterfield (or the public) will suffer irreparable injury, and (2) granting the stay would cause irreparable injury to the public as WJR is now in the process of constructing and unless prevented by a stay will provide the only local television service to Flint (the second largest city in the state of Michigan) in the fall of 1958.

8. Even if Trebit and Butterfield had established "irreparable injury," the motion for stay would have to be denied as there has been no showing of a reasonable likelihood that the Petitioners will prevail on the merits. For the reasons set forth below the petition for rehearing must be denied in its entirety, including the request for a further hearing. Even if a further hearing were held, there is no likelihood that Trebit or Butterfield would prevail.

IV. No Grounds have Been Advanced to Support the Requests that the July 11, 1958 Decision Be Vacated and Set aside and the WJR Application Be Dismissed

9. The only arguments advanced in support of the requests to (a) vacate and set aside the July 11, 1958 Decision and (b) dismiss the WJR application are those summarized in "Points 1 and 2" of the Petition for Rehearing.

10. "Point 1" argues that WJR "abandoned" its original application and that since WJR did not and could not amend its application,

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it is in "default" and its application must be dismissed. These identical arguments have been advanced several times in the past by Petitioners evidently in the hope that by endless repetition they will somehow gain validity. Each time the arguments have been correctly rejected by the Commission. In this connection reference is made to the Memorandum

Opinion and Order released by the Commission in this proceeding on December 17, 1956 (see also Conclusion 23 of the July 11, 1958 Final Decision). There the Commission clearly spells out the nature of the further hearing and specifically rejects the arguments advanced under "Point 1." The Court of Appeals also rejected the same arguments when on January 14, 1957 it denied a joint petition by Trebit and Butterfield filed December 15, 1956 (supplemented by a reply filed December 24, 1956). Petitioners have advanced nothing new and the "Point 1" arguments must be rejected.

11. "Point 2" advanced by Petitioners is in essence but a restatement of the arguments set forth in "Point 1" and should be rejected for the same reasons. For example, Petitioners argue that "since the Commission has admittedly compared WJR's application as unlawfully amended with the original applications of Petitioners which were clearly beyond the privilege of amendment, this hearing has lost its true comparative status contrary to law." The invalidity of this argument and the false premises contained in it have been explicitly stated in the above-noted Commission Memorandum Opinion and Order released December 17, 1956.

12. Petitioners also argue under "Point 2" that the July 11, 1958 Decision "is utterly devoid of a comparative finding or conclusion" on the issue relating to "whether the time in which WJR filed its modification application reflects adversely upon WJR's character and fitness as a licensee." The allegation is completely without support as a reading of the July 11, 1958 Decision will reveal (Findings 46-80 and Conclusions 16-22 and 28). The Commission considered all of the record evidence relating to this issue and correctly resolved the issue in WJR's favor. The Petitioners fail to demonstrate any error. The fact that a similar issue presented in a separate proceeding (Docket No. 11412) was also resolved in WJR's favor does not demonstrate error, as alleged by

Petitioners, requiring reconsideration or rehearing.

13. Petitioners also allege under "Point 2" that it was improper to credit WJR with an excellent past record. However, Petitioners fail to point out any respect in which the record does not support the findings and conclusions made with respect to WJR's past broadcast record. The Petitioners recklessly and erroneously assert, without bothering to give a record citation, that the parties stipulated that no showing as to past records would be made. The record shows just the contrary. The Examiner specifically asked for a showing

respecting past broadcast records (October 31, 1952, Tr. 54). The record also shows that all of WJR's exhibits respecting its past broadcast record were received without objection (January 30, 1953, Tr. 712-715 and January 28, 1958, Tr. 356-360). In addition, Trebit and Butterfield each asserted that its past record entitled it to a preference (Trebit Proposed Finding 215, and Butterfield Proposed Conclusion 9). * The parties did stipulate that certain matters with respect to WJR and Butterfield "are not relevant to the instant case and that no inquiry will be made into said matters." However, the stipulation went on to state as follows: "It is further stipulated and agreed that the stipulation of the matters set forth in this Stipulation in no way limits the introduction of further or additional evidence by each applicant to support its application herein and to meet the issues specified." (See Part IV of Stipulation accepted February 20, 1953, Tr. 1985.)

14. Accordingly, it is clear that the Commission must deny the requests to (a) vacate and set aside the July 11, 1958 Decision and (b) dismiss the WJR application.

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* Throughout this proceeding WJR has urged that its superior past broadcast record was of decisional significance. For example, see WJR Proposed Findings filed March 30, 1953 (Findings 30-35 and Conclusion 13); WJR Reply Findings filed April 6, 1953 (Par. 15); WJR Exceptions filed June 15, 1953 (Exceptions 73 and 74); WJR Findings filed June 7, 1957 (Conclusions 30 and 40-46, 53 and 58) and WJR Exceptions filed October 22, 1957 (Exception 26).

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V. The Request for a Further Hearing Must Be Denied

15. Although Section 405 of the Communications Act of 1934, as amended, gives the Commission discretionary power to order a further hearing, nothing has been advanced by Petitioners to establish that the Commission should exercise its discretion so as to order a further hearing. The only grounds advanced consist of the following two allegations: (a) "WJR cannot obtain an affiliation with CBS" and (b) "WJR has for some time been aware of these facts which have not, to Petitioners' knowledge, been reported to the Commission."

A. Alleged Failure to Report Facts

16. The May 14, 1954 Decision was based on a record in which Trebit and Butterfield proposed NBC affiliations and WJR proposed a DuMont affiliation. In comparing the program proposals, the Commission specifically held that the "matter of possible network affiliation is too speculative to form a proper ground for comparative consideration" (Conclusion 31). As pointed out in the July 11, 1958 Decision, changes occurred after the closing of the original record which led WJR to seek authority to change its transmitter site. In filing the application necessary for such authority (Form 301 filed December 16, 1954), WJR set forth certain other changes in its proposal which had been brought about by post-hearing events, which changes (network affiliation and studio) did not require a prior approval and which

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did not affect in any material way the preferences awarded WJR or the overall comparative considerations. In a decision released April 1, 1955 the Commission, as requested in a petition filed December 28, 1954, reconsidered its May 14, 1954 Decision in light of these changes. The Commission concluded the changes did not affect the bases for its May 14, 1954 Decision and refused to order a further hearing. On appeal, the Court of Appeals held that in view of the changes in transmitter site, network affiliation and studios, and in view of the protest hearing (Docket 11412), it was an abuse of discretion not to order a further hearing (Butterfield v. FCC, 13 R.R. 2175).

17. Pursuant to the Court's mandate, a further hearing was held between January 6, 1957 and April 17, 1957. Among the changes considered during the course of the further hearing was the fact that WJR proposed a CBS affiliation. The further hearing record makes it clear that WJR filed its December 16, 1954 modification application for authority to move its site from Clarkston to Chesaning in view of the fact that WJR believed that DuMont was no longer in effect a network and although strenuous efforts were made, neither ABC, CBS nor NBC would consider affiliating at Clarkston. WJR learned that at a location near Chesaning, it would be equally attractive to ABC, CBS and NBC and decided to propose CBS in view of the fact that WJR considered it to be the best of the then available networks (see testimony

of Patt and Kramer, including Exhibit 97, Kramer Tr. 1021 and 1147-48 and Patt Tr. 1244-5, 1251 and 1380-1). Accordingly, the December 16, 1954 application proposed a primary affiliation with CBS. *

18. After the Commission granted the modification application on April 14, 1955 and before a mandatory Section 309 (c) stay was issued on July 10, 1955 in Docket 11412, WJR signed an affiliation agreement with CBS on April 29, 1955. This contract was filed with the Commission on May 31, 1955. It provided that the term would commence September 1, 1955 and continue for a period of two years with the provision that it would be automatically extended for two year periods unless either party sent contrary written notice at least six months in advance of the expiration date (i.e., by March 1, 1957. **

19. The CBS contract signed April 29, 1955 was replaced by a contract executed February 28, 1957 which was filed with the Commis-

sion on March 25, 1957, well in advance of the closing of

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* As shown in the record of the further hearing, the program schedule submitted included some DuMont programs (see Faust, Tr. 774 and Patt, Tr. 70). Although DuMont had ceased to operate as a network in September of 1955, well in advance of the further hearing, no questions were raised by any party to the "unavailability" of DuMont programs. Nor were any questions raised as to the "unavailability" of CBS programs.

** The CBS contract signed April 29, 1955 and filed May 31, 1955 was produced at the request of WJR's opponents at the further hearing on January 17, 1957. However, the only use made of it was to read into the record its provisions relating to option hours (Tr. 790).

the further hearing record on April 17, 1957. The contract provided that the term would start when WJR commenced operation on Channel 12 at Flint, Michigan with the proviso that the contract would be null and void if WJRT had not commenced operation by September 1, 1957. CBS explained to WJR that the "null and void" proviso was a purely technical clause which had been included in view of the then pending litigation in Dockets 10268 et al and Docket 11412 as a result of which no date for commencement of operations by WJRT was either certain or predictable.

20. Following the release of the Examiner's September 12, 1957 Supplemental Initial Decision, WJR notified CBS of this fact and that WJR hoped for an early end to the pending litigation in the comparative (Dockets 10268 et al) and protest (Docket 11412) cases. However, WJR pointed out that the mandatory stay order issued in the protest case was still in effect and that WJR could not then predict for certain when or whether it would be able to resume construction at Chesaning.

21. In December of 1957 WJR consulted with CBS and learned that there had been no change in CBS's interest in WJRT. CBS asked to be kept advised of future developments.

22. In late January of 1958, after the oral argument held herein on January 21, 1958 had been concluded, WJR again contacted

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CBS to express optimism that (1) the Commission might soon affirm the Examiner's Supplemental Initial Decision and (2) WJRT could sign an affiliation contract with CBS in the reasonably near future. WJR was told by CBS that (1) because of the delays and uncertainties respecting WJRT's starting time, CBS, in its own interest, had to remain free to consider possible alternative arrangements for affiliations in the area should the occasion warrant, (2) CBS had no present plans for any other affiliation in the Flint area, (3) CBS was under no unusual or compelling pressure from advertisers to add any other stations to the network in this area, and (4) CBS, as of that time, planned no changes in the area until (a) a Nielsen Survey due in the summer* was completed for CBS, or (b) WJRT received a reaffirmation of its grant, whichever was earlier, at which time CBS would appraise the situation and determine its future affiliation plans.

23. On April 2, 1958 the Commission publicly announced that it had instructed its staff to prepare a final decision reaffirming the grant of Channel 12 at Flint to WJR. The following week a story was published in Broadcasting that CBS (which for several years had a secondary affiliation with WJIM-TV at Lansing**) had entered into a

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* This survey was not completed until August 1, 1958 .

** WJIM-TV at that time had a primary NBC affiliation agreement which, as far as WJR knows, is still in effect.

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primary affiliation with that station. WJR contacted CBS shortly thereafter -- on or about April 15 -- but could not learn from CBS the exact nature of the WJIM arrangements. It was WJR's belief at that time, based on all the information available to it, that the CBS arrangements with WJIM-TV were temporary or cancellable and that once the litigation was terminated, there was a good possibility that WJR could obtain a CBS affiliation effective when WJRT took the air or a reasonable time thereafter.

24. After the Commission announced (on July 9, 1958) that it had adopted its final decisions (released July 11 and 16, 1958) favoring WJR in both the comparative and the protest cases, WJR's president called on CBS in New York on July 22. He was informed that WJR could not at that time receive a primary affiliation, but could have an affiliation agreement for such CBS programs as WJIM-TV might not carry and which advertisers might order for WJRT.

25. In the meantime, ABC (which has no primary affiliation in the Flint-Saginaw-Bay City-Lansing area) had telephoned WJR about July 9 and again July 16 that it would like to discuss an affiliation with WJR. Following WJR's meetings with CBS on July 22, WJR held discussions with ABC on July 30 and 31 and entered into a primary affiliation agreement with that network. With ABC now offering a competitive day as well as evening program schedule, and with ABC programs now unavailable on a fulltime basis to the viewers in the Flint-Saginaw-Bay City-Lansing area, WJR concluded that it would be in the public interest to offer the expanded programs of ABC. It is possible that WJR may also accept such CBS or

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other network programs as are offered to it which would not conflict with ABC or WJRT's local commitments and that WJR may in the future find desirable. WJR will file a copy of its ABC contract* as well as copies of any per program contracts as may be concluded with other networks in compliance with the Commission's Rules.

26. It is thus clear that the charge that WJR "failed to report" information which it should have reported is completely without foundation and does not constitute a ground for a further hearing. It was not until this week that WJR was in a position to report anything approaching definite information to the Commission. The Commission's Rules (1.342) require that network affiliation contracts be filed within thirty

days of execution and that point has not been reached even as of today.

B. Present Unavailability of CBS

27. There remains the question whether the fact that CBS is not available to WJR at this time constitutes any reason for ordering a further hearing. Petitioner's arguments that the present unavailability of CBS, a matter beyond the control of WJR, requires a further hearing are invalid for the following reasons:

(a) The Commission held in its May 14, 1954 Decision (Conclusion 31) and in its July 11, 1958 Decision (Conclusion 5) that the matter of network affiliation is too speculative to afford a basis for choice among the parties.

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* The agreement has not yet been formally signed.

(b) In many recent comparative television hearings the Commission has refused to consider network proposals on a comparative basis because of the speculation involved (e. g. WSAV, Inc., 10 R. R. 402 (1955); KTBS, Inc., 10 RR 811 (1955); Brush-Moore Newspapers, Inc., 11 RR 641 (1956); Columbia Amusement Company, 12 RR 509 (1956); The Travelers B/Casting Service Corp., 12 RR 689 (1957); Television East Bay, 14 RR 1 (1957); and Queen City B/Casting Co., 15 RR 645 (1957).)

(c) The fact that the subject of network proposals is too speculative to form the basis for comparative consideration was recognized by Butterfield in its Proposed Conclusions filed March 30, 1953, which read in part as follows:

> "The Commission must also take into account the uncertainties that surround the matter of network affiliations during the present period of rapid growth of television. Moreover, an applicant can do little more than express his considered views with respect to his network affiliation plans. Our rules are such that an applicant cannot affiliate substantially in advance of securing an authorization; and we are aware

that as a matter of practice networks will not affiliate with applicants prior to a grant. Absent a binding affiliation, the factors we must consider are so speculative and illusory as to make definite conclusions impossible. For example, consideration of those affiliations which are in existence at the time of hearing is of little value since they are subject to termination by their terms. Additionally, any testimony by an applicant that he will secure a certain affiliation must at all times be subject to alteration by the granting of other applications in the immediate area and the commencement of network affiliations during the very pendency of the proceeding."

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(d) A change in WJR's network proposals would not create any preference for Trebit and Butterfield and would not change any preference awarded WJR (See Exhibit A hereof).

(e) The Court cases cited by the Petitioners are distinguishable from the present case and do not constitute authority for the relief requested. In the Plains case (175 F. 2d 359), (1) the unavailability of the proposed network was alleged at oral argument before the Commission whereas here the argument was not raised until after the Final Decision; (2) the Commission did not specifically find, as it did here, that the subject of proposed network affiliation was too speculative to form the basis for a choice among the applicants; (3) no showing was made there, as here, that a network other than the one originally proposed was available at the outset of operation; and (4) other non-network matters, which are not present here, required a further hearing and reconsideration. In the Butterfield case (13 RR 2175), the Court placed reliance

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on several factors not present here, including (a) a change in the transmitter site, (b) a change in the studio proposal, and (c) the fact that a protest proceeding was pending.

28. For the above reasons, there is no basis for ordering a second further hearing in this proceeding which already has been unduly protracted. There must be some administrative finality to comparative proceedings and that point has certainly been reached in this proceeding. If the administrative process justifies reopening of the record in this instance on the tenuous grounds advanced by Petitioners, then it must be conceded that the Commission can never render a final decision in any case of adjudication where the opponents are disposed to continue litigation. By the time another hearing could be held with all the various procedural steps required and a final decision rendered, there can be no doubt that by the mere passage of time equally tenuous if not even more substantive changes will occur. Such changes would require a further hearing and so on ad infinitum.

WHEREFORE, the premises considered, it is respectfully requested that the "Petition for Rehearing" and "Motion

for Stay"* filed herein on July 25, 1958 by Trebit Corporation and W. S. Butterfield Theatres, Inc. each be denied.

Respectfully submitted

WJR, The Goodwill Station, Inc.

* * * *

August 1, 1958

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*At 3 p. m. on August 1, 1958 the Commission released the following public notice: "The Commission en banc, by Commissioners Doerfer (Chairman), Hyde, Bartley, Lee, Ford and Cross, took the following action on August 1: By Order, the Commission denied that part of a July 25 joint petition by W. S. Butterfield Theatres, Inc., and Trebit Corp. requesting stay of Commission July 9 action affirming grant of a construction permit to WJR, The Goodwill Station, Inc., for a new TV station (WJRT) to operate on Channel 12 in Flint, Michigan; reserved consideration of petitioners' request for reconsideration of grant (Dockets 10268-70). Commissioner Lee dissented; Commissioners Ford and Cross not participating." (Public Notice B-62170.)

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EXHIBIT A - THE NETWORK PROPOSALS OF THE THREE PARTIES

At the original hearing, each applicant proposed to operate as a network affiliate.

WJR proposed DuMont as it believed it to be the only network then available to it or to any of the applicants at the sites proposed. (Patt, tr. 1901-02 and Kramer, tr. 595-96). WJR also made it clear that it would make any changes in affiliation brought about by future events and that it would always attempt to improve its competitive position to the fullest extent possible (Kramer tr. 607).

Trebit and Butterfield each proposed NBC. As shown in Exhibit B hereof, a substantial number of the NBC programs proposed are no longer available from NBC. Exhibit B also shows that in some instances Trebit did not bother to supply a program title but merely showed "Network Commercial" or "Network Sustaining". The record shows that in the application filed by Trebit no network program titles were supplied and that with respect to those instances where titles were supplied in the hearing exhibit, Trebit's witness stated, "Frankly, we used some network names as window dressing, you might say" (Knoph, tr. 1310; see also tr. 1371 which shows Trebit proposed a network program at a time when no NBC program was available). Neither Trebit nor Butterfield submitted program proposals which would be followed if NBC were not available.

The further hearing already held demonstrates that post hearing

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events led WJR to change from DuMont to CBS and that the change had no effect on the comparative differences between the parties. Substitution by WJR at this time of ABC for CBS programs will have no meaningful effect on (1) the quantity or quality of WJR's proposed network programs or (2) WJR's non-network proposals or (3) the comparative differences between the parties.

At the present stage of this proceeding it is clear that not a single one of the parties could operate a station this fall that would carry the network programs originally proposed even if it were assumed, contrary to the record, that Trebit and Butterfield could secure NBC. The further hearing requested would be directed to the question of what network programs WJR would carry. It has already been determined that there is no basis for choice based on network proposals, and such a further hearing could not possibly change this conclusion. If a further hearing is required for this purpose, then another further hearing would be required later as future changes in network affiliations and programs are bound to occur. This process could go on forever. A further hearing is not necessary as it is clear that WJR will, as proposed, operate as a network affiliate. The fact that at the outset, WJR will be an affiliate of ABC rather than some other network is without comparative significance as there is no possibility of Trebit or Butterfield carrying the exact network programs they proposed even if they could secure NBC, which appears to be impossible in view of the proposed Grade B

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overlap with Detroit NBC affiliates.

No one can say now what the future holds respecting WJR network affiliation other than what has already been said in the record, namely that WJR will always attempt to improve its competitive position (Kramer, tr. 667 of the original hearing) and that WJR's performance will, to the best of its ability, be in substantial compliance with its promises (WJR Exhibit 74).

The only conclusion which can be drawn now or at any time in the future, regardless of the number of further hearings held, is that the area of network affiliation is too speculative upon which to base a comparative preference.

Exhibit B

NETWORK PROGRAMS PROPOSED BY TREBIT AND BUTTERFIELD

* indicates program no longer available for the network
** indicates program now in syndication

TREBIT (Exhibit 71) — BUTTERFIELD (Exhibit 5)

SUNDAY

Time			Time		
			12:45-1:00	*Nature of Things	NS-T
			1:00-1:30	Youth Wants to Know	NS-D
1:30-2:00	(Net Sustaining)	NS-E	1:30-2:00	Frontiers of Faith	NS-R
3:00-3:30	(Net Commercial)	NC-E	2:30-3:00	*American Forum	NC-D
4:00-4:30	Meet The Press	NC-D	4:00-4:30	*Kukla, Fran & Ollie	NC-E
4:30-5:00	*Hall of Fame	NC-E	4:30-5:00	*Hall of Fame	NC-E
5:00-5:30	*Zoo Parade	NC-E	5:00-5:30	*Zoo Parade	NC-E
5:30-6:00	**Sky King	NC-E			
6:00-6:30	**Roy Rogers	NC-E	6:00-6:30	Meet the Press	NC-D
6:30-7:00	*Once Upon a Fence	NS-E	6:30-7:00	**Roy Rogers	NC-E
7:00-7:30	*Red Skelton	NC-E	7:00-7:30	*Red Skelton	NC-E
7:30-8:00	*Eddie Mayhoff	NC-E	7:30-8:00	*Mr. Peepers	NC-E
8:00-9:00	*Comedy Hour	NC-E	8:00-9:00	*Comedy Hour	NC-E
9:00-10:00	*TV-Playhouse	NC-E	9:00-10:00	*Playhouse	NC-E
10:00-10:30	*The Doctor	NC-E	10:00-10:30	*The Doctor	NC-E

MONDAY THROUGH FRIDAY DAYTIME

7:00-9:00AM	Today	NC-E, N, T	7:00-9:00AM	Today	NC-E
11:30-12:00	Net Commercial	NC-E			
3:00-3:30PM	*The Big Payoff	NC-E	3:00-3:30PM	*The Big Payoff	NC-E
3:30-4:00PM	*Johnny Dugan Show (Except Monday)	NS-E	3:30-4:00PM	*Welcome Travelers	NC-E
4:00-5:00PM	*Kate Smith Hour	NC-E	4:00-5:00PM	*Kate Smith Hour	NC-E
5:00-5:15PM	*Hawkins Falls	NC-E			
5:15-5:30PM	*Gabby Hayes	NC-E	5:15-5:30PM	*Gabby Hayes	NC-E
5:30-6:00PM	*Howdy Doody (Only 1/2 hour now available for TV per week-Saturday AM)	NC-E	5:30-6:00PM	*Howdy Doody (Only 1/2 hour now available for TV per week-Saturday AM)	NC-E

Exhibit B - Page 2

MONDAY EVENING

Time			Time		
			7:30PM	*Those Two	NC-E
			7:45 PM	*Camel News	NC-N
8:00PM	*Winchel & Mahoney	NC-E	8:00PM	*Winchel & Mahoney	NC-E
8:30PM	*Voice of Firestone	NC-E	8:30PM	*Voice of Firestone	NC-E
9:00PM	*Hollywood Opening Nite	NC-E	9:00 PM	*Hollywood Opening Nite	NC-E
9:30PM	*Robert Montgomery	NC-E	9:30PM	*Robert Montgomery	NC-E
10:30PM	*Who Said That	NC-E			

TUESDAY EVENING

Time			Time		
			7:15PM	*Pepsi Stories	NC-E
			7:30PM	*Dinah Shore	NC-E
			7:45PM	*Camel News	NC-N
8:00PM	Milton Berle	NC-E	8:00PM	Milton Berle	NC-E
9:00PM	*Fireside Theatre	NC-E	9:00PM	*Fireside Theatre	NC-E
9:30PM	*Circle Theatre	NC-E	9:30PM	*Circle Theatre	NC-E
10:00PM	*Two for the Money	NC-E			
10:30PM	*Embassy Club	NC-E			

WEDNESDAY EVENING

Time			Time		
			7:30PM	*Those Two	NC-E
			7:45PM	*Camel News	NC-N
8:00PM	**Cavalcade of America	NC-E	8:00PM	**Cavalcade of America	NC-E
8:30PM	**I married Joan	NC-E	8:30PM	**I Married Joan	NC-E
9:00PM	Television Theatre	NC-E	9:00PM	Kraft Theatre	NC-E
10:00PM	This is Your Life	NC-E	10:00PM	This is Your Life	NC-E
10:30PM	(Net Commercial)				

EXHIBIT B-page 3

THURSDAY EVENING

Time			Time		
			7:15PM	*Pepsi Short Stories	NC-E
			7:30PM	*Dinah Shore	NC-E
			7:45PM	*Camel News	NC-N
8:00PM	*Groucho Marx	NC-E	8:00PM	*Groucho Marx	NC-E
8:30PM	*Treas. Men in Action	NC-E	8:30PM	*Treas. Men in Action	NC-E
9:00 PM	Dragnet	NC-E	9:00PM	Dragnet	NC-E
9:30PM	*Ford Theatre	NC-E	9:30PM	*Ford Theatre	NC-E
10:00PM	**Martin Kane	NC-E	10:00PM	**Martin Kane	NC-E
10:30PM	*Ask me Another	NC-E			

FRIDAY EVENING

Time			Time		
			7:30PM	*Those Two	NC-E
			7:45PM	*Camel News	NC-N
8:00PM	*Dennis Day	NC-E	8:00PM	*Dennis Day	NC-E
8:30PM	*We The People	NC-E	8:30PM	*We The People	NC-E
9:00PM	**Big Story	NC-E	9:00PM	**The Big Story	NC-E
9:30PM	*The Aldrich Family	NC-E	9:30PM	*The Aldrich Family	NC-E
10:00PM	Cavalcade of Sports	NC-E	10:00PM	Cavalcade of Sports	NC-S
10:30PM	*Greatest Fights	NC-E	10:30PM	*Greatest of Fights	NC-S

SATURDAY

Time			Time		
4:00PM	*John Hopkins Science Review	NS-Ed	1:30PM	Football Game of Week	NC-S
5:00PM	Youth Wants to Know	NS-D	4:30PM	Football Scoreboard	NC-S
5:30PM	*NBC Weekly News Review	NS-N			
5:45PM	*Short Story Playhouse	NC-E			
6:30PM	Frontiers of Faith	NS-R			
7:00PM	Mr. Wizard	NS-E	7:00PM	Mr. Wizard	NS-T
7:30PM	**My Little Margie	NC-E	7:30PM	**My Little Margie	NC-E
8:00PM	*All Star Revue	NC-E	8:00PM	*All Star Revue	NC-E
9:00PM	*Your Show of Shows	NC-E	9:00PM	*Your Show of Shows	NC-E
10:30PM	*Your Hit Parade	NC-E	10:30PM	*Your Hit Parade	NC-E

[7330]

[Aug. 4, 1958]

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D.C. on the 1st day of August, 1958;

The Commission having under consideration a Motion for Stay of its action of July 9, 1958 affirming grant of construction permit to WJR, The Goodwill Station, Inc. and denying the competing applications of W. S. Butterfield Theatres, Inc. and Trebit Corporation, filed jointly by Trebit and Butterfield on July 25, 1958 in conjunction with their joint petition for rehearing of the said Commission action of July 9, 1958;

IT APPEARING, That the motion is based on the allegation that Trebit and Butterfield believe that the network programming of the Columbia Broadcasting System proposed by WJR will not be available to it, but that such allegation is based on industry rumors and the wording of a story in a Flint newspaper, and that no actual facts in support of the said allegation are presented;

IT FURTHER APPEARING, That no allegation is made that WJR cannot or will not present its proposed local programming;

IT FURTHER APPEARING, That no allegation is made nor any facts presented that the public interest will not be served or that petitioners will suffer any irrepairable injury by the orderly consideration of the matters alleged in the said petition for rehearing in the normal course of Commission business;

IT IS ORDERED, That the Motion for Stay filed jointly on July 25, 1958 by W. S. Butterfield Theatres, Inc. and Trebit Corporation IS DENIED.

Federal Communications Commission

Gordon J. Kent
Acting Secretary

Released: August 4, 1958

[August 4, 1958]

BROADCAST BUREAU OPPOSITION TO PETITION FOR REHEARING

On July 25, 1958, Trebit Corporation and W. S. Butterfield Theatres, Inc. (hereinafter "Petitioners") filed a petition for rehearing requesting that the Commission's Decision of July 9, 1958 (released July 11, 1958), affirming the grant of the application of WJR, The Good-Will station, Inc. (hereinafter "WJR") and denying the applications of petitioners be vacated and set aside; that the WJR application be dismissed as in default; that in the event WJR's application is not dismissed, that a comparative proceeding be conducted; that the record be reopened to take evidence of the availability to WJR of the programs of the Columbia Broadcasting System (hereinafter "CBS"). For the reasons which follow, the Chief, Broadcast Bureau respectfully opposes the instant petition and submits that it should be denied.

1. Petitioners assert three points of argument in support of the requested relief. They argue that WJR abandoned its application and that since it neither did nor could amend its application it is in default and should be dismissed. We believe that the Commission acted correctly

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when it ruled adversely to petitioners on this point and that no purpose would be served by a further discussion of this contention. Similarly, we believe that Petitioners' second contention that the Commission's decision failed to accord them the comparative consideration mandatory under the Communication's Act is without merit. The Commission fully complied with the mandate of the Court of Appeals (13 RR 2175) when it considered the differences between WJR's original and modified proposals and whether the changes affect the decisional basis of the comparative preference of WJR.[1] We will address ourselves to Petitioner's third point - that the record in this proceeding must be reopened to consider post-hearing evidence that a CBS affiliation is no longer available to WJR.

2. Petitioners contend that the record must be reopened to consider the evidence which raises a serious question of whether WJR "can or will carry out the essential program plan" and whether, without further hearing, the Commission's decision of July 9, 1958, satisfies the Court's mandate. In substance, petitioners allege that CBS has taken steps to achieve a realignment of its Michigan television affiliates; that WKNX, Saginaw, Michigan, will continue as a CBS affiliate; that WJIM-TV, Lansing, Michigan, which provides a signal to Flint and maintains studios in Flint, announced its primary affiliation as a basic outlet for CBS. Petitioners asserts, on information and belief, that WJR's television Station WJRT cannot obtain an affiliation with CBS. It is petitioners' position that since the record of the further hearing contains no WJR proposal to operate

[7333]

independently or with a network other than CBS, that the record must be reopened to consider this post-hearing evidence. We submit that this contention of Petitioners is also without merit and that it is not necessary to reopen the record for the adduction of evidence with respect to a possible CBS affiliation.

3. The history and background of this proceeding is set forth in the decision of July 9, 1958 and other orders and rulings of the Commission and repetition would serve no useful purpose. It is sufficient to note that WJR proposed Dumont programming and Petitioners proposed NBC programming.2/ The Commission released its Decision granting the WJR application and denying the applications of Petitioners on May 4, 1954. With respect to programming, the Commission held that WJR was entitled to a clear preference on the basis of its local live programming and its immediate plan for remote programming. It held that the

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1/ The Court held that the effect of the changes upon the Commission's decision is significant and that the Commission should have received evidence on the changes and completed the comparative consideration.

matter of possible network affiliation is too speculative to form a proper ground for comparative consideration. WJR subsequently filed a modification application which, inter alia, proposed a change from Dumont to CBS network programming. The Commission's action denying petitions for rehearing and reopening the record was reversed by the Court of Appeals (13 RR 2175); the further hearing was held, and the Commission's decision of July 9, 1958 was released reaffirming the grant of WJR's application. During the further hearing extensive testimony was adduced relative to the difference between WJR's original and modified programming proposals necessitated by the change from a Dumont to CBS network affiliation.

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[2] At the time WJR filed its application on July 3, 1952, it proposed CBS programming. However, on October 25, 1952, WJR amended its application to specify Dumont programming.

The record clearly establishes WJR's firm intention and determination to carry out its original local live programming without any material changes in content or scheduling.[3] While the change to CBS required realignment or discontinuance of a number of film programs, WJR displayed a determination to retain its local live program proposal. With this attitude of WJR clearly in mind we turn to Petitioners' contention that since the record contains no WJR proposal to operate independently or with a network other than CBS, that the record must be reopened to consider the post-hearing evidence that a CBS affiliation is no longer available to WJR.

4. The contention that any change in network affiliation requires further testimony in a comparative hearing brings into sharp focus the problem in the instant case. As the Commission pointed out in its July 9, 1958 decision (paragraph 5, Conclusion) this case illustrates "the impracticability of expecting an applicant to be able to give absolute assurance "that several years after filing its application it will be able to effect the exact operation originally proposed. This case emphasizes

the necessary uncertainties in prognosticating future program developments not within the control of the applicants. An applicant at best is only in a position to state that it hopes to affiliate with a national network provided such affiliation is available to it and the network programming still appears to be of the type which would meet the needs of its viewing audience at such time as the station commences operation. There has been a lapse of approximately six years since the original proposals of WJR and Petitioners. There is some question as to

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3/ The Commission in its decision of July 9, 1958 (paragraph 5 of Conclusions) held that the changes in the network and film programming are without significance to the decision. It pointed out that there was no showing that the network or film programming proposals of the applicants were such as to favor one over the other.

[7335]

whether petitioners would be able to obtain an NBC affiliation at the present time.4/ Certainly, Petitioners are not contending that the final determination as to which applicant should be successful in a comparative hearing should be subject to the business decisions of the networks, which by realignment of its affiliates could result in vitiating an applicant's programming proposal.

5. We submit that the most recent decision of the Court of Appeals (*Massachusetts Bay Telecasters, Inc*. v. *FCC*) is controlling on this point. In that case, two applicants, Massachusetts Bay Telecasters, Inc. (hereinafter "MBT") and Greater Boston Television Corporation (hereinafter "GBT") presented alternative program proposals based on CBS network and non-network operation. WHDH, Inc. presented only a non-network proposal, but indicated during the course of the hearing that it would consider an appropriate network affiliation offer, providing that such offer did not interfere with its fixed intent to provide adequate local television programming. On appeal, MBT argued that network programming is in the public interest and that with three VHF stations assigned to Boston it would be contrary to the public interest for one of the three VHFs to operate on a non-network basis. It also argued that

since WHDH had indicated that it would accept network affiliation, provided the network proposal could be made to fit into the WHDH plan of operation, that it could not be determined exactly what type of operation WHDH was in fact proposing. MBT urged that

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[4] NBC had informed WJR that the overlap between WJR operating at Clarkston and WWJ-TV, the NBC Detroit affiliate, was far too great and indicated that NBC might be interested if WJR moved its site north or northeast of Flint (Par. 53, Decision of July 9, 1958).

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because of this uncertainty a "definite demerit" should have been given to WHDH in this area of comparative consideration.

6. The Court of Appeals rejected these arguments.[5] The Court in noting that the Hearing Examiner had considered significant the failure of WHDH to give assurance of a national network affiliation, cited the Supreme Court opinion FCC v. Allentown Broadcasting Co., 349 U.S. 358, 363, 364. In the Allentown case the winning applicant before the Commission had proposed a non-network type of operation but stated that it retained its freedom to consider affiliation with a network should adequate network programming subsequently become available to it. The Commission rejected the Examiner's finding that the uncertainties as to exactly which local programs should be dropped in the event an affiliation took place warranted the granting of a preference to other applicants. The Court of Appeals (Allentown Broadcasting Corp. v. FCC 94 U.S. App. D.C. 353, 222 F. 2d 78) took issue with the Commission finding that: "The fact that an affiliation may be entered into in the future if a desirable arrangement becomes available does not render these proposals so uncertain as to preclude any findings or conclusions based thereon..." 8 RR 31, 70. The Supreme Court upon certiorari expressly upheld the Commission's determination. The Court held:

> "In reaching its conclusion to set aside the Commission's order awarding the license to Easton the Court of Appeals found that the Commission's reversal of its Hearing Examiner was erroneous. That Court analyzed the

> evidence before the Commission as to Easton's uncertainty on affiliating with radio networks to secure their programs for its listeners... The Court agreed with the Examiner and overruled the Commission. None of the above circumstances are in themselves a bar to the Commission's grant of a license. Each involves appraisals of testimony that put into a record facts derived from various witnesses by interrogation. There was substantial evidence considering the whole record that had to be weighed, pro and con, as to the types of programs..."

5/ See Footnote 2, page 3 of decision (No. 13896 and 13899, decided July 31, 1958).

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Wherefore, we respectfully submit that the instant petition for rehearing should be denied. We further submit that the request for oral argument should also be denied.

Respectfully submitted,

Harold G. Cowgill
Chief, Broadcast Bureau

by /s/ Robert J. Rawson
Chief, Hearing Division

/s/ Thomas B. Fitzpatrick,
Attorney, Federal Communications Commission

August 4, 1958

[7672]

[FCC March 30, 1953]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF W. S. BUTTERFIELD THEATRES, INC.

* * * * * *

[7737]

9. In sharp contrast we have the Butterfield proposal. Butterfield, since its inception has been a truly Michigan institution identified

Flint and other communities in lower Michigan, except Detroit. Moreover, some 26% of its stock is owned by the University of Michigan and two of its six directors are Regents of the University.[4] Butterfield's achievements in the field of civic, philanthropic and religious cooperation with the communities (including Flint) in Michigan in which it engages in business is indeed outstanding. The record is replete with evidence clearly demonstrating full, complete and affirmative efforts by the Butterfield organization to improve the conditions and moral atmosphere in each of the communities in which it operates. Nor is there any evidence in this record which would lead us to conclude that the fact that Butterfield is engaged in the motion picture exhibition business should be considered adversely to it. In fact, in view of its splendid record of public service and its proposal here we can only conclude that in view of its experience and background it can make substantial contributions to television. And we can not conclude that Butterfield's theatre ownership, standing alone, is of any adverse significance, especially when consideration is given to the fact that both WJR and WGAR, Cleveland are under common control. In this connection, we believe it of particular importance that up to this time Butterfield has not been engaged in a business which has required Government licensing and has been under no obligation, expressed or implied, to render public service in conjunction with its business activities. While we recognize that conduct of this character may be deemed good business practice and not without its economic rewards, we nevertheless find little difficulty in entrusting such an organization with public responsibility inherent in the granting of the license here sought.

4/ As indicated above, WJR has always been identified with Detroit. In addition, less than 30% of the WJR stock is held by residents of Michigan. Moreover, and despite the fact Trebit is not entitled to comparative consideration here, it is noted that it is entirely owned by nonresidents of Michigan.

[7993]

[June 7, 1957, FCC]

FURTHER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF W. S. BUTTERFIELD THEATRES, INC.

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[7999]

FINDINGS OF FACT

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WJR's Program Proposals

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[8001]

21. In its new proposal, WJR represents that it will broadcast 45 hours of CBS programming per week instead of the previously proposed 30 hours and 15 minutes per week of DuMont programs - a completely different service. In its modification application WJR declared that it would broadcast only three of the network programs per week (total time 1-1/2 hours) which it previously represented to the Commission it would present.[7] (WJR Exs. 80-81.) In similar vein, WJR originally proposed to broadcast some 42 hours and 45 minutes of recorded programs per week, whereas it has abandoned this proposal and now it will broadcast only 28-1/2 hours of such programs. Except for the type classification assigned to these programs, the record is silent as to the content and purpose of substantially all of them. (WJR Exs. 82 and 83.) In considering this question of changes in film programming, the Court held: (237 F.2d at 558)

> "The Commission erroneously disregarded the sharp curtailment of film programming upon the ground that the film programs proposed by an applicant are not 'the Commission's concern.' Film programs make up a very substantial part of the program fare of television audiences. WJR's original proposal, for example, was to devote about 40 per cent of its broadcast time to films. Moreover, unlike network programs, over which perhaps the licensee has relatively little control, films are the free and independent

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[7] In the decision of May 14, 1954, the Commission made findings as to and apparently credited WJR for some 9 network programs which it

then proposed to present (FCC 54-626, 9RR227.) In its new proposal WJR abandoned its plans in this regard for, when this new plan was presented, it declared it would then present only 3 of such programs. While WJR presented no evidence of the content of the programs proposed in its new network proposal, it is obvious from an examination of the name, number and classification of these new network shows that a completely new and different service in this regard is now contemplated. (FCC 54-626, 9RR227; WJR Ex. 80.)

> selection of the licensee and are, therefore, as much a part of and a measure of his responsibility to the public and the Commission as are the live programs he produces. We pointed out in Johnston Broadcasting Co. v. Federal Communications Comm. that 'in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and the programs are the essence of that service' . . . " (Footnote omitted.)

WJR did not come forward with such a showing as to its film proposals, and the record is deficient in this regard. (WJR Exs. 82-83.) In fact no instructions as to film programs were given to the employee who prepared the new proposal and no particular attention was given thereto except that the amount thereof to be presented was reduced to accomodate the increased network service proposed. (Tr. 722; Butterfield Ex. G, p. 62.)

22. By design, and in an obvious attempt to retain a preference previously awarded it by the Commission, the type analysis of WJR's new program proposal and the amount of live programming proposed are substantially the same as in the proposal presented at the original hearing herein. (FCC 54-622, 9RR227; WJR Exs. 85-86.) This does not, however, establish that the changes in the program proposals are negligible or of no consequence. WJR originally proposed to devote 9.95% of its broadcast time to network commercial programs, whereas it now declares that 39.34% of its time will be devoted to suchprograms. WJR also originally asserted that 17.41% of its broadcast time would be devoted to network sustaining time, but it now admits that only 1.36%

of its time actually will be devoted to such programs. WJR now proposes a total of nearly 10% more commercial time than it previously represented it would produce. (FCC 54-626, 9RR227; WJR Ex. 86.)

23. In its decision of May 14, 1954, the Commission made findings as to some 30 non-network programs, other than the usual news and entertainment shows, which WJR had originally proposed to produce. WJR was accorded substantial preference over its competitors for the local live programming it proposed (including the Detroit remotes). In addition, substantial preference was given WJR for the studios it originally proposed, particularly since these studios were in some undescribed fashion related to the program proposal. (FCC 54-626, 9RR227.) When questions were raised by Trebit and Butterfield as to the appropriateness of the quantitative and qualitative approach to this subject, the Commission declared that its previous conclusions were in

[8003]

error " . . . to the extent that the significance of superior facilities is based in part upon the quantity alone of local live programs . . ." To correct this error, the Commission asserted that it was making additional findings to show the meritorious nature of the programs. The Commission held that it did not need to find that the WJR programs were superior in quality to those of its competitors, but all that was required was a finding that such programs " . . . are of a quality which makes their presentation, in terms of greater quantity and of superior facilities for presenting them, significant as an element of public interest in which WJR excels." (FCC 54-1496, 9RR 260u.)

24. As demonstrated below and in the Trebit findings, the original WJR studio proposal was abandoned even before the decision of May 14, 1954, and WJR now proposes entirely different and inferior studio facilities. WJR now contends that it will retain substantially the live programming it originally represented it would present (at least by names of programs) and in fact now adds a few more such programs to

its schedule. However, here again WJR modified its proposal by substantial changes as to the time of production, length of program, classification and the actual content of its proposed live shows. (WJR Exs. 87 and 88.) Since the most that can be said is that only in this limited area, except for general classifications as to type, WJR has attempted to retain the general plan which it previously represented to the Commission it would follow, we believe that this entire proposal should be further examined.

25. WJR now has an affiliation agreement with the Columbia Broadcasting System. Its network option hours are 10:00 A.M. to 1:00 P.M.; 2:00 P.M. to 5:00 P.M. and 7:30 P.M. to 10:30 P.M. (Tr. 791.) Despite these option hours in the WJR affiliation agreement and the fact that the network has scheduled programs during those hours, WJR does not propose to fully honor its contractual obligations and accept all the programs offered. WJR now asserts it will not accept from 2-1/2 to 3-3/4 hours per day of programs offered by the Columbia Broadcasting System during these option hours. WJR declares that it felt it would not be ordered for some of the programs in question and that it elected not to take the networks's sustaining shows. It made these decisions without consulting the network. (Tr. 799-806; Butterfield Ex. B.)

26. Except for the listings and broad general descriptions of the programs it originally proposed and now proposes to produce locally (WJR Exs. 56-58, 87-89), WJR has not established, and in fact does not know, just what these programs are or how or where they would be produced. (Original Tr. 389-91; 405; 407; 427; 432-33; 564; 566-70; 729-37; 740-41; 794-803; 806-07; 809-14.) It is clear that the new schedule was prepared with only three objectives in mind, (1) to show a Columbia affiliation, (2) to make a show of retaining basically the same amount of programming as to type (apparently regardless of content), and (3)

to retain substantially the same amount of live programming. (Tr. 510-11; 514; 718-25; 760-61.) And it is equally clear that WJR's preparation of its new proposal amounted to only the paper juggling required to accomplish the above objectives to WJR's satisfaction, and that there were no contacts made to determine the appropriateness thereof for the new areas and populations to be served. In fact, except for minor modifications, the new schedule was prepared by a new WJR employee over a two-day period while in Washington, and this employee had only generally reviewed the old proposal a few days prior thereto. This new program schedule and proposal was included in a draft of a substantially completed (except for engineering data) application for modification of permit forwarded to Mr. Patt, President of WJR, on September 23, 1954, the day following the Washington meeting. (Tr. 513-14; 715-30; 744-48; 835-37; 842-43; 846; 850; WJR Ex. 105; Butterfield Ex. G, pp. 75-122.) As shown above, in its decision the Commission preferred WJR over Butterfield on the basis of program preparation. In addition, the Commission held that there was no basis for distinguishing between WJR and Trebit with respect to this criterion. Butterfield and Trebit must now be preferred over WJR in this regard.[8/]

[8/] This new program proposal, prepared in the manner described, is now submitted by WJR to serve substantially different areas and populations than was the previous proposal. (See Trebit's findings.) As noted above, the Commission awarded WJR a preference over Butterfield and equated WJR and Trebit in the area of preparation. Apart from all other considerations, that preference not only disappears but Butterfield and Trebit must now be preferred to WJR on this score, for as demonstrated herein, there was no public interest consideration given to the development of the new WJR plans.

[8005]

27. The efforts as regards WJR's new program proposal and the retention of at least a portion of its original showing (to retain the preference previously awarded) are demonstrated by the facts set forth below. On September 16, 1954, a few days prior to the above-described

Washington meeting, Mr. Patt addressed a letter to Mr. Kramer, Vice President and General Manager of WJR, and, with respect to the new program plans, asserted:

> "We are trying to keep as many things identical as possible, and to that end we will work to identical local programming, although CBS network programs will be substituted for DuMont. We will make the percentage of local live originations come out the same, but we may have to adjust the film percentages downward, in order to accommodate a few more network shows. . . .
>
> "Don and I discussed the rate schedule briefly, and while this does not need to be finalized for a long while yet, I should think we might aim for a national rate of $700. per hour - the same as WJIM-TV, and try for the same rate with CBS. As to local, I believe we should go no higher than $450. per hour, inasmuch as we want to really make ourselves attractive to the local merchants who have been so unanimously against us . . . " (Butterfield Ex. G, p. 62) 9/ [underscoring supplied]

On September 17, 1954, Mr. Kramer wrote Mr. Patt and, *inter alia*, asserted:

> "I had discussed with Don and Bud the very urgent need of integrating our local program proposals with the CBS schedule, and I'm sure that they are completely aware that we must keep our percentages as near our proposals as is humanly possible." (Butterfield Ex. G, p. 63.) [underscoring supplied]

Thereafter on September 28, 1954, Mr. Patt wrote his counsel stating in part as follows:

> "In going over the application in the form you sent it to me, I noticed that the religious, educational and talk percentages were down fractionally. It would be very easy to make these percentages identical and Don is willing to do it if you want them to be identical. I thought you did and that is the reason I am raising the question again . . ." (Butterfield Ex. G, p. 126.) [underscoring supplied]

Then on September 29, 1954, counsel for WJR wrote Mr. Patt as follows:

> "Confirming our telephone conversation this afternoon and in answer to your letter of September 28, 1954,

> I understand that you will advise Don to revise his religious, educational and talk percentages upward to become identical with those proposed in the hearing." (Butterfield Ex. G, p. 130.)

9/ At the original hearing, WJR asserted its first year's income would be $800,000, based on a rate of $450 per hour. (FCC 54-626, pp. 23-24 Original Tr. 520-22; WJR Ex. 35.) In its modification application its estimated first year's income is still $800,000. (WJR Modification Application, filed December 16, 1954.) However, it now appears that WJR proposes a basic rate of $700. per hour. These inconsistencies have not been explained nor can they be squared or justified. They do, however, demonstrate the cavalier manner in which WJR has conducted itself throughout this proceeding.

On September 30, 1954, counsel for WJR was advised that the programs scheduled had been juggled and "re-calculated" so that the percentages, referred to above, were as close as possible to those contained in the original proposal. (Butterfield Ex. G, p. 131.)

28. In view of the foregoing, the total lack of good faith, preparation, appropriateness, and public interest considerations with respect to the new program plans as well as the other new proposals (including the new studio and transmitter location) of WJR are readily apparent. It is clear that each is a new and different proposal from that submitted at the hearing, and that WJR has in fact abandoned its original proposals, while, at the same time, relying upon patent contrivances which make a mockery of the selection process and the criteria alleged to be used therein. The Court carefully and properly characterized the effect of these radical changes as follows: (237 F. 2d at footnote 10, p. 556.)

> "In this case, the effect of the new facts upon the Commission's decision is or should be palpably significant and proximate. That a hearing should be granted in such circumstances is a minimal proposition."

The Commission also properly characterized the new proposal and the abandonment of the original proposal by WJR when, in its action of June 10, 1955 (FCC 55-651, 12RR440), it said:

> "3. On December 16, 1954, WJR filed the above-entitled application for modification of its construction permit to change its transmitter location from 23 miles southeast of Flint to 20.5 miles northwest of the city limits of Flint. The applicant also requested minor antenna changes, a change of the studio location within Flint, changes in studio facilities, and indicated changes in programming, a change in network affiliation from DuMont to CBS, and changes in staff proposals . . . "

We turn now to the matter of the concealment of the facts as to all of these subjects.

WJR's Action in Actively Prosecuting Its Original Proposals Long After Their Actual Abandonment, Without Disclosing the Fact of Abandonment and in Actively Concealing Said Abandonment and in Making False Representations With Respect Thereto, Reflects Adversely on the Good Faith, Character and Fitness of WJR and Disqualifies It for Grant

29. The findings set forth above and those submitted by Trebit demonstrate the fact of abandonment by WJR of its original proposals. Moreover, the fact of this abandonment was deliberately withheld from the Commission; false statements with respect thereto were made to the Commission; and these voluntary acts of WJR not only affected the legality and propriety of the Commission's prior actions herein but also demonstrates the lack of reliability, good faith and basic qualifications of WJR. We believe that in order to put this subject in its true light and to demonstrate its vital importance to the decision here, it is appropriate and proper to refer to the Court's decision pursuant to which this further proceeding is being held. In this decision, the Court, inter alia, held that the questions as to the changes in the WJR proposal were properly and timely raised by Trebit and Butterfield; that for many months the changes had been concealed by WJR; and that the changes go to the very foundation of the Commission's decision. (237 F. 2d at 555-

556.) In considering the importance of the concealment of these changes by WJR, the Court in footnote 7 declared: (237 F. 2d at 555)

> "The reason which WJR gave for holding off the announcements of the modifications it had decided upon months earlier was that the new proposal might be construed as an attempt to improve its transmitter site at a time when the Commission was considering Trebit's claim of superiority over the original WJR transmitter site. The Commission, in accepting that explanation, assumed that the new WJR transmitter proposal really was an improvement over the old. In denying the petition to reopen, the Commission stated that 'the move places WJR in a geographic position similar to the one posed by Trebit who has argued vigorously that this location entitled it to a substantial preference;' and, further, that the appellants do not 'allege that on a comparative basis WJR will be in any worse position than it was under its original proposal.' But the Commission misreads the record. The appellants, in their petition to reopen, point out that in the new proposal, as compared to the old, the transmitter site is 3.4 miles farther from the center of Flint, the antenna is 450 feet lower, and the adverse shadow effect is twice as great; and they argue that the new transmitter proposed is therefore clearly less desirable than the old.
>
> "Another defect in this 'reason' for WJR's withholding of the truth until after denial of the petition for rehearing is the fact that it refers to only part of the changed proposal. For example, it does not explain why WJR withheld for at least six months the fact that it had abandoned its plan of building a new two-story building and had already leased an existing one-story building partially installed its equipment in that building and given it a nucleus staff.
>
> "In view of the foregoing, we do not share the Commission's view that 'it is hard to conceive of a more forthright or open approach' than WJR's. We do not, however, express any opinion as to whether under Federal Communications Comm'n v. WOKO, Inc., 329 U.S. 223 (1946), WJR's late revelation of its changed situation reflects upon its character and fitness as a licensee. That is one of the questions to be dealt with by the Commission, upon a consideration of all of the evidence, in the reopened hearing we ordered herein."

30. WJR first learned of the availability of the WTAC studio building sometime prior to April 30, 1954. After that date, no consideration was given to complying with its original representations as to studio facilities. WJR's sole activity in this regard was directed to the acquisition and use of the WTAC building which was formally acquired on July 30, 1954. Thus, prior to the Commission's decision of May 14, 1954, WJR abandoned its original studio plans upon which the Commission relied in its decision herein. Despite the requirements of the Commission's rules (section 3.613) that a change such as this shall be promptly reported, WJR gave no consideration to making such report until it filed its 701. (TR 987; 989-91; 994-96; 1039; 1299-1303; 1313-14; see also Trebit's findings.) The cavalier attitude of WJR with respect to disclosing or reporting all this change (and all other changes) is clearly stated by Mr. Patt in a letter to his counsel, dated September 29, 1954, as follows:

> "It seems to me that we should leave the engineering proposal as nearly the same as before in the application inasmuch as any minor changes that we might make would be the result of final conclusions and decisions later on. Of course, we would have to reflect the WTAC equipment purchase. I think Clarence feels that we should make the changes conform to the actual facts as we believe them to be now, but I am simply wondering if that will raise any questions which need not be raised." (Butterfield Ex. G, pp. 128-129.) [underscoring supplied]

31. It is clear that on and after May 14, 1954, the date on which WJR received its construction permit, until sometime prior to July 21, 1954, WJR could have entered into an affiliation agreement with DuMont and proceeded with the construction and operation of the station in accordance with its representations to the Commission. DuMont desired an affiliation with WJR for Detroit as well as for Flint coverage. But WJR did not enter into an affiliation agreement with DuMont, as it could, and proceed to carry out its representations to the Commission. In fact at the further hearing and despite prior representations obviously intended to leave a contrary inference, WJR admitted that the question

of a DuMont affiliation had nothing to do with the decision not to construct and operate the station from the Clarkston site as authorized. (Tr. 295; 328-30; 1012; 1016; 1064; 1070-71; 1260-62; 1425-26; 1436; WJR Ex. 98; Butterfield Ex. G, pp. 2 and 7; see findings, infra.) Instead, WJR elected to follow another course. It assigns as its prime reason for this action its fear of an unsuccessful operation with a Du Mont affiliation, despite the fact DuMont was then offering its affiliates substantially the same amount of programming as it was in 1952 when WJR formed its program plans, of which it was so proud and for which it received a substantial preference. Moreover, not only was DuMont offering its affiliates substantially the same amount of programming in 1954 as it was in 1952, but DuMont's network billings increased each year over this three-year period, 1952-1954. (FCC 54-626, 9RR227; TR. 1014; 1763.)[10] WJR asserts that this fear existed even before the decision of May 14, 1954, and it promptly began to seek other full network affiliations. (TR. 207; 1011-12; 1119-20; 1138; 1140; 1264-66; 1283-84; 1458; 1466; WJR Ex. 104, Ex. A, p. 2). According to WJR and in connection with this effort, it soon discovered that because of the overlap of service areas which would result from its operation from the Clarkston site with the Detroit stations affiliated with CBS, NBC and ABC, it would not be possible for it to secure an affiliation with any of these networks if it operated from that site. Accordingly, as early as June 8 or 9, 1954, WJR began consideration of and investigation for a new site to the north, east, west or northwest of Flint suitable to the networks. (TR. 1019-22; 1077; 1144; 1147-48; 1248; 1277-83; 1458.) At the same time it sought unsuccessfully to convince the networks that they should affiliate with WJR operating from its Clarkston site. (TR. 238-241; 248; 320; 322-29; 1126; WJR Ex. 104, pp. 13-19.) Ultimately WJR selected the Chesaning site in order to secure a CBS affiliation. In fact, the Chesaning site was selected only after approval of that network. (TR. 1022-23; 1463; 1479; 1481-82.)

32. It was developed at the further hearing herein (1) that at least until July 21, 1954, WJR could have had a DuMont affiliation, (2) that WJR's decision to secure and search for a different network affiliation and transmitter site began long prior to July 21, 1954, and (3) that the matter of a DuMont affiliation had nothing to do with WJR's decision not to construct and operate the station from the Clarkston site as it had represented it would. However, in its modification application (File No. BMPCT-2689, Ex. P-3) WJR, in the reasons for the changes reflected therein, asserted:

> "Since the hearing and the grant of applicant's construction permit by the Commission on May 14, 1954, Du Mont has affiliated with station CKLW-TV in Windsor, Ontario, Canada. As a result of this affiliation, applicant's officers have had numerous discussions with other networks to determine which, if any, would be available . . ." (Emphasis added)

This statement cannot be squared with the evidence of record at the further hearing, for it is a false and misleading representation.

33. We have set forth herein and in Trebit's findings facts as to WJR's abandonment of its original proposals. It is clear that the basic decisions as to the abandonment of these proposals were all made during the period from on or about April 30, 1954 to mid-June, 1954. While some details as to the specific manner in which the new proposals would be effectuated were still to be completed, the abandonment of the old proposals actually occurred during this period and at the same time the basic aspects of the new proposals had been formulated. Thus, it is not material to the decision here that the agreement for the acquisition of the WTAC studio building was executed on July 30, 1954 (TR. 419), that WJR was not satisfied that it could secure a CBS affiliation until August, 1954 (TR. 1463; 1479; 1481-82), that the new program schedule was not prepared until September, 1954 (see paragraph 26 *supra*), and

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10/ There can be no doubt that actions such as this of WJR had an adverse effect on DuMont and contributed to the network's ultimate end. (Tr.295;1140-41.)

that the agreement for the acquisition of the Chesaning transmitter site was not executed until September 20, 1954 (Butterfield Ex. G, pp. 70-71).

34. Despite the foregoing decisions and activities of WJR relating to the abandonment of the proposals it had submitted at the hearing and upon which it had been preferred over its competitors, WJR deliberately concealed the facts with respect thereto. WJR now declares that it decided to conceal these facts at least until the Commission had acted upon the petitions for rehearing filed by Butterfield on June 11, 1954, by Trebit on June 14, 1954, and by the Flint Citizens Committee on June 14, 1954. It did this with full knowledge that these petitions for rehearing had raised questions as to the WJR proposals of record and the criteria described above which the Commission considered in its decision of May 14, 1954. At the same time

[8011]

and with full knowledge that its original proposals had been abandoned and that the record with respect thereto was a nullity, WJR in its opposition to the petitions for rehearing, filed June 21, 1954, defended the validity of the Commission's findings and conclusions relating thereto. Moreover, the matters in question were vital and controlling to the Commission's decision of May 14, 1954. (FCC 54-626, 9RR227; Petitions for rehearing of Butterfield and Trebit, filed June 11, 1954, and June 14, 1954, respectively; opposition to petitions for rehearing, filed June 21, 1954 by WJR; Tr. 1031; 1036-39; 1240; 1306-07; 1309; 1311; 1316-17; 1331.)

35. Nor was WJR unaware of the impropriety of these acts. In a letter dated May 17, 1954, three days after the Commission's decision granting the WJR application, counsel for WJR advised Mr. Kramer as follows:

> "I think your question about network affiliation is part of the over-all problem of being scrupulously careful to adhere to the representations made during the hearing. Reed and I will submit a detailed recommendation on this whole area in the near future. With respect to

> network affiliation, it is my preliminary feeling that you should not affiliate with anyone other than DuMont, unless (1) the other network is without a Detroit affiliate, or (2) the other network's signal is not receivable in Flint. This is based particularly on findings 81 and 82 on page 23 and conclusion 31 on pages 49 and 50.
>
> "In any event, as a general proposition, I think it would be wise to move slowly with respect to decisions of this nature until the 30-day appeal period has run. At that time, we will have knowledge of what grounds (if any) Trebit and Butterfield will advance to the Commission or to the Court as part of their argument that the decision is incorrect . . . " (Butterfield Ex. G, pp. 5-6)

On July 9, 1954, counsel for WJR wrote Mr. Patt. In this letter counsel advised that in connection with a move of transmitter site to the north " . . . several serious questions present themselves. These questions are not related to the economics of such a move but rather to the problems that would be created before the Commission." After discussing the delay which would be occasioned by the requirement of airspace approval and the processing of an application to change site, counsel continued:

> "Another problem is that we would have to file such an application on a Form 301 and we would either have to state that there were no programming changes or set out the changes. If we propose a different network than DuMont, this would result in a new program schedule and we run into the problem of the fact that one of our major preferences was in programming. If we change the programming, in any way, Trebit

> and Butterfield will petition the Commission to designate the modification application for hearing and will probably claim the right to a comparative hearing. This would lead to further delay and the remote possibility of a further hearing.
>
> "Another factor is that Butterfield has requested that the record be reopened, and if we file an application to change the transmitter site, this will give them additional arguments for reopening the main proceeding.

> "Of course, if we file such an application, Butterfield and Trebit will argue that we are much too late to do so. I doubt that this particular argument would stand up, but it may be appealing to some Commissioners and, again, I think it would add to Butterfield's argument that a rehearing should be held.
>
> "In addition, the filing of such an application would seem to cut both ways as to the pending petitions for reconsideration. On the one hand, it could result in the withdrawal of objections by the Flint citizens group. On the other hand, Trebit could argue that such an application proves that their assertion with respect to transmitter locations was correct and that we in reality are trying to strengthen our case." (Emphasis supplied) (Butterfield Ex. G, pp. 41-42.)

On August 19, 1954, counsel for WJR addressed a letter to Mr. Patt, enclosing application forms for a modification application, and after advising that application forms had also been sent to WJR's engineer, declared:

> "As you know, I am reluctant to see you file such an application, but we have thoroughly discussed the pros and cons, and I recognize that you are faced with compelling economic reasons which outweigh the legal considerations. If the application to change location runs into the difficulties I anticipate, you could, of course, have it dismissed without prejudice before it is designated for hearing." (Butterfield Exhibit G, p. 53.)

On September 16, 1954, Mr. Patt wrote a letter to Mr. Kramer in which he expressed concern as to the concealment of WJR's new plans and suggested that the following course of action could be followed:

> ". . . I think it is possible that we can announce our intention to do something of this kind perhaps even in advance of our actually filing it. I want to get Reed's philosophy and perhaps the advice of one or two Commissioners on this point." (Butterfield Ex. G, pp. 61-62.)

On September 23, 1954, counsel for WJR, in a letter transmitting the draft of the WJR modification application to Mr. Patt, again expressed his concern of the course of action WJR had elected to follow, declaring:

> "As you know, I have been somewhat apprehensive about this application, first because it might possibly become involved in a further comparative hearing, and secondly, because a grant of the application might be reversed in court. As a result of our discussions when you were here on Tuesday and
>
>
>
> Wednesday, I feel quite confident that the application will be granted by the Commission. However, there is a possibility that Trebit and Butterfield would both be considered parties in interest under section 309(c) of the Communications Act and, therefore, would be entitled to protest a grant of the application without hearing. This would mean that a hearing would be held and the Commission would automatically stay the grant of the modified construction permit pending further litigation. In all probability, the application would be granted by the Commission after the protest hearing, after which our opponents could appeal to the court. In the meantime, I presume that our opponents will file an appeal from the original grant and both appeals would be consolidated at a later date. I recognize that you have no choice from a business point of view about filing the application to move. However, I have spelled the legal obstacles out in a little more detail than I did when you were here, particularly the provision of the law which requires the Commission automatically to stay a protested action. I am not sure whether I mentioned that while you were here." (Butterfield Ex. G, p. 75-A.)

On October 25, 1954, Mr. Patt again wrote his counsel concerning this subject. From this letter, it appears Mr. Patt was also concerned by the fact that no action had been taken on the petitions for rehearing. He stated in pertinent part as follows:

> "I haven't checked with you for more than 10 days, but I think it is time we recheck at the Commission with [the Chief of the Commission's Opinions and Review Staff] or one of the Commissioners to see what is going on. As I understand it, the Commission is still waiting for the Opinion and Review Section to write the decision, and the original draftsman has left the Commission and it has been reassigned to someone else . . .
>
> "As I understand it, you now agree that we should not file any amendment application until 30 days have elapsed

> following the Commission's pronouncement . . ."
> (Butterfield Ex. G, p. 139.)

36. During the course of the original proceeding WJR was opposed by a committee of citizens from Flint. On May 19, 1954, WJR principals met with this committee and the opposition to the WJR proposal was made known. (WJR Ex. 104, pp. 5-7). On September 15, 1954, WJR principals again met with this Committee to "eat a little crow" and inform the committee of its above-described new plans. In view of these new plans, the Committee advised WJR that it would withdraw its previously filed petition objecting to the original WJR proposal. WJR did not want this petition withdrawn since issues as to the original site proposed were before the Commission and undecided, and it felt the withdrawal of the petition and thus the announcement of the new plans "might be construed as an attempt to improperly influence the Commission's determination on the petitions." (WJR Ex. 104, pp. 26-28.) WJR then asked

that no announcement of these new plans be made. (Tr. 1307-08) On November 22, 1954, the new WJR plans still not having been revealed, the president of the Flint Chamber of Commerce wrote Mr. Patt with respect thereto, referring to inquiries he had received from local citizens as to WJR's plans, and stating:

> "Because of these many requests for information, it is our considered opinion that your plans should be publicized to the community. Accordingly, we respectfully request confirmation of your intentions regarding a television station for Flint as disclosed during your visit here with full details on location, construction, etc., and authorization for a public statement. We would like to know, if possible, whether the Federal Communications Commission has been advised of your amended plans and what is delaying disposition of the matter." (WJR Ex. 108, letter Thomas to Patt dated November 22, 1954.)

On December 1, 1954, Mr. Patt replied to the above-described letter of November 22, 1954. He asserted that WJR's new plans were the same as disclosed to the committee on September 15 and that a decision on the petitions for rehearing should be rendered "in the very near future." Continuing, Mr. Patt declared:

> ". . . we shall within 30 days file an application with the Commission for a revised transmitter site, in accordance with the plans I outlined to the group at the City Club on September 15th.
>
> "However, I respectfully request that you do not make any public statement with regard to this matter, in accordance with the understanding we had two months ago. We will make a full public statement at the time we file our application for the new site." (WJR Ex. 108, letter Patt to Thomas dated December 1, 1954.)

37. One additional matter must be considered with respect to this aspect of the case and its ultimate determination. On December 1, 1954, WJR tendered with the Commission an application for the extension of completion date (Form 701) of its permit granted on May 14, 1954. No public notice of the filing or acceptance of this application was made until December 21, 1954 when the acceptance thereof was announced. During the period December 1 -- December 21, 1954, inquiries at the Commission failed to disclose the existence of this application. On December 21, 1954, this application was granted. Thus, Trebit and Butterfield received no notice of this application until the date of its grant, December 21, 1954, and in fact did not learn of its existence until that date. (Tr. 387-93; 395-98; 412-14.)

38. In this 701, WJR made reference to the acquisition of the WTAC studio building, changes in stockholders and its staffing and integration plans, a change in its network plans, and a change in transmitter location, asserting that a modification application, reflecting those changes, soon would be filed. In this application, WJR also represented to the Commission that the construction of its station as authorized on May 14, 1954 had not been completed because of (1) the fact no action

had been taken on the petititions for rehearing, including the petition of the Citizens Committee, directed against the original grant, and (2) "changes in television station facilities and network affiliations occurring during the past two years, which have required a review of applicant's network affiliation plans." (WJR Ex. 100.) Despite the fact Mr. Patt admitted that the change in transmitter site was in large measure the reason construction at the Clarkston site was not completed,[11] this reason was not divulged in the sworn statement, the very purpose of which was to advise the Commission of the genuine reasons for non-completion. (Tr. 1473; 1477; WJR Ex. 100.)

39. As shown above, this application (Form 701) was tendered to the Commission by WJR on December 1, 1954. On December 2, 1954, the Commission adopted its order, released December 6, 1954, denying the petitions for rehearing. Obviously this order was prepared long in advance of December 1, 1954 and gave no consideration to the 701. (FCC 54-1496, 9RR260u; Butterfield Ex. G, p. 139.) Moreover, the other applicants in this proceeding received no notice, actual or constructive, of the tendering of this 701 by WJR. (Tr. 387-93; 395-98; 412-14.) In view of the application processing procedures of the Commission and the facts set forth above, the tendering of this 701 by WJR cannot be considered as a proper or timely disclosure of its new plans, nor does it in any way justify or excuse the deliberate concealment of these new plans by WJR. However, since the court and the Commission have specifically directed a reconsideration of these matters here, we shall further consider the representations made therein.

---

[11] As shown in Trebit's findings construction at this site was in fact never really started.

[8016]

40. At the further hearing facts were developed which make the representations of WJR in this 701 important to the determination here. Despite the fact the real and controlling reason for not completing con-

struction was the change of transmitter site, WJR did not disclose this fact although such disclosure was called for by the application. (Tr. 1473; 1477; WJR Ex. 100.) WJR asserted that the pending petitions for rehearing were reasons that construction had not been completed. However, it was shown at the further hearing that WJR could have had the Citizens Committee petition withdrawn long prior to December 1, 1954 (see paragraph 36, supra), and, in fact, WJR knew that these petitions had nothing to do with stopping construction nor did the fact that they were pending prevent WJR from proceeding. (Tr. 1017.) Moreover, in its response to the petitions for rehearing opposing Butterfield's request for a stay, WJR makes it clear that in no way were such petitions or request considered a basis for not proceeding with construction. (WJR opposition to petitions for rehearing [p. 8], filed June 21, 1954.) No disclosure was made as to the extent of construction (or lack thereof) at the transmitter site, or that the change of transmitter site was a move of some 44 miles. (See Trebit Findings.) Similarly, in this 701 WJR did not advise the Commission that it had actually abandoned its original studio and program proposals and was in fact then proposing new or substantially new proposals in these regards. (See paragraphs 18-36, supra.) In view of the facts developed at the further hearing and detailed above, it is clear that this WJR 701 was not a request for additional time to construct the station authorized on May 14, 1954; it can only be considered as a request to keep the WJR construction permit alive, despite the abandonment of the originally approved proposals, until WJR was ready to disclose its new proposal. Thus, the representations contained in the WJR 701 are far from frank and full disclosures and in some respects are completely false. Nor were these representations mere inadvertences on the part of WJR. They can only be considered as deliberate representations designed to accomplish the purposes of WJR. The awareness of this is demonstrated by a statement in a letter, dated November 18, 1954, from the Director of Television Operations

[8017]

of WJR, to counsel for WJR. This letter was with reference to the preparation of the 701, and, in this connection, the Director of Television declared:

> ". . . We are unable to supply feasible reasons for retarding construction [under the original authorization] other than the one which I presume you will use, i.e., the various petitions that have been filed objecting to the decision." (Butterfield Ex. G, pp. 144-145.)

* * * *

[8306]

EXHIBIT P-3

WJR, The Goodwill Station, Inc.
Section IV
Paragraph 6

Network Affiliation Plans

During the comparative hearing held on applicant's original application for construction permit, its proposed programming was based upon the use of the DuMont network, inasmuch as the network was the only TV network without a full-time outlet in the Flint - Lower Michigan area. Since the hearing and the grant of applicant's construction permit by the Commission on May 14, 1954, DuMont has affiliated with station CKLW-TV in Windsor, Ontario, Canada. As a result of this affiliation, applicant's officers have had numerous discussions with the other networks to determine which, if any, would be available to WJRT, since applicant considers that network programming is essential to successful operation of a television station. As a result of these discussions, it has been learned that both CBS and ABC would be interested in affiliating with WJRT, but only if the WJRT transmitter is moved sufficiently to the northwest to avoid any substantial degree of overlap between WJRT and the networks' respective affiliates in Detroit.

This application is being filed primarily to change the transmitter site and to propose network affiliation with CBS.

[10155]
[Tr. 1471]

VOLUME 11

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Monday, July 25, 1955

* * * *

The hearing in the above-entitled matter reconvened at 10:07 o'clock a.m., in Room 1416 New Post Office Building, before HERBERT SHARFMAN, Hearing Examiner (The Presiding Officer).

APPEARANCES:

(Same as heretofore noted.)

[10156]

[Tr. 1472]

PROCEEDINGS

* * * *

WILLIAM J. EDWARDS

* * * *

[10165]

[Tr. 1481]

* * * *

CROSS EXAMINATION

* * * *

[10169]

[Tr. 1486]

By Mr. Eagan:

* * * *

[10207]

[Tr. 1524]

* * * *

Q. I am referring to the fact that on page 170 there is not only an advertisement of WKNX, but in the listing of the station it shows population figures for Grade A, Grade B, and total, including fringe area; and the total, including fringe area, is given as 1,083,925 people. Isn't that correct?

[10208]

[Tr. 1525]

A. Yes. This shows Grade A of 341,100, Grade B of 761,500, and a total, including fringe area, of 1,083,925.

Q. The only question is, weren't those figures supplied by the station to the magazine? A. I don't believe so. I think these figures were the result of the research which was done by this agency, because you will note that this same figure of total retail sales is identical in the ad with the station index.

Q. Did the station authorize the agency to furnish that information on behalf of the station? A. I think we gave the agency the blank, which of course has these categories and asked the questions, and we asked them to do it.

Q. Doesn't Broadcasting state at the bottom, with respect to information under station listings, that market information in station listings is furnished by stations and any inquiries should be directed to that source? A. It says that, yes; but as I recall, this was supplied by the agency.

Q. At your request, I take it. A. Yes, we asked them to prepare this information for us.

Q. I take it that you are not claiming that the operation of Channel 12 affects those coverage figures in any way whatsoever, are you?

[10209]

[Tr. 1526]

A. I don't understand the question, Mr. Eagan. What do you mean, how would it affect it?

Q. Will it affect it in any way?

Mr. Scheiner: I would like an explanation of that question, too, sir. Certainly if WKNX-TV goes off the air, as Mr. Edwards said it will, it will vitally affect its coverage figures in every conceivable respect. Clearly Mr. Eagan didn't intend that, and if he didn't, I don't know what he meant.

Mr. Eagan: I think it is pretty obvious what I meant, but I will explain it.

This station claims these coverage figures. That occurred at a time before Channel 12 was on the air in Flint. My question is, assuming of course that the station stays on the air, would there be any change in those coverage claims because of the operation of Channel 12?

Mr. Scheiner: Do you mean interference-wise?

Mr. Eagan: I mean in any wise.

Mr. Scheiner: Interference-wise, obviously the question answers itself. The answer is obviously no. Is there any other respect in which you intend to solicit a meaningful answer?

Mr. Eagan: I think the answer has to be no. I think perhaps it is too obvious to ask.

The Presiding Officer: That is the point. Certainly

interference-wise there is no question.

Mr. Eagan: That settles it as far as I am concerned.

Mr. Scheiner: I will stipulate there is no interference problem between Channel 12 and Channel 57.

By Mr. Eagan:

Q. In this same ad in the 1954 Telecasting, page 170 --

Mr. Scheiner: I object to further inquiry, Mr. Examiner. Again, I fail to see any relevance to anything that is before us.

The Presiding Officer: Mr. Eagan? I don't know what the question is. I can't rule upon it.

Mr. Bass: I think we ought to get the question first.

The Presiding Officer: Let's hear what the question is.

Mr. Eagan: It might be helpful.

By Mr. Eagan:

Q. This same ad at page 170 refers to the average area as being a billion dollar market. The question again is probably an obvious one and it might be objectionable on that basis. The existence of a billion dollar market isn't changed by the fact that Channel 12 would go on the air in Flint, is it?

Mr. Scheiner: Objection.

The Presiding Officer: The objection is sustained.

Mr. Scheiner: I suggest that Mr. Eagan put this ad in evidence in exhibit form, and then we can argue about the

[10211]

[Tr. 1528]

relevance of this ad.

Mr. Eagan: I am not that interested in it.

The Presiding Officer: I think that question doesn't add anything to the sum total of our knowledge.

Mr. Eagan: I think it does, sir. They are claiming they had a billion dollar market, and I don't think that Channel 12 coming on the air in Flint Changes that fact one iota. That billion dollar market is still there.

The Presiding Officer: It may still be a billion dollar market.

Mr. Scheiner: Let's not reargue.

The Presiding Officer: Let's go on, gentlemen. I suppose that "billion dollar market" is a term of art.

Mr. Eagan: In view of that, I would like to offer this ad as an exhibit. I take it there will be no objection.

Mr. Scheiner: I object to its relevance.

Mr. Eagan: I think it goes to the question of their coverage claims. I think we can argue that none of these facts that they claim are changed by the operation of Channel 12 in Flint. It is strictly a matter of argument.

The presiding Officer: That is marked for identification as Exhibit No. 101.

Mr. Bass: I think that might be handled by official notice, perhaps.

Mr. Eagan: I think that is true.

[10212]

[Tr. 1529]

The Presiding Officer: Will you name the issue, and so on?

Mr. Eagan: Yes. It is the 1954 Telecasting Yearbook-Marketbook, and the ad appears at page 170.

The Presiding Officer: Is there any objection to my taking official notice of that?

Mr. Scheiner: As I understand, Mr. Eagan has stated that the purpose of this request is that he may later contend that the advent of WJRT on Channel 12 in Flint will not affect such market representations as are set out there. With that stated purpose, I withdraw my objection.

The Presiding Officer: All right. Official notice will be taken of that. The ad will be reproduced for the benefit of myself at least, or will I have to go to the yearbook?

* * * *

[10253]

[Tr. 1570]

Q. Just to make sure, suppose instead of CBS at Chesaning, WJR had specified NBC. I may have asked you this before, but I would like your answer again at this time. Suppose they specified NBC at Chesaning rather than CBS, would your decision to go off the air remain the same? A. If the station came on the air at this site in Saginaw County, near Chesaning, and had NBC, and we could maintain our CBS affiliation as the CBS outlet for the Saginaw market, I have every reason to believe that we could continue our operation.

* * * *

[10733]

[Tr. 1]

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

New York, New York

July 21, 1955.

[Received July 27, 1955, F.C.C.] Docket No. 11412

The deposition proceedings in the above-entitled matter convened at 11:15 A.M. at 485 Madison Avenue, New York, New York, before Marvin P. Birnbaum, a Notary Public in and for the State of New York.

* * * *

[10806]

[Tr. 73]

MR. COTTONE: Was there any discussion, Mr. Akerberg, with Mr. Patt or any of the WJRT people with respect to WJRT carrying DuMont programs?

MR. AKERBERG: No.

Mr. Cottone: Was there any discussion, Mr. Akerberg, with Mr. Patt or any other WJRT officials as to whether WKNX, which is presently an affiliate of CBS at Saginaw, Michigan, would or would not continue to carry CBS programs when WJRT began operating?

Mr. Brauner; What is that question?

(The reporter read the last question as recorded.)

Mr. Cottone: At the new site.

Mr. Akerberg: I brought that subject up myself, and I told Mr. Patt that we would not terminate the Saginaw affiliate, UHF affiliate. I pointed out, however, that in my opinion the Saginaw station would probably suffer as far as business is concerned because I couldn't conceive of a client -- or our clients collectively -- buying both stations; but in no event would I cancel out their contract. Does that answer your question?

Mr. Cottone: Yes. Did Mr. Patt or anyone

[10833]
[Tr. 100]

* * * *

Mr. Cottone: Can I ask you this further question, Mr. Akerberg? In your experience and

[10834]
[Tr. 101]

with your knowledge of what happens in this field as to what the advertiser is buying, is it conceivable to you that in any situation where WJRT might wish to take all of the programs that are available on network option time, that under those conditions WKNX could conceivably get any CBS programs, any of those CBS programs?

Mr. Akerberg: It's a difficult question to answer because again a client does what he wants to do. If JRT carried every program that we offered, whether it be option time or not, which a lot of stations do, if a client comes along and wants to buy Saginaw along with it, there is no reason -- is there, Ed? -- that I know of why we wouldn't make it available to them.

Mr. Cottone: Does that ever happen, though? I am asking you, in your experience, does it ever happen with the two close together?

Mr. Akerberg: I just don't know.

Mr. Shurick: There is a situation similar to this in the case of Indianapolis and Muncie.

Mr. Cottone: How far apart are they?

Mr. Shurick: They are about forty miles apart, and in the case of this, Muncie is a UHF

[10835]
[Tr. 102]

station and the Indianapolis is VHF, and in this case Muncie has a reasonable share of programs.

Mr. Cottone: Are you aware of the fact that the distance between WKNX and WJRT at the Chesaning site would be about fourteen miles?

Mr. Shurick: I am aware of that.

Mr. Cottone: You say it is conceivable in that situation that an advertiser would --

Mr. Shurick: I am talking in terms of the engineering contours.

Mr. Cottone: I am talking about the practical aspects of what happens in your experience. Do you know of any case where an advertiser would buy, in a situation comparable to the one that we would have here, for the same program at the same time, both WKNX-TV and WJRT?

Mr. Shurick: I would say this on the matter: You are trying to use mileage, the difference between 14 and 45 miles. I would say if it was a difference between 14 and 70 miles it would be significant.

However, in this case you have Muncie, in the case of Indianapolis, which has been used as the example, has satisfactory coverage from the

Indianapolis station with an acceptable signal.

Mr. Cottone: Mr. Shurick, don't you recognize a distinction between Muncie and Indianapolis and Saginaw and Chesaning?

Mr. Shurick: Of course I do.

Mr. Cottone: Isn't it true that the situation that would be created makes it virtually impossible for the purchase of WKNX-TV by an advertiser who wants to sponsor a CBS program? In other words, isn't it inconceivable, to state it very plainly, that an advertiser would place an order for the same program at the same time on both WKNX-TV and WJRT?

Mr. Shurick: Again, as Mr. Akerberg says, only time will tell in this particular case because all things are not equal. You asked for an example which is somewhat similar to this situation, and I gave you an example where advertisers are buying a second station even though they are getting an acceptable signal out of the major market in Indianapolis, and they are getting an acceptable signal from Indianapolis still, and at the same time they are buying the UHF in the Muncie Market.

[10837]

[Tr. 104]

Mr. Cottone: Are they buying the same programs simultaneously?

Mr. Shurick: Same programs, that's correct.

Mr. Bass: Simultaneously?

Mr. Shurick: That's correct.

Mr. Cottone: In that case, the distance is about what?

Mr. Shurick: About forty or forty-five miles.

Mr. Cottone: You still say that it is conceivable that they might do the same here?

Mr. Shurick: I say it's not impossible.

Mr. Cottone: Do you know of any cases where you have a closer location than that?

Mr. Shurick: No, offhand I cannot think of any case.

Mr. Cottone: You don't have any affiliations really, do you, where you have stations located that close together?

Mr. Eagan: How close?

Mr. Cottone: Fourteen miles.

Mr. Shurick: No.

* * * *

[11401]

Docket No. 11412
Exhibit No. 108
Date: 7/26/55

Affidavit on behalf of Sparton Broadcasting Company, Inc. Cadillac, Michigan, (WWTV) in re Construction Permit BMPCT-2689 issued to WJR, The Goodwill Station, Inc. Flint, Michigan, (WJRT)

City of Washington :
: ss
District of Columbia :

James C. McNary, on his oath states that he is a professional engineer registered in the District of Columbia, that his record of qualifications and experience is on file with the Federal Communications Commission, and that he further states as follows:

1. Maps have been prepared on the basis of the "Third Notice of Further Proposed Rule Making" with respect to co-channel and adjacent channel interference to Grade B contours as pertains to WWTV operating with 105 KW ERP and 316 KW ERP, and WSPD-TV operating with 316 KW ERP.
2. A desired/undesired signal ratio of 28 db was used for co-channel interference while 0 db ratio was used for adjacent channel interference.
3. Pertinent population and area figures are included with this exhibit.

/s/ James C. McNary

Sworn to before me this 25th day of July, 1955

/s/ Beatrice J. Shelton
Notary Public, D.C.
My Commission Expires
Apr. 14, 1956

Population and Area Summary

A: WWTV - 105 KW Operation

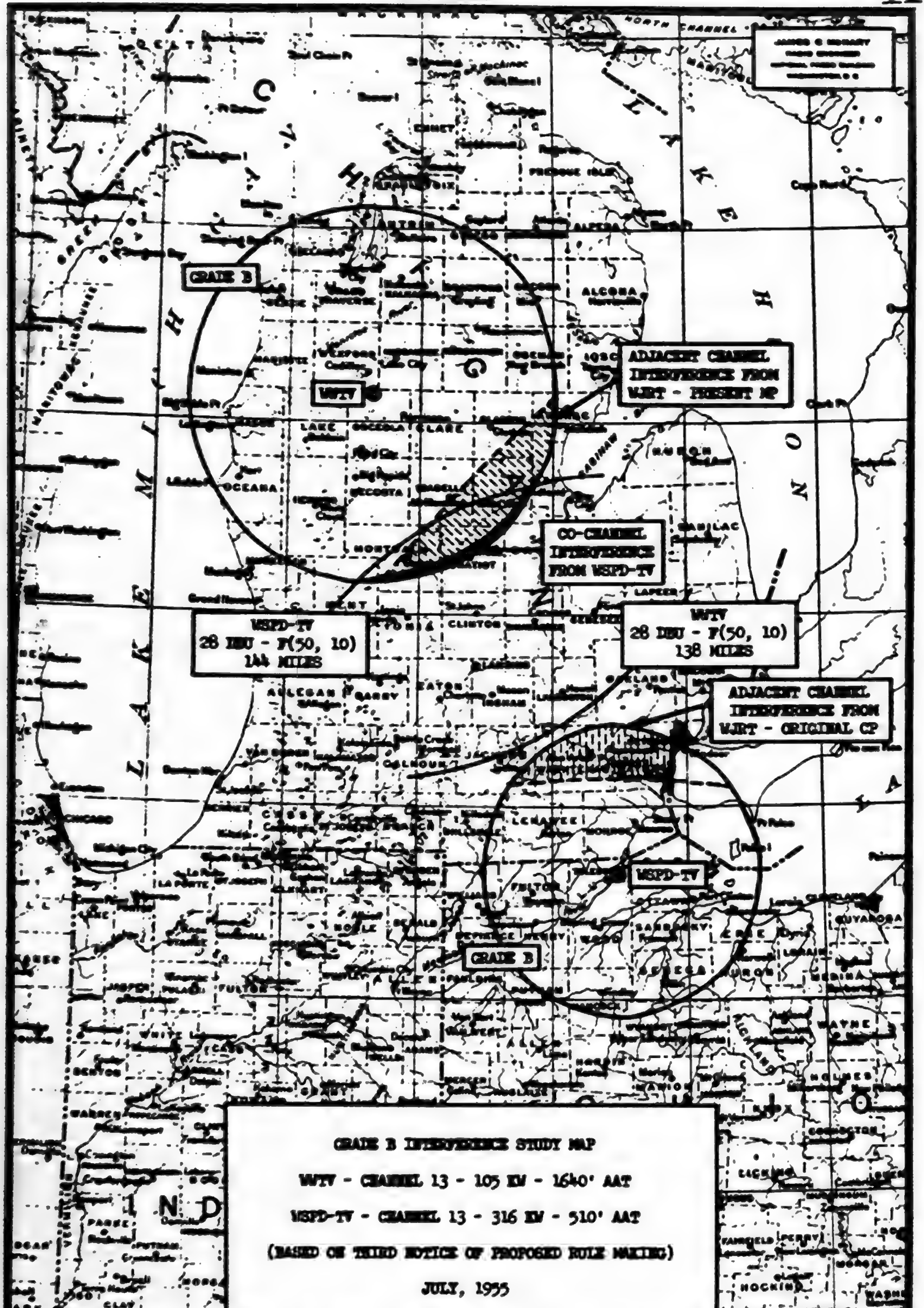
	Population (1950 Census)	Area (Sq. Miles)
Grade B	365,540	13,160
Interference from WJRT present MP	77,669	1,407
Interference from WSPD-TV	9,771	186
Portion of inferference from WSPD-TV which is within interference from WJRT	9,288	178
Net increase in interference to WWTV due to WJRT	68,381	1,229

B: WWTV - 316 KW Operation

	Population (1950 Census)	Area (Sq. Miles)
Grade B	455,421	14,870
Interference from WJRT present MP	99,014	1,740
Interference from WSPD-TV	18,162	279
Portion of interference from WSPD-TV which is within interference from WJRT	14,850	248
Net increase in interference to WWTV due to WJRT	84,164	1,492

C: WSPD-TV

	Population (1950 Census)	Area (Sq. Miles)
Grade B	1,967,756	6,684
Interference from WJRT original CP	1,095,112	924
Interference from WWTV	11,864	170
Portion of interference from WWTV which is within interference from WJRT	11,386	162
Net WJRT interference to WSPD-TV	1,083,726	762



GRADE B
WWTV
WSPD-TV
GRADE B
LAKE MICHIGAN
LAKE HURON
CHICAGO

ADJACENT CHANNEL INTERFERENCE FROM WJRT - PRESENT MP

CO-CHANNEL INTERFERENCE FROM WSPD-TV

WSPD-TV
28 DBU - F(50, 10)
144 MILES

WWTV
28 DBU - F(50, 10)
138 MILES

ADJACENT CHANNEL INTERFERENCE FROM WJRT - ORIGINAL CP

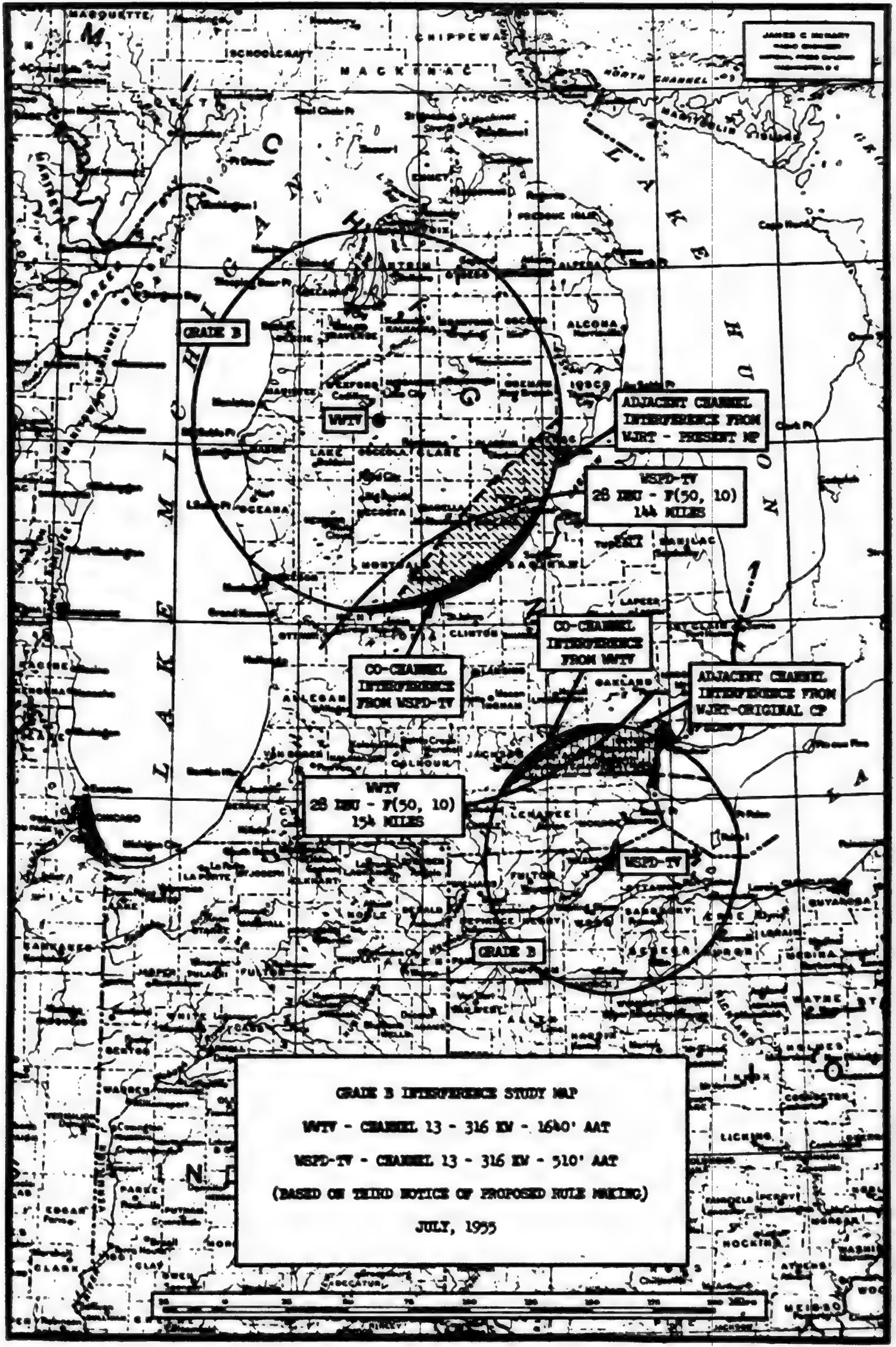
GRADE B INTERFERENCE STUDY MAP

WWTV - CHANNEL 13 - 105 KW - 1640' AAT

WSPD-TV - CHANNEL 13 - 316 KW - 510' AAT

(BASED ON THIRD NOTICE OF PROPOSED RULE MAKING)

JULY, 1955


GRADE B
WWTV
ADJACENT CHANNEL INTERFERENCE FROM WJRT - PRESENT MP
WSPD-TV 28 DBU - F(50, 10) 144 MILES
CO-CHANNEL INTERFERENCE FROM WSPD-TV
CO-CHANNEL INTERFERENCE FROM WWTV
ADJACENT CHANNEL INTERFERENCE FROM WJRT-ORIGINAL CP
WWTV 28 DBU - F(50, 10) 154 MILES
WSPD-TV
GRADE B
LAKE MICHIGAN
LAKE HURON
MACKINAC
CHIPPEWA
SCHOOLCRAFT
MARQUETTE
NORTH CHANNEL
ALCONA
CHICAGO
LENAWEE
OAKLAND
LAPEER
SANILAC
CLINTON
CALHOUN
ALLEGAN
OTTAWA
OCEANA
MONTCALM
OSCEOLA
CLARE
LAKE
LICKING
HOCKING
CUYAHOGA
MEDINA
WAYNE
HOLMES
COSHOCTON
DECATUR
CLAY
CLARK

GRADE B INTERFERENCE STUDY MAP

WWTV - CHANNEL 13 - 316 KW - 1640' AAT

WSPD-TV - CHANNEL 13 - 316 KW - 510' AAT

(BASED ON THIRD NOTICE OF PROPOSED RULE MAKING)

JULY, 1955

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley not participating; Commissioners Mack and Craven abstaining from voting.

1. Oral argument in the instant protest proceeding has been held and the matter now awaits final decision. WJR, by petition filed November 15, 1956, requests immediate issuance of a final decision.[1/] Lake Huron Broadcasting, one of the protestants and now a party intervenor in the comparative hearing, has, as an alternative to its request for consolidation of the two cases, asked that final disposition of the protest case be deferred pending completion of the comparative case. The request to consolidate has been disposed of today in a separate Memorandum Opinion and Order issued in the comparative case.[2/]

2. WJR maintains that Section 309(c), in stating that "the hearing and determination of cases arising under this subsection shall be expedited by the Commission", requires the Commission to issue a final decision in the immediate future. It is argued that the basic question here is whether the protestants met their burden of proof, which is different from the question at issue in the comparative case, and that an immediate final decision will not affect in any way the separate further proceeding in the comparative matter. WJR alleges that extreme hardship is being imposed both upon it and the citizens of Flint and that all of this works to the advantage of protestants who continue to operate their stations at a profit.

3. Sparton, in its opposition, states that it has no objection to the issuance of an immediate final decision in the protest proceeding if the Commission thereby vacates the grant to WJR in accordance with

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[1/] This was opposed by Sparton Broadcasting Company on November 26, 1956 and WJR replied to Sparton on December 3, 1956.

[2/] The request for deferral is opposed by WJR in a pleading filed December 3, 1956 and by Trebit and Butterfield on December 6, 1956. The Bureau supports deferral in a partial opposition filed December 6, 1956. On December 13, Lake Huron submitted a reply to the oppositions.

the Court of Appeals' determination that the Ashbacker doctrine has been violated by the acceptance and grant of WJR's application for modification of permit. Absent such a ruling, Sparton insists that the protest and comparative proceedings are not completely separate and distinct and that they both involve WJR and WJR's modification proposal. It is contended that a decision of the protest case in a manner requested by WJR would have a vital effect upon the comparative proceedings by illegally placing one of the applicants in the position of being a permittee before the hearing had concluded. Thus, states Sparton, the two proceedings are inextricably bound together not only by a substantial overlapping of substantive issues, but by the procedural Ashbacker question. It is asserted that WJR's reliance upon its right to expedition under Section 309(c) overlooks the fact of Trebit's and Butterfield's overriding right to a full comparative hearing under Section 309(b). Sparton contends that it is obvious that the 309(b) determination must be finally and lawfully made before WJR can have even the foundation for a Section 309(c) right and maintains that since the court has held that the Section 309(b) procedure has not yet been completed and that Trebit and Butterfield have not yet received their rights thereunder, WJR's claim for rights under 309(c) is unwarranted. Sparton states that WJR cannot be heard to complain about delay which results from WJR's voluntary abandonment of its original hearing proposal and failure to make full and timely disclosure of its new proposals. Sparton concludes that one of the most important rights of competing applicants herein is the right to completion of the comparative process before any one of them is given permission to construct and to commence operation.

4. The basis of Lake Huron's petition for deferral is that any decision within the framework of the protest proceeding prior to decision in the comparative case would be inappropriate and prejudicial to the disposition of the issues of the comparative case and would in-

volve prejudgment of the issues involved in the comparative proceeding. WJR, in opposition, asserts that there would be no prejudice to the rights of the parties in the comparative hearing for the reason that the ultimate question involved in the protest proceeding is whether the protestants met their burden of proving that it was not in the public interest for the Commission to grant the application of WJR, whereas, on the other hand, the ultimate question in the comparative case is whether upon reconsideration of the grant to WJR following further hearings ordered by the court the grant to WJR should remain undisturbed or should be taken from WJR and given to either Trebit or Butterfield.

5. The Broadcast Bureau, in commenting on Lake Huron's request for alternative relief in the form of a deferral of action in the protest proceeding, states that although it is axiomatic that the Commission is under a statutory mandate to expedite protest proceedings, the Commission may, because of the peculiar facts involved, within its sound discretion either issue a final decision in the protest now or delay such decision until it is prepared to act finally in the comparative case. The Bureau believes that action to be perfectly proper since a final decision which would prefer either Trebit or Butterfield over WJR would render the protest proceeding academic.

[12828]

6. In its reply submitted December 3, 1956, WJR has responded to Lake Huron's request for alternative relief as well as Sparton's opposition to WJR's request for an immediate decision in the protest proceeding. WJR insists that Lake Huron and Sparton base their contentions on a misinterpretation of the holding of the Court of Appeals in the WJR case, and urges that an immediate decision in the protest proceeding will not affect in any way Trebit or Butterfield's rights in the further hearing and reconsideration ordered by the court in the comparative case. WJR notes that the court stated that the rights of Butter-

field and Trebit are fully protected regardless of the outcome of the instant protest proceeding. It is reiterated by WJR that the ultimate question in the comparative proceeding is whether WJR should remain as the permittee of Flint Channel 12 whereas the ultimate question in the protest proceeding is whether the protestants have met their burden of proof that it was not in the public interest for the Commission to grant the application filed by WJR as a permittee of Channel 12 to modify its construction permit.

7. The Commission in a separate document adopted today has held that consolidation as requested by Lake Huron would not be appropriate. However, the Commission views Lake Huron's alternative request to defer action in the protest proceeding in a more favorable light and believes that WJR's petition for an immediate grant should be denied. We do not regard the requirement imposed by Section 309(c) of the Act that protest cases be expedited as a bar to such deferral, for what constitutes expedition and what constitutes unreasonable haste is a question that must be determined in the context of each case. In the instant situation, it is our opinion that it would be unwise to continue at this time with consideration of the protest case when because of the similarity of the factual issues, a final decision would present one side or the other in the comparative case with the difficulty of overcoming the subjective disadvantage of a decision on the facts contrary to its viewpoint. Additionally, the Commission cannot disregard the fact that in a statutory sense the protest proceeding must be said to be subsidiary to the comparative hearing. Thus, should the Commission decide in its comparative reevaluation of the applications of WJR, Trebit or Butterfield, that the WJR proposal is no longer to be preferred, further consideration of the protest would clearly be unnecessary. In light of the general purpose of Section 309(c), the Commission considers that in the peculiar circumstances of this case it is entirely proper, and not a violation of the statutory mandate, to postpone completion of the protest until it is decided whether the expenditure of

[12828]

more time and effort thereon is required.

[12829]

8. Accordingly, IT IS ORDERED This 23rd day of January, 1957, that the alternative request of Lake Huron Broadcasting Company for a deferral of further action in the instant proceeding IS GRANTED and that the petition of WJR for an immediate final decision herein IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris
Secretary

Released: January 24, 1957

[12830]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley not participating;
Commissioners Mack and Craven abstaining
from voting.

1. Three sets of pleadings relating to this comparative proceeding are now pending before the Commission. The first group relates to Lake Huron's petition to consolidate this and the protest proceeding,[1] the second involves Lake Huron's petition to enlarge and clarify issues,[2] and the third pertains to Butterfield and Trebit's motion to vacate the modification of construction permit now held by WJR.[3] In a separate document also adopted today we have discussed and disposed of a petition by WJR requesting an immediate final decision in the protest case as well as the alternative portion of Lake Huron's petition to consolidate in which deferral of further action on the protest case is requested.

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[1] Petition to consolidate comparative proceeding and protest proceeding or to defer action in protest proceeding pending decision in comparatove proceeding, filed by Lake Huron on November 26, 1956; opposition to petition to consolidate, filed by WJR, The Goodwill Station, Inc., on December 3, 1956; partial opposition to petition to consolidate, filed by Broadcast Bureau on December 6, 1956; opposition to petition to consolidate, filed jointly by W. S. Butterfield Theatres, Inc. and Trebit Corporation on December 6, 1956; response to oppositions to consolidate filed by Lake Huron on December 13, 1956.

[2] Petition to enlarge and clarify issues filed by Lake Huron on November 8, 1956; opposition to petition to enlarge and clarify issues filed by WJR on December 20, 1956; joint opposition to petition to enlarge issues filed by Trebit and Butterfield on December 31, 1956.

[3] Petition to vacate modification of construction permit and for other relief filed jointly by Butterfield and Trebit on December 18, 1956; opposition to petition to vacate filed by WJR on December 20, 1956; and opposition to petition to vacate filed by the Broadcast Bureau on December 28, 1956.

Lake Huron's Petition to Consolidate

2. Lake Huron, at the time the petition to consolidate was filed, was a party to the protest proceeding but not to the instant comparative matter. Petitioner operates television station WKNX-TV on Channel 57 at Saginaw, Michigan, and it is claimed that a grant to WJR on the basis of its modified proposal would deprive Lake Huron of its CBS network affiliation and would force WKNX-TV to cease operations. The petitioner asserts that the issues in both cases require, in part, a determination of the differences between the original WJR proposals and the modified WJR proposals and a determination whether the circumstances under which WJR tardily advised the Commission of its changed plans affect the qualifications of WJR to receive a grant of its Channel 12 application. Lake Huron points out that as a protestant it had the burden of proof in the protest proceeding whereas, had the modified proposal of WJR originally been designated for hearing, as it now has been, the burden with respect to any questions raised about WJR's proposal would have been upon that applicant. Lake Huron asserts that consolidation of the two proceedings is not only appropriate but would accord with fundamental considerations of orderly administrative procedure because both cases would be disposed of simultaneously, the most effective use of the evidentiary material compiled in the protest case would be possible, the rights of WJR, Trebit and Butterfield in accordance with the court's decision would be fully protected, as would the rights of Lake Huron. Petitioner insists that it has a right as a party in interest to have the ultimate decision with respect to Channel 12 made in a comparative contest, with the burden of proof on the applicant and with Lake Huron permitted to participate as a party in interest.

3. Consolidation, according to Lake Huron, is a long recognized procedure for the orderly handling of matters before administrative agencies and the courts and is one which the Commission has followed repeatedly. Lake Huron contends that Rule 42 of the Federal Rules of

Civil Procedure expressly provides for the consolidation of such matters, and that there is a strong policy against piece-meal disposition of matters having substantial common questions of fact or law.

4. Opposing the petition for consolidation, WJR asserts that Lake Huron's reliance on the Federal Rules of Civil Procedure is without merit inasmuch as Rule 42 relates to the discretion given to the courts to consolidate pending separate actions for a joint hearing or trial if such consolidation will avoid unnecessary costs or delay. WJR insists that the rationale of that rule has no applicability here inasmuch as the hearing on the protest case has been completed and no unnecessary delay or reduction in costs would be avoided by the consolidation.

5. Butterfield and Trebit, in a joint opposition, contend that Lake Huron has misunderstood the status of the proceeding inasmuch as that for the purpose of the comparative proceeding between WJR, Butterfield and

Trebit the only significance of the modification application is the manner in which it mirrored intentions of WJR and revealed abandonment by that applicant of the proposal on which it was preferred. Butterfield and Trebit contend that the objections of Lake Huron and others to a proposal by WJR that it operate a television station near Saginaw is totally without relationship to the three pending applications neither one of which in lawful concept proposes such an operation. It is argued that under these circumstances the Commission should not require consolidation of the protest case with the proceeding presently before the Commission because in the comparative proceeding WJR cannot be authorized to operate a station markedly different from that which was granted to it in the comparative proceeding. Trebit and Butterfield assert that no useful purpose can be served and much mischief can be caused by co-mingling the various proceedings and requiring respondents to deal with parties who are utterly without interest or right in their respective applications. They also contend that as a matter of due process they cannot be saddled with the record in the protest proceeding because the applicants have the right to be free of the obligation to encounter or deal with strangers and unrelated issues to their proceedings and are entitled as of right to be free of the proffered participation of protestants, whether advanced under the guise of intervention or consolidation.[4]

6. The petition to consolidate is also opposed by the Broadcast Bureau whose principal assertion is that Lake Huron's arguments in favor of consolidation are without merit because, although the issues in the two cases are basically the same and call for the production of the same type of evidence, the ultimate questions are different. According to the Bureau the question in the protest proceeding is whether, in light of the evidence adduced under the issues, the public interest would be served by a grant of the modification application and whether WJR is qualified to receive such grant, whereas the ultimate question in the further comparative hearing is whether the changes proposed by WJR in its modification application and the misrepresentation or concealment, if any, by WJR require a reversal of the Commission's original decision favoring WJR over Trebit and Butterfield. It is also pointed out that the protest proceeding is being held pursuant to Section 309 (c) of the Act which imposes the burden of proof upon the protestant whereas the further hearing to be conducted in the comparative case is pursuant to Section 309 (b) which places the burden of proof upon WJR, the applicant. The Bureau argues that consolidation at this particular juncture of the two cases would not serve the interests of expedition or contribute to orderly administrative procedure because such consolidation would only further complicate an already complicated proceeding.

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[4] Butterfield and Trebit also argue that Lake Huron cannot be allowed to achieve through consolidation what it had been refused through a denial of its petition to intervene. However, since the opposition was filed, the Commission has reversed the ruling of the Examiner and allowed Lake Huron to intervene in this proceeding. See footnote 5/, *infra*.

7. Answering WJR's opposition, Lake Huron insists that there are common issues of fact and that it is incorrect to state that these factual issues cannot be determined in one proceeding without affecting a determination in the other because some of the ultimate questions in the two cases may be different. Answering Trebit and Butterfield's argument that Lake Huron does not have standing to request consolidation, Lake Huron points out that it is a party to the protest proceeding and as such clearly has standing to submit the petition in question. Lake Huron also states that it has on file an application for a new station using Channel 12 in Flint and that under these circumstances it is obvious that Lake Huron has a most direct interest in the comparative proceedings. Its interest in the comparative proceeding allegedly also stems from the fact that through this proceeding a determination will be made which will determine the extent to which Lake Huron as the operator of a UHF station in Saginaw, Michigan would suffer from Channel 12 if WJR, Trebit or Butterfield receives a grant. Thus, according to Lake Huron, the selection of a grantee is a matter of direct importance to it since the actual competitive effect of such a selection will depend upon which applicant is selected. Lake Huron opposes Trebit's and Butterfield's arguments that consolidation would deprive them of procedural rights, since making appropriate use of the already completed protest record to expedite and facilitate completion of the comparative proceeding would be far from meaningless. The petitioner insists that that aspect of its proposal, that those who were not a party to the protest proceeding be afforded full opportunity to make further inquiry concerning matters covered by the record in the protest, would, if adopted, fully protect the procedural rights of Trebit and Butterfield.

8. The Commission believes that consolidation of the two proceedings as requested by Lake Huron is neither a desirable nor proper solution to the problems which exist as a result of the fact that both cases are now pending in different stages of completion. While it is

perhaps not altogether clear that in this case consolidation of the two proceedings, if done for limited purposes, would run counter to the restrictions imposed upon the method of handling remanded cases by Section 402 (h) of the Act, the intermixture of the two -- in which the burden of proof, and, indeed, the very statutory basis is different -- would likely lead to confusion and misunderstanding inimical to an orderly disposition of both cases. An attempt to use in the comparative hearing evidence introduced in the protest hearing, even with the safeguards proposed by Lake Huron, is viewed by the Commission as a procedure out of which confusion and delay rather than expedition may be expected to grow.

9. Consolidation is not necessary for protection of the rights of Lake Huron. After the instant petition to consolidate was filed, the Commission, on petition to review the Chief Hearing Examiner's denial of Lake Huron's petition to intervene, reversed the denial and allowed intervention.[5] As an intervenor under Section 309 (b) of the Act, Lake Huron

will have ample opportunity to assist in compiling a complete hearing record without incurring the danger of misunderstanding and confusion or taking the risk of jeopardizing the proceeding to a subsequent determination that through consolidation the issues and basis of the remanded case have been altered contrary to the restrictions of 402 (h).[6]

Lake Huron's Petition to Enlarge and Clarify Issues

10. On November 8, 1956 Lake Huron petitioned to enlarge the issues in the comparative proceeding.[7] It seeks to have included issues to determine the nature and proposals of all the applicants both before and after the closing of the record together with the reasons for any changes disclosed, whether any of the applicants abandoned or amended their proposals or so changed their nature as to destroy the basis for

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[5] Memorandum Opinion and Order dated December 14, 1956 and released December 17, 1956 (Chairman McConnaughey dissenting to the allowance of intervention) FCC 56-1249.

the Commission's decision, whether WJR abdicated to another its responsibility to determine the nature of its operation, the availability of television service to the area, the suitability of services proposed by the applicants, whether other applications for the facility have been filed and, if so, whether the Commission can properly consider them, the effect of a grant of any of the applications on existing television service, and a comparative finding of which, if any, of the applicants should be preferred. In support of this petition, Lake Huron argues that these issues are necessary to fully accomplish the purpose of the hearing order released October 19, 1956. WJR opposes the petition on the ground that Section 402 (h) of the Act provides that, on proceedings conducted pursuant to remand, the Commission shall, unless otherwise ordered by the Court, give effect to the order of the Court on the basis of the existing proceedings. Trebit and Butterfield argue that Lake Huron is permitted to intervene only to the extent specified in the order granting its intervention, and that in the order released December 17, 1956, the Commission limited the intervention to the issues already designated. In its reply to the oppositions, Lake Huron argues extensively that Section 402 (h) of the Act and the Court's decision are no bar to the enlargement requested. However, for the reasons hereinafter indicated, these arguments need not be set out in detail.

6/ In this connection, the Commission recalls that when it petitioned the Court of Appeals for rehearing to allow the Commission general authority to consider in the remanded proceedings other significant changes which have taken place in any of the other applicants since the close of the original hearing record, this request was denied.

7/ This petition was filed prior to the Commission order of December 14, 1956 which permitted Lake Huron to intervene in the comparative proceeding. By Commission order, the time in which to file replies to the petition to enlarge issues was extended to 15 days after the final Commission action on the petition to intervene.

11. The Commission has heretofore expressed its views regarding enlargement of the hearing issues in the comparative proceeding.

We stated in our December 14 order allowing Lake Huron to intervene that we regard Section 402 (h) "as limiting our authority to add or delete issues" in the remand proceeding. See also footnote 6/ supra. In the circumstances, no further consideration of Lake Huron's request is necessary.

Butterfield and Trebit Petition to Vacate Modification of Construction Permit And For Other Relief

12. Butterfield and Trebit have jointly petitioned the Commission to vacate the modification of construction permit granted to WJR on April 14, 1955 contending that such action is necessary under Ashbacker v. Federal Communications Commission, 326 U.S. 327. Petitioners rely on that portion of the Court's decision which at page 333 reads as follows:

> "We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing on both deprives the loser of the opportunity which Congress chose to give him."

On the basis of this, petitioners declare that they will be deprived of their statutory right to a fair comparative hearing with WJR if WJR goes to the hearing as a permittee rather than as an applicant for the authorization involved.

13. WJR in opposition notes that the Court of Appeals in remanding for further hearing expressly refused to order the Commission to rescind the modification of construction permit. Additionally, WJR asserts that the comparative hearing does not involve the question whether WJR's modification application should be granted or dismissed, and thus there is no violation of the Ashbacker rule. The Broadcast Bureau opposition emphasizes that a comparative hearing on WJR's modification proposal is not involved, the sole purpose of the evidentiary hearing being to decide "whether the changes proposed by WJR in its modification application, filed after grant of the construction permit, worsen WJR's original proposal to the extent that it would be more in

the public interest to grant the proposal of either Trebit or Butterfield." The Bureau asserts that, stated simply, the question is "whether the changes affect the decisional basis of the final decision."

14. The Ashbacker doctrine is not applicable in the instant case, for what is at issue in the hearing on remand is whether the original television construction permit awarded to WJR should be affirmed or withdrawn and given to another, not whether the modification of construction permit should stand. Further hearings are being held not to decide whether the modification should be granted but to determine whether certain changes, and the manner of making those changes, by the winning applicant destroy the basis of the preferences which led to the award to it. It is to be noted further that the Court of Appeals specifically refused to order a vacation of WJR's modified permit commenting that Trebit and Butterfield's rights were completely protected by the procedure ordered in the remand.

[12836]

Accordingly, IT IS ORDERED, This 23rd day of January, 1957, that Lake Huron's petition to consolidate this proceeding and the protest proceeding in Docket No. 11412 IS DENIED, that Lake Huron's petition to enlarge and clarify issues IS DENIED, and that the joint petition of Trebit and Butterfield to vacate the modification of WJR's construction permit and for other relif IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
/s/ Mary Jane Morris, Secretary

Released: January 24, 1957

[12843]

DECISION

By the Commission: Commissioner Lee dissenting; Commissioners Craven, Ford and Cross absent

Preliminary Statement

1. This proceeding arises out of three protests, under Sec. 309(c) of the Communications Act of 1934, as amended, against the Commission action of April 14, 1955[1] which granted without hearing the application of WJR, The Goodwill Station, Inc. for modification of construction permit for television station WJRT. WJR had been granted the construction permit as the successful applicant in a comparative hearing for Channel 12, Flint, Michigan, involving it, Trebit Corporation and W. S. Butterfield Theatres, Inc. in a Decision released May 14, 1954.[1] The protestants are Lake Huron Broadcasting Corporation, Inland Broadcasting Company and Sparton Broadcasting Company, permittees of existing television stations in Michigan; respectively, WKNX-TV, Channel 57, Saginaw; WTOM-TV,[2] Channel 54, Lansing, and WWTV, Channel 13, Cadillac. The protestants all allege that they would suffer economic injury as a result of the modified operation proposed by WJR.

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[1] The Commission's action was remanded by the United States Court of Appeals for the District of Columbia on May 25, 1956, 13 RR 2175, wherein reconsideration was directed. The Commission has affirmed its previous actions in a Decision released contemporaneously herewith.

[2] Inland Broadcasting Company did not file proposed finding of facts, did not file exceptions to the Initial Decision, and did not participate in the oral argument. By Memorandum Opinion and Order of March 7, 1956, the Commission enlarged the original issues in this proceeding to permit a showing as to the consequences of a grant of the WJR modification on Station WTOM, Inland, however, did not offer evidence at the consequent hearing.

[12844]

2. On June 8, 1955 the Commission granted the protests, stayed the effective date of the grant, and designated the protests for hearing on the following issues:

(a) To determine whether the type and character of the applicant's proposed program service will meet the needs of the communities and areas within the Grade A and Grade B field intensity contours of the television station proposed in the above-entitled application.

(b) To determine whether, in the light of the plans and intentions of WJR with respect to the location of the proposed television station, a grant of the application would be consistent with the provisions of Sec. 3.607 of the Commission's Rules, the principles in the Commission's Sixth Report and Order, and statements of policy of the Commission, or would contravene the requirements of Sec. 307 (b) of the Communications Act of 1934, as amended.

(c) To determine whether WJR misrepresented and concealed from the Commission material facts with respect to its intention to construct and operate the television station proposed in its original application for construction permit.

(d) To determine whether WJR abdicated to other persons and organizations its basic and primary responsibility to determine the nature of its operations in the public interest.

(e) To determine whether a grant of the said application is precluded by the provisions of Sec. 1.319 or Sec. 1.387(b) of the Commission's Rules or the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327.

(f) To determine whether the consequences of a grant of such application would be to impair the ability of Stations WKNX-TV and WWTV [3] to compete effectively with the station proposed by WJR in the said application for modification permit or to deprive the public of the service of WKNX-TV or WWTV.[4]

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[3] As noted at footnote No. 2, supra, this issue was later enlarged to include a determination of the effects on Station WTOM.

[4] The Commission noted that the inclusion of this issue did not constitute a determination that the competitive effect of a grant upon existing stations was a relevant consideration, determination of that question being left for the hearing.

(g) To determine, in the light of the evidence adduced upon the foregoing issues, whether public interest, convenience, or necessity would be served by a grant of the application of WJR, and whether the applicant is qualified to receive a grant of the application.

The Commission directed that the burden of proof on each of the issues should be on the protestants.

3. Hearings were held before Examiner Herbert Sharfman, and the record was closed on July 27, 1955. The Examiner's Initial Decision, which would deny the protests and affirm the grant to WJR, was released on January 17, 1956. Exceptions and replies to exceptions were filed by the parties actively participating in the proceeding, and oral argument thereon was heard before the Commission _en_ _banc_ on June 19, 1956. By Memorandum Opinion and Order released January 24, 1957, the Commission determined that disposition of the instant proceeding should be delayed pending its Decision in the reconsideration of the comparative award to WJR. That decision is released contemporaneously herewith (see footnote No. 1, _supra_).

Area Involved

4. Flint, Michigan had a 1950 population of 163,143, and the Flint metropolitan area, co-extensive with Genesee County, had a population of 270,263. Populationwise, it ranks as the 69th U.S. city. Detroit is 57 miles southeast of Flint and had a 1950 population of 1,849,568. Saginaw, 31 miles from Flint, and Bay City, 42 miles from Flint, both generally northwest of that city, had 1950 populations of 92,918 and 52,513, respectively. Cadillac, with a 1950 population of 10,425 is 124 miles northwest of Flint, 95 miles northwest of Saginaw and 116 miles

north and west of Lansing. Lansing, which is 48 miles south and west of Flint and 48 miles from the proposed Chesaning site, had a 1950 population of 92,129.

History, Description and Background of WJR

5. WJR has been the licensee of Class I-A (clear channel) broadcast station WJR, Detroit, Michigan, since 1928, operating on 760 kc, with 50 kw power, unlimited time. Since 1952, it has been the licensee of a Class B FM station, WJR-FM, operating on Channel 242 with 24 kw ERP unlimited time. WJR (AM), which claims a primary coverage of 16 million people in 5 states, has been affiliated with the Columbia Broadcasting System since 1935 and is used for some programs as a key or originating station on the CBS network. At one time, the station's transmitter was located in Pontiac, Michigan, but later its site was changed to Detroit. WJR was a basic affiliate of CBS until CBS initiated a radio affiliation arrangement termed a "selective facilities plan." Prior to a transfer of control on December 30, 1953, to Peoples Broadcasting Corporation, Frances S. Richards (Mrs. Parker) and the Estate of G. A. Richards (Mrs. Parker's late husband), who together hold 44% of the stock of WJR, held a majority of the stock of WGAR, Cleveland, Ohio, a Class II standard broadcast station operating on 1220 kc with 50 kw power, DA-1, and affiliated with the CBS network.. Cleveland is about 90 miles from Detroit. At the time of the hearing, John Patt, president and director of WJR, had been a member of the CBS Radio Affiliates Board for two or three years.

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WJR Representation in Original Application for Television Construction Permit in Flint

6. On July 3, 1952, WJR filed an application for Channel 12 in Flint, proposing to locate its transmitter at Waterford Hills about 22 miles southeast of the nearest Flint city limit and about 21 miles northwest of the nearest city limits of Detroit. This application also pro-

posed CBS network programming. Conversations were held with representatives of CBS at the NARTB convention in Chicago during the spring of 1952, at which time WJR advised CBS of its intention to file for the Flint station and to propose CBS programming. This conversation between CBS and WJR was a casual one, WJR having specified CBS affiliation without consideration of questions of overlap with existing CBS affiliates. WJR officials, who had not conducted an engineering study of the overlap situation, believed there would be no overlap problem with the CBS Detroit affiliate because of approximately 60 miles separation between the two cities.

7. In the application of July 3, 1952, as later revised, the information set forth with respect to the percentage of voting stock held in the applicant corporation, as well as the officers and directors of WJR, was as follows:

Name	Office	No. of Shares	%
John F. Patt	Pres. & Dir.	7,600	1.47
Worth Kramer	V.P.,Gen.Mgr.&Dir.	1,720	.33
George F. Laydorf	V.P. & Dir.	1,100	.21
George W. Cushing	V.P.	1,200	.23
Gordon Gray	V.P.		
William G. Siebert	Sec.,Treas.& Dir..	2,705	.52
F. Sibley Moore	Ass't.Treas.& Dir.		
Frances S. Richards	Dir..	129,690	25.11
Selden S. Dickinson	Dir.	200	.04
C. Russell Feldman & L.R. Jackson, trustees for G. A. Richards Life Insurance Trust		30,000	5.81
Estate of G. A. Richards Frances S. Richards, Executrix		134,937	26.12
Less than 3% stockholders			40.16

8. As of May 31, 1955, the WJR officers, directors and stockholders were:

Name	Office	No. of Shares	%
John F. Patt	Pres. & Dir.	3,600	0.697
John F. Patt, trustee		1,500	0.291
Ruth R. Patt (wife of John F.)		1,000	0.194
Worth Kramer	V. P. & Dir.	1,720	0.330
F. Sibley Moore	V. P. & Dir.	-	-
Rozene R. Moore (wife of F. Sibley)		11,817	2.288
William G. Siebert	Sec. Treas.	2,500	0.484
Evelyn G. Siebert (wife of William G.)		205	0.040
William E. Siebert (son of William G.)		10	0.002
George W. Cushing	V. P.	1,000	0.194
Clara Cushing (wife of George W.)		200	0.040
George F. Laydorf	Dir.	-	-
Frances S. Parker		93,906	18.180
Frances S. Parker, executrix		134,937	26.123
Selden S. Dickinson	Dir.	200	0.040
C. Russell Feldman & J.R. Jackson, trustees		42,740	8.274
Charlotte Feldman (wife of C. Russell)		45	0.008
Less than 1% stockholders		221,153	42.820
		516,533	100%

9. The application of July 3, 1952 specified the following program operation.

Entertainment	72.3
Religious	2.3
Agricultural	1.4
Educational	3.8
News	11.8
Discussion	1.1
Talks	7.3

Program Log Analysis by %

	8 a. m.-6 p. m.	6 p. m.-11 p. m.	All Other	Total
Network Commercial	25.1	62.9		33.8
Network Sustaining	15.8	7.1		11.1
Recorded Commercial	24.3	7.1	42.6	21.2
Recorded Sustaining	3.6	4.3	26.6	6.8
Live Commercial	16.2	11.4	12.4	14.2
Live Sustaining	15.0	7.2	18.4	12.9
Total Commercial	65.6	81.4	55.0	60.2
Total Sustaining	34.4	18.6	45.0	30.8
Proposed Broadcast Hours	61 +	35	14 +	110 +
No. of Spot Announcements per Week	148	78	22	248
No. of Non-Commercial Spot Announcements per Week	37	19	6	62

[12848]

10. The total cost of operation for the first year was estimated at $525,000 and revenues at $800,000. The estimate of anticipated revenues was based upon a return to the station from the sale of programs at an hourly base of $450 in Class "A" time, and from the sale of spot announcements. The anticipated revenue from the sale of network programs was based upon 30% of the base rate. It was anticipated that in the first six months of operation the station would sell 35% of its proposed commercial hours and in the second six-month period it would sell 60% of its proposed commercial hours.

11. On June 30, 1952, Trebit filed its application proposing NBC programming at a site 4.4 miles north of Flint and 55 miles north of Detroit. On October 17, 1952, Butterfield amended its then-pending application to specify Channel 12 at Flint, and proposed a site 15 miles southeast of Flint and 29 miles north of Detroit. The applications of Trebit, Butterfield and WJR were designated for hearing in a consolidated proceeding.

12. On October 25, 1952, WJR amended its application to specify DuMont network programming in lieu of CBS and to make other pro-

gramming changes. Network commercial time was reduced from 33.8% to 9.95%; film commercial programs were increased from 21.2% to 34.14%; and the total amount of live programming was increased from 27.1% to 33.53%; the number of commercial spot announcements was reduced from 248 to 224; and the number of non-commercial announcements was reduced from 62 to 57. This amendment showed no change in estimated revenues and expenses, although a subsequent amendment increased the estimated expenses to $530,000. This was based on WJR's belief that the increased cost of the extra film would be absorbed by the advertiser, and the reduced income from network programming would be offset by increased income from film programming.

13. On January 9, 1953, WJR further amended its application to specify a new transmitter site at Clarkston. The location of this site and the sites specified by Trebit and Butterfield with reference to the pertinent boundaries of Flint and Detroit are as follows (in miles):

	WJR	Trebit	Butterfield
Nearest Flint Boundary	16.8	4.4	15
Farthest Flint Boundary	24	11.1	22
Nearest Detroit Boundary	27	54	29
Farthest Detroit Boundary	40	66	42

14. The United States land areas in square miles within the respective Grade A and Grade B contours of the stations (WJR at Clarkston); computed in accordance with Section 3.684 of the Commission Rules, and the persons residing within the contours would have been as follows:

	WJR	Trebit	Butterfield
Grade A - area	6,320	6,320	6,514
Grade A - population	3,620,660	929,100	3,612,602
Grade B - area	10,800	11,640	11,340
Grade B - population	4,302,550	3,779,480	4,319,986

15. Briefly, WJR's proposals and representations in the comparative hearing were as follows:

(a) Engineering Considerations. The considerations which determined the selection of the Clarkston site, aside from meeting the requirements of the Commission's Rules and the avoidance of hazard to air navigation, were the desire to obtain high elevation and to encompass the maximum population within the Grade A and Grade B contours.

(b) Integration of Ownership and Management. On March 7, 1952, the WJR Board of Directors authorized restrictive stock options to certain of its key personnel for the two-fold purpose of providing incentive to management and integration of ownership and management. The following shows the stock to be issued under these options and the stock held at that time.

	Shares Option Stock	Shares Existing Holding
John F. Patt	15,000	3,600
Worth Kramer	5,000	1,720
George E. Laydorf	5,000	1,100
F. Sibley Moore	5,000	0
Selden S. Dickinson	2,500	200
To be designated by the Board of Directors	2,500	
Total	40,000	

(c) Television Preparations. The WJR proposals were designed to provide a television outlet for local Flint activities and its program proposals incorporated the studies and investigations made by its officers and staff. The program proposals were drafted in the light of visits by the public service director and other executive personnel to Flint for the purpose of ascertaining the local programming requirements of the community.

(d) Programming. Through various of its officials WJR represented that, at the time it proposed DuMont programming, its programs were designed to be of interest to the entire area except those which were designed specifically to meet the needs of Flint; that it expected to affiliate with the DuMont network, and that the affiliation had been favorably discussed with DuMont; that DuMont was chosen because it would enable WJR to offer a new network as

well as non-network service to viewers in the area to be served; that the needs of Flint were of primary consideration in the choice of DuMont, but the needs of those outside of Flint were also considered; that the three existing Detroit television stations are affiliated with the other three networks; that it was a matter of public information that WJBK-TV the CBS Detroit affiliate, was planning to apply for an increase in power and a change of transmitter location; that it did not contemplate affiliating with any other network, but it would always attempt to improve its competitive position including a change in network affiliation if that appeared desirable; that it would not consider changing its network affiliation to a network whose Detroit affiliate transmitted a receivable signal into Flint; and that it would not have selected DuMont had the other three networks been available. WJR further represented that various programs set forth in its typical weekly schedule were designed to meet the needs of the communities within the WJR Grade A and Grade B contours as determined by the prior experience of the corporation.

(e) Proposed Staff. WJR proposed a staff of 53 full-time employees in addition to department heads. Mr. Laydorf, a small stockholder, was to be responsible for the organization and staffing of the engineering department, the construction and installation of the various facilities, and for keeping management advised of technical advances in the art of television. It was proposed that Mr. Laydorf would devote 80% of his time to the television station during the first year of operation.

(f) Proposed Physical Facilities. WJR proposed to spend $776,821 to construct a new two-story building to house its main studios. The building, which would be designed specifically for television, would contain three studios of the following dimensions: 50' x 50'; 34' x 52' (to be extended to 52' x 84'); and 16' x 20'. The two larger studios would be two stories high, and the smallest would be one story high. The first floor would contain a reception room, offices, dressing rooms, film projection room, engineering laboratory, lavatories, air conditioning equipment and space for viewing the studios. In addition, WJR proposed a new transmitter building and auxiliary studios in Detroit.

16. In its proposed findings and conclusions in the comparative proceeding WJR urged the following as the basis for preference of its application over the Trebit and Butterfield applications.

(a) Engineering Considerations. WJR contended for a slight advantage over Butterfield and a substantial advantage over Trebit on the basis of overall antenna height above mean sea level and it further urged a preference to itself on the

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ground that it would provide the best service to Detroit, thus offsetting the loss of television service suffered by Detroit as a result of the assignments adopted by the Commission in its Sixth Report and Order which deleted a channel from that city.

(b) Multiple Ownership. WJR contended that since neither it nor Butterfield had any television authorizations, the Commission's multiple ownership rules should weigh heavily against Trebit.[5/]

(c) Diversification. WJR argued for a preference on the criteria of diversification of ownership of mass media of communication because of other television interests held by Trebit together with the latter's proposal to operate its AM and television stations with the same staff, and Butterfield's predominant position in the motion picture business.

(d) Television Preparations. WJR asserted that it had been more diligent than Butterfield in preparing itself for television, and that it had spent more time in preparation than Trebit.

(e) Integration. WJR argued that it had the highest degree of integration of ownership and management.

(f) Network Affiliation. WJR contended that its proposals for DuMont programming would bring a new and unique service to Flint and the entire area, and there was no basis in the record for assuming that DuMont would not be available to it, whereas it was improbable that Trebit or Butterfield would be able to effectuate their network proposals.

(g) Program Proposals. WJR argued that its program proposals most fully reflected the needs and desires of the populations to be served.

17. In its reply to the proposed findings of fact and conclusions of Trebit and Butterfield, WJR reiterated the foregoing contentions of superiority, and urged further preference on the criteria of integration of ownership and management on the basis of the stock option available to management (paragraph 15(b), supra), and the proposed participation of the WJR management in the day-to-day operations of the television station.

[12852]

18. On April 30, 1953, the Hearing Examiner released his Initial Decision in the comparative proceeding, wherein he favored the Trebit application.

19. Exceptions were filed to the Initial Decision and on May 14, 1954, the Commission released its Decision which reversed the Hearing Examiner and favored the application of WJR.

20. The Commission concluded that there was no basis for preference among the applicants as to transmitter location; that WJR and Trebit were entitled to a preference over Butterfield on the basis of past experience in the broadcast field as compared to Butterfield's lack of such

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5/ In pertinent part, Sec. 3.636 of the Commission's Rules provides:
Multiple ownership. - (a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if:

(1) Such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

[Footnote continued on following page.]

experience; that WJR was entitled to a slight preference on integration of ownership and management;[6] that WJR was entitled to preference on the basis of its studio and equipment proposals insofar as those proposals were related to its proposals for remote programs at the outset of operations and superior local live programming; that Trebit should receive some preference on the basis of its greater familiarity with the needs of Flint; that Trebit and WJR were entitled to equal preference over Butterfield in preparation for television; and that WJR was entitled to a clear preference on the basis of its local live programs and its immediate plans for remote programming. The Commission rejected the Examiner's preference to Trebit on transmitter location and network availability.

5/ [Footnote continued from preceding page.]
(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band."

[6] This preference was based in part on the participation of Mr. Laydorf.

Proceedings Subsequent to Commission's Final Decision

21. Within 30 days after the Commission's final decision, Butterfield, Trebit and the "Citizens Committee for VHF Television Station for Flint" filed pleadings urging reconsideration and rehearing of that decision, and on June 21, 1954, WJR filed oppositions to these pleadings.

22. In their petitions, Trebit and Butterfield contested each of the grounds relied upon by the Commission in its decision. In addition, Butterfield requested a stay of the WJR construction permit pending disposition of its petition. Butterfield's request for reopening was based

primarily on the acquisition by some of WJR's principals of an interest in television station WINT, Waterloo, Indiana. In its opposition, WJR defended the grounds of the Commission's decision. It did not indicate in that pleading that any portion of its proposal had been or was in the process of being changed.

23. In a Memorandum Opinion and Order released December 6, 1954 (9 RR 260 U) the Commission denied the foregoing petitions for rehearing, but made additional findings and conclusions wherein the preference awarded WJR on local live programming was clarified. The Commission denied the motion to reopen the record, citing the need for administrative finality.

Activities of WJR Subsequent to Commission Decision of May 14, 1954

Acquisition of WTAC-TV Studios

24. In the modification application which is the subject of the present hearing, WJR proposes, as its main studios, studios acquired from WTAC-TV, a Flint UHF station licensed to Trendle-Campbell Broadcasting Company which suspended operation on April 30, 1954.

25. WJR first became aware of the availability of the WTAC studios when Mr. Campbell of WTAC telephoned WJR shortly prior to the Commission's grant of May 14, 1954, the exact date of the phone call being uncertain on this record. Mr. Campbell advised WJR of the imminent suspension of WTAC, and proposed some arrangement whereby WJR could take over the WTAC facilities.

26. On May 20, 1954, a special meeting of the WJR Board of Directors was held at which a resolution was adopted to authorize negotiation for the rental of the real estate and rental or purchase of the WTAC equipment.[7] On June 1, 1954, a meeting was held with

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[7] Lake Huron has excepted to the Examiner's failure to characterize WJR's activities relative to the WTAC studios between Mr. Campbell's initial phone call and May 20, 1954, as "negotiations." The Examiner's appraisal is the correct one, the authorization of negotiations having been given at the meeting of May 20.

Campbell to negotiate for the acquisition of the WTAC studios and equipment. On June 16, 1954, the WJR Board of Directors, at a special meeting, authorized the management to negotiate with Mr. and Mrs. Pamperton, the owners of the WTAC real property, for a lease on the property; the purchase of certain leasehold improvements and other facilities from Trendle-Campbell; and the purchase of equipment from RCA. A lease for the WTAC studios with an option to purchase was executed on July 30, 1954, and was publicly announced on August 10, 1954. The lease calls for a monthly rental of $865. The option purchase price is $125, 000.

27. The WTAC studio building is one story more than 20' high with a false ceiling over much of its area. Its overall dimensions are approximately 105' x 125'. The approximate measurements of the individual studios are: Studio A, 48' x 58' with a 20' ceiling; Studio B, 20' x 29'; and Studio C, 13' x 24'.[8/] The master control room is the only control room. The proposal includes space for a film projection room, dark room, film editing and storage space, film viewing room, conference room, engineer's workshop, rest rooms, mailing room, general office and lobby. The originally proposed building had a sponsor's viewing room; the present building does not. However, WJR proposes to take space for this purpose from the master control room (now approximately 29' x 33') to permit viewing of Studio A only. WJR proposes to remodel the present structure to create Studio B, which together with some additional remodeling, would cost $25,000. Whereas the originally proposed structure would have four dressing rooms, the newly acquired building would have two, each approximately 7' x 13'; the original building would have had fourteen general offices, the new seven. The WTAC studios are within the city limits of Flint, two miles from the center of town and about 175' from a railroad track. It has no garage for the mobile unit which will now be kept at the transmitter.

28. A comparison of the studio and technical equipment proposed in the WJR original and modification applications shows the following:

8/ There is some contradiction in the record as to the exact size of the individual studios. Our findings are based on the most reliable testimony of WJR's plans at the time of the hearing in the proceeding.

[12855]

Item	Original	Modification
(a) Transmitter studio equipment	$15,366.00	$15,366.00
(b) Transmitter film equipment	7,281.00	7,281.00
(c) Transmitter camera & network	18,350.00	17,559.25
(d) Transmitter lighting equipment	615.69	615.69
(e) Technical test equipment (all locations)	5,189.00	12,834.25
(f) Flint studio switching equipment	13,649.00	12,949.05
(g) Flint studio cameras	37,730.00	38,103.25
(h) Flint film cameras	22,920.00	22,920.00
(i) Flint film projectors	10,421.75	11,418.75
(j) Flint studio audio equipment	13,626.00	5,652.80
(k) Flint studio general & color equipment	83.75	22,459.00
(l) Flint lighting equipment	3,674.30	3,040.09
(m) Remote equipment	12,022.85	91,576.00
(n) Materials and installation	30,000.00	30,000.00
(o) Furniture, etc.	2,500.00	2,500.00
(p) Shipping charges and contingencies	7,000.00	7,000.00
(q) Detroit Field cameras	42,084.00	39,137.85
(r) Detroit film cameras	22,920.00	22,920.00
(s) Detroit switching equipment	13,649.00	Included in q
(t) Detroit lighting equipment	615.69	615.69
(u) Detroit film projectors	10,421.75	10,421.75
(v) Detroit audio equipment	5,050.00	Will use equipment on hand.
(w) Detroit Sync generator	4,516.75	Included in q
(x) Installation and contingencies	25,000.00	15,000.00
(y) Spare tube kits	-	3,032.43
Total	$324,686.53	$392,402.85

29. In the comparative proceeding, WJR proposed auxiliary studios at the transmitter and in Detroit. These plans have not been changed other than for a minor modification in transmitter studios.

Construction at Clarkston Site

30. On May 14, 1954, upon release of the Commission's decision, WJR issued a press release stating that it planned to start construction of a new transmitter within 60 days. The construction permit for the Clarkston site required that construction be begun on or before July 12, 1954, and completed by January 12, 1955. On May 19, 1954, WJR executives met with the Flint Chamber of Commerce and assured them that it intended to operate as a Flint station, but it did not propose to move its transmitter closer to Flint as the local group had requested. At the special meeting of the WJR Board of Directors held on May 20, 1954, the Board ratified the prior purchase of the Clarkston site for $11,241, and also authorized the opening of a Flint bank account for the "WJRT Division."

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On June 5, 1954, WJR placed a firm order for a tower and its erection and it proceeded to expedite the ordering of equipment. A property line survey of the Clarkston site was completed on June 9, 1954, at a cost of $1340. Elevation studies of the Clarkston site, including tower orientation, were completed June 10, 1954, at a cost of $637. Microwave interference problems were explored with personnel of the Michigan-Wisconsin Pipe Line Company by letters dated February 10, June 14 and June 16, 1954. A blueprint of the June 9 Clarkston property line survey was mailed to WJR's architects on June 15, 1954. Seven soil test borings were completed at the Clarkston site on June 22, 1954. Elevation studies between Clarkston and Flint and Clarkston and Detroit were completed on June 24, 1954 by WJR engineers. On June 28, 1954, arrangements were made with the owner of property near the Clarkston site to erect and maintain a sign to indicate the location of the transmitter building. An oral agreement to retain national sales representatives was reached on July 1, 1954. About July 1, 1954, the Detroit Edison Company began the preparation of drawings showing how power would be delivered to the Clarkston site. The grading and building of a roadway at Clarkston was completed on July 3, 1954, at a cost of $6,542. On July 6, 1954, a construction field shed was erected at the Clarkston site at a cost of $450. Some 4900 pounds of steel for Clarkston were shipped from Houston to Detroit, arriving about July 5, 1954, and were placed in storage. WJR paid a handling charge of $130 for other steel to be used at Clarkston. On July 6, 1954, an employee of the tower construction firm arrived at Clarkston to begin work on having the tower foundation and guide point anchors installed at a cost to WJR of $965. As will appear more fully at paragraph 34, infra, brochures for submission to NBC and CBS seeking to interest them in an affiliation at the Clarkston site were prepared at a cost of $3,738.

Negotiation with Respect to Network Affiliation

31. WJR had received DuMont program schedules during 1952 and 1953. It noted changes in the schedules from time to time, but was satisfied with DuMont progress until around the time of the Commission's grant of May 12, 1954. However, by the conclusion of the NARTB convention in Chicago May 23-27, 1954, based on conversations and rumors heard there, WJR had misgivings as to the future of the DuMont network.9/ About this time the WJR

[12857]

management also noted that DuMont was scheduling less time than when WJR first proposed it as a network affiliation 10/, and, in the opinion of

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9/ The record is unclear as to whether these questions may have antedated the Chicago convention, and if so, by how long. Mr. Kramer did not recall whether WJR officials had any discussions relative to the condition of DuMont prior to the convention.

WJR, that programming was of poorer quality. At the NARTB convention, however, Mr. Kramer of WJR conversed with Mr. Elmore B. Lyford, then director of station relations for the DuMont Television Network. Mr. Kramer felt that both parties assumed the WJR and DuMont would affiliate, and he advised Lyford that WJR would be on the air no later than September 15, 1954, possibly September 1. This date approximately coincided with the expected starting date of CKLW, a Windsor, Canada television station. Lyford indicated that the anticipated starting date for WJR was satisfactory to DuMont. Lyford and Kramer agreed to keep in close touch with each other relative to the affiliation question, and apparently agreed to meet later in New York.

32. WJR officials decided at a meeting of June 1, 1954 to go to New York to investigate the network situation. On three occasions (about June 8, [11/] July 8 and July 13, 1954) they discussed the subject of affiliation with DuMont officials in New York. Although considering the bid of Station CKLW at that time, DuMont would have preferred to affiliate with WJR and indicated that it was favorably disposed toward offering it an affiliation. WJR, in view of the overall uncertainty regarding its network affiliation prospects, did not wish to foreclose the possibility of a DuMont affiliation, but ultimately advised DuMont that it could not be on the air by September due to legal action against the Commission's grant. On July 21, 1954, subsequent to WJR's advising DuMont that it would not be on the air by September and at WJR's request, Mr. Lyford wrote a letter in confirmation of an earlier telephone conversation stating that, in view of the uncertainty of WJR's starting date, DuMont would consummate the CKLW affiliation. By this time, WJR was no longer considering DuMont as a primary source of network programming.

10/ Mr. Kramer did not at that time ascertain whether the specific DuMont programs proposed in the WJR application were available in May of 1954. His opinion was based on a superficial examination of the DuMont schedules provided him for that specific week or the week following, which schedules would not reflect the programming for the fall of 1954. In October, 1952, DuMont provided 35 1/4 hours of programs of which 12 3/4 hours were commercial, 2 1/2 hours were cooperative (commercial, but the station must sell the program itself and pay the network part of the revenue), and 20 hours were sustaining. In the fall of 1952, when it first proposed the DuMont network, WJR specified approximately 28 hours of DuMont programming, 11 hours commercial and 17 hours sustaining. In May of 1954, the DuMont schedule was reduced to 21 3/4 hours of programming, 5 1/2 hours commercial, 11 1/4 hours cooperative, and 5 hours sustaining. The Commission takes notice that the DuMont network no longer exists.

11/ Prior to June 8, 1954, WJR had not contacted any network other than DuMont.

[12858]

33. On June 8, after the meeting with Lyford, Patt and Kramer discussed the WJRT situation in the event it should operate without network affiliation and decided to embark on a study of independent operation, which study was subsequently pursued with unfavorable conclusions. At a special meeting of the WJR Board of Directors on June 16, 1954, the problems raised by the Trebit and Butterfield petitions for rehearing were discussed, but it was decided to proceed with plans for construction. The Board authorized a commitment of $750,000 for the purchase of equipment, and as hereinbefore noted, directed negotiations for the WTAC studios.

34. On June 22 and 23, 1954, Patt and Kramer engaged an advertising agency to prepare a presentation to be shown to CBS and NBC for the purpose of obtaining an affiliation with either at the Clarkston site. This resulted in the brochure expense of $3,738, paragraph 30, supra, as, at this time, WJR believed that a CBS or NBC affiliation was a possibility at Clarkston. On July 8, 1954, Patt and Kramer visited representatives of CBS, NBC and ABC in New York to discuss the possibilities of network affiliation. They took with them the brochure presentation which they showed to CBS. In their calls on the other networks, they exhibited only a map showing WJRT's proposed Grade A and B contours from the Clarkston site.

35. As a result of the meetings with CBS, NBC and ABC, Messrs. Patt and Kramer concluded there was practically no hope of securing an affiliation with any of these networks at Clarkston. On the same day, July 8, 1954, following the meetings with the networks, Patt called Clarence Jones, chief engineer of WJR, and directed him to prepare coverage maps and investigate real estate availabilities east, west, and northwest of Flint, and to make predicted contour maps of WJR's resulting signals from such sites.

36. On July 9, 1954, Mr. Kramer directed the chief engineer to cease construction at the Clarkston site, and on July 10 Jones retained real estate agents to investigate availabilities for a new site. Between July 8 and July 10, Mr. Jones prepared studies, which he furnished to Mr. Kramer, consisting of coverage maps and area and population data for operations from the vicinity of Davison, approximately 5 miles east of Flint, and Owosso, about 20 miles west of Flint.

37. On July 10, 1954, Mr. Kramer dictated a memorandum setting forth his analysis with respect to the availability of a network affiliation to WJR. His conclusions were: (1) affiliation with a major network was a necessity if WJR was to experience initially profitable operations; (2) neither CBS nor NBC would consider affiliation at the Clarkston site; and (3) CBS, NBC and ABC would seek affiliation with WJR if it moved its transmitter location to a point nearer Flint, thus eliminating duplication of Grade A coverage over Detroit. He recommended that WJR immediately take steps to move the transmitter to a point within a 5-mile radius of Davison.

38. On July 13, 1954, Mr. Jones received a report from the real estate agents describing the availability of six parcels of land in the Davison area, including several within 5 miles of the Flint city boundaries. On July 19, 1954, a further report was submitted as to the availability of two more tracts in the same area.

39. During the period, July 13-16, 1954, Messrs. Patt and Kramer returned to New York to talk to the networks. CBS had completed its study of the WJR proposal and had concluded, on July 9, that affiliation with WJR at Clarkston was impossible due to a 94% overlap with WJBK-TV, the CBS Detroit affiliate, Mr. Patt then presented a proposal for an operation from Davison, but Mr. Lodge of CBS expressed the view that CBS would not consider affiliation at that site. Similar views regarding affiliation at Clarkston were expressed by NBC due to overlap with its Detroit affiliate, WWJ-TV, and by ABC because of overlap with its station WXYZ-TV.

40. On July 22, 1954, Mr. Patt visited counsel in Washington to discuss the possibilities of relocating WJR's site in view of the rejection by CBS, NBC and ABC of an affiliation at Clarkston.

41. On July 23, 1954, Mr. Patt consulted in New York with Mr. Akerberg of CBS, concerning a study by Mr. Lodge, dated July 20, 1954, which showed that from the Davison site there would be duplication of 92.8% of the homes served by WJBK-TV, as compared with 94.4% at the Clarkston site. On the date of this meeting, Mr. Patt wrote Mr. Akerberg urging the advantages of the Davison site and asking, alternatively, whether CBS would affiliate with WJR at a designated site near Owosso or at some location between the Davison and Owosso sites. He also asked whether a directional antenna at the Davison site, restricting coverage to the south would be satisfactory. There was attached to Mr. Patt's letter a map showing the contours from the Owosso site and the contours of WJBK-TV.

42. On July 26, 1954, the real estate agents submitted to Mr. Jones a report on the availability of five parcels of land in the Owosso area, and on the same day WJR's real estate agents met with a Chesaning real estate man. This meeting resulted, on July 30, 1954, in an offering of property some seven miles east of Chesaning.

43. On July 30, 1954, Mr. Kramer wrote a letter to Mr. Patt wherein he raised the possibility of securing an ABC network affiliation at Clarkston by providing that network's station WXYZ-TV with a

transmitter site at Trenton, the location of WJR's transmitter and tower, thus causing an increase of about 21 miles in separation between the WXYZ transmitter and the WJRT site at Clarkston. Although Mr. Patt was favorably impressed with the idea, it was not broached to ABC.

44. In a memorandum from Mr. Lodge to Mr. Akerberg, dated August 10, 1954, Mr. Lodge concluded that the WJR proposal at Owosso still did not make the station an attractive affiliate for CBS.

45. Subsequently, the record being unclear as to the exact date, WJR showed CBS a map with a large triangle around Owosso, between three airways. CBS expressed interest in an affiliation within that triangle. Sometime in the latter part of August, Mr. Patt called Mr. Akerberg and advised him of the availability of a site in the northern apex of the triangle. This site, although it was not then identified by name, was at Chesaning. On August 31, 1954, Mr. Patt wrote Mr. Akerberg reporting on a specific site, designated as "Alternative Site 2-A," some nine or ten miles north of the Owosso site, and located within the aforementioned triangle. He stated that, subject to CAA approval and the availability of property and utilities, WJR believed that site would be suitable for its operation.

46. The final decision to abandon the Clarkston site and to apply for modification of permit to move to Chesaning and propose CBS programming was made at a meeting of the WJR management on September 8, 1954. It was decided on the basis of advice of counsel [12/] that the modification application would not be filed until after the Commission had ruled on the pending petitions for rehearing.

47. On September 15, 1954, a meeting was held between officials of WJR and representatives of the Flint Citizens Committee, which, as noted at paragraph 21, supra, had protested the Commission's grant of May 12, 1954, on the ground that WJR, operating from Clarkston, would be a Detroit rather than a Flint station. Mr. Patt told the citizens that

WJR was seriously considering moving its transmitter to a point northwest of Flint (away from Detroit).

48. On September 18, 1954, an option was obtained for a site at Chesaning, but it was later abandoned because of CAA problems. On September 22, 1954, an option was secured on the "Alternative Site 2-A" which was designated as the Chesaning transmitter site in the subsequently filed modification application.

49. On September 21 and 22, Messrs. Patt, Faust and Jones met with counsel in Washington with respect to the modification application. Thereafter, there were further meetings between Mr. Patt and CBS officials in New York. The purpose of these meetings was to keep CBS advised of WJR's progress, and, although no formal affiliation agreement had been reached, it would appear that the participants assumed an affiliation would be forthcoming if and when the Commission granted the WJR modification application. The actual affiliation agreement was signed on April 29, 1955, two weeks after the Commission's favorable action on the modification application.

50. In deciding to move to Chesaning, WJR was motivated solely by a desire to secure a desirable network affiliation; conditions of coverage were secondary except as they would effect the station's attractiveness to a network. Overlap with Detroit was a principal consideration and overlap with WJIM-TV, Lansing (then but not now a CBS affiliate) was discussed with CBS. However, overlap with CBS affiliates in Saginaw and Cadillac (WKNX and WWTV) was not considered by WJR or, to any extent, by CBS. [13]

WJR Application for Extension of Construction Permit

51. On December 1, 1954, WJR filed an application (FCC Form 701) for modification of construction permit for extension of time to

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[12] Counsel's advice was communicated to the meeting through Mr. Patt.

complete construction. In paragraph No. 1 of the application in response to the question whether there "have been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendment thereto, or modification since filing." WJR submitted the following information:

"1. Former WTAC-TV studio building has been acquired*
2. Minor changes in stockholders*
3. Change in proposed chief engineer*
4. Change in network plans (see back of form)*
5. Change in proposed transmitter location*

* Application for modification of construction permit reflecting those changes is in course of preparation and will be filed in the near future.

Studio building has been acquired and furnished; studio technical installation is approximately 20% completed; studio lighting is approximately 80% installed; and studio production equipment and basic scenery are approximately 75% constructed."

13/ The result of the CBS realignment of affiliations would be that to cover Michigan from Travers City south it would require only three affiliates: WKZO, Kalamazoo; WJBK, Detroit and WJRT, Flint. CBS' interest in the WJRT site was conditioned on protection to WJBK and WKZO. Other affiliations would not be cancelled, but in the case of WKNX, its attractiveness to advertisers would probably be affected.

The information on the "back of form" referred to is as follows:

"Applicant has commenced construction by acquiring studio facilities in Flint and preparing them in part for operation; also by investing a total of approximately $672,000 to date and is expending at the rate of $8,700 per month since July 1 for maintaining a nucleus staff at the Flint studio.

Applicant has been delayed in construction of the station authorized by construction permit, File No. BPCT-967, partially by the fact that no action has yet been taken by the Commission on Petitions for Rehearing filed by W. S. Butterfield Theaters, Inc. on June 11, 1954, and by Trebit Corporation on June 14, 1954, and by Motion of a so-called "Citizens Committee for a VHF Television Station for Flint" filed on or about June 14, 1954, and partially because of changes in television station facilities and network affiliations occurring during the past two years, which have required a review of applicant's network affiliation plans."[14]

Differences in WJR Programming Proposals

52. There follows a comparison of the programming contained in the application as granted on May 12, 1954 and the schedule proposed by WJR in the modification application.

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[14] We are asked to find that WJR's statement that the delay in construction was partly caused by the pendency of the petitions for rehearing is false. In support, Mr. Kramer's testimony at Tr. 142 wherein he testified that he thought the pendency of the petitions for reconsideration was one of the considerations as to why the starting date for Station WJRT was unpredictable and his testimony at Tr. 194 that WJR did not decide to take any different course of action than to go ahead and start constructing the station after the petitions for rehearing were filed are cited as being inconsistent. In view of the ambiguity of the question asked at Tr. 194, we see no support for the requested finding in the cited pages of the transcript of testimony. Nor do we find support in the other record citations for the requested findings as to lack of candor in Mr. Kramer's testimony. The sincerity and candor of a witness must be determined by a perusal of his entire testimony. Mr. Kramer's testimony, as a whole, is cohesive with no omissions or contradictions on significant points. The Examiner, who had opportunity to observe the demeanor of the witness found no reason to question his veracity or candor. We are also asked to regard Mr. Kramer as unworthy of credence in this proceeding on the basis of the Commission's finding in Kanawha Broadcasting Co., 3 RR 1977 wherein the Commission accepted the conflicting testimony of other witnesses and rejected that of Mr. Kramer. Protestants' position is legally unsound. He was, at the start of this proceeding, accepted by protestants as a witness without objection, no objection was raised during the several days of his testimony, and no attempt was here made to examine him relative to the Kanawha case. In the absence of conflicting evidence, of which protestants adduced none, we find no basis for questioning the veracity or candor of Mr. Kramer in his testimony in the instant proceeding.

Type	May 12 Grant	Modification Application
Entertainment	69.86%	69.56%
Religious	4.28	4.28
Agricultural	2.48	2.48
Educational	4.07	4.07
News	7.55	7.55
Discussion	4.07	4.07
Talks	7.69	7.99
	100%	100%

Class	May 12 Grant	Modification Application
Network Commercial	9.95%	39.35%
Network Sustaining	17.41	1.36
Recorded Commercial	34.14	13.56
Recorded Sustaining	4.97	12.21
Wire Commercial	0	0
Wire Sustaining	0	0
Live Commercial	21.85	21.17
Live Sustaining	11.68	12.36
Total Live	33.53	33.53
Total Commercial	65.94	74.07
Total Sustaining	34.06	25.93
Broadcast Hours	110	110
Spot Announcements	224	224
Non-Commercial Spot Announcements	57	57

53. In preparing the programming proposals of the modification application, no further survey of the area to be served was made. The additional contacts made by WJR within the city of Flint, with few exceptions, were confined to securing assurances of general cooperation. In its modification application WJR obviously no longer relies on its use of a new network service, since it no longer proposes only a DuMont

affiliation for the reasons given herein. At least some CBS program service was being provided by existing stations at the time of the filing of the WJR modification application throughout most of the coverage area of WJR from Chesaning. Parts of the said area are served by WKZO-TV, Kalamazoo; WJBK-TV, Detroit; WKNX-TV, Saginaw; and WWTV, Cadillac [15]. WJIM-TV, Lansing has served portions of the proposed WJR coverage area with some CBS programs, although as a result of the CBS-WJR affiliation CBS has notified WJIM-TV of cancellation of its affiliation. The portion of the WJRT Grade B area operating from Chesaning which does not already receive some CBS programs has a population of 26,318, or 1.4% of the total population within WJRT's Grade B contour.

[12864]

54. The modified schedule was prepared retaining in large part WJR's originally proposed live programming. It proposes basically to retain the same overall percentages by type as proposed during the comparative hearing. The program proposals in the modification application were prepared by A. Donovan Faust, who was engaged as operations manager by WJR on September 1, 1954, and Franklin Mitchell, program director. Mr. Faust was directed to prepare a program proposal that would reflect substantially the same character, balance, etc. of local programs as did the original proposal. Mr. Patt instructed that the CBS programs then carried by WKNX-TV were not to be shown for the reason that such programs might not be available to WJRT. Mr. Faust checked the CBS programming carried by WKNX, and, with two exceptions, excluded it from the proposed schedule. [16] The following CBS programs were broadcast by WKNX for periods ranging from several months to a year prior to the preparation of the WJRT proposal:

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[15] The listed stations do not all broadcast all, or substantially all, of the CBS programming. During June 1955, WKNX-TV transmitted some 15 hours of CBS programs per week, and WWTV broadcast about 75 hours of CBS programs during May, 1955.

You Are There; Jack Benny alternating with Private Secretary; General Electric Theatre; Perry Como; I Love Lucy; December Bride replacement for Masquerade Party; Godfrey and Friends; Strike It Rich; I've Got A Secret; Playhouse of Stars; Jackie Gleason; Two For The Money; and That's My Boy. However, in the future, WJR will attempt to schedule additional CBS programming Mr. Patt and Mr. Kramer made no changes in the program proposals prepared by Mr. Faust.

55. In preparing the modified program proposal, the program schedule proposed in the original application as amended was used as the starting point. First, the DuMont programs in the original schedule which were no longer on the air were stricken off. The remaining DuMont programs which had been included in the original schedule, with the exception of Life Is Worth Living [17] were retained. Next, some of the local programming was scheduled in the non-network hours, and the remaining local live programs originally proposed were placed in other parts of the schedule. Following this, network programs were fitted into the schedule with an effort to include as much of the network programming as would not require discarding the local live programs originally proposed. In the process, local programs were scheduled during certain CBS option hours. Where a conflict between local and network programs was presented, an attempt was made to find comparable time for the local program, but, if no such time was available, the local program was included in preference to the network program. This resulted in a program proposal with fewer CBS programs in network option time than were available. WJR reasoned that WJRT would be a basic optional rather than a "must buy" CBS

16/ "Doug Edwards and the News" was carried only once or twice a week by WKNX, and Mr. Faust believed that WJRT could propose it as a regular presentation. Additionally, programs then carried by both WKNX and WJIM-TV were considered available to WJRT.

17/ This program was dropped because of conflict with a local program.

affiliate and, thus, WJRT would not be ordered for the entire CBS schedule during option hours.

56. WJRT's affiliation contract with CBS contains the following provision:

> "Nothing herein shall be construed (i) with respect to network programs offered pursuant hereto, to prevent or hinder Station from rejecting or refusing network programs which Station reasonably believes to be unsatisfactory or unsuitable, or (ii) with respect to network programs so offered or already contracted for, (a) to prevent Station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or (b) from substituting a program of outstanding local or national importance . . . . "

Whether CBS would concur in continuous rejection of programs was not established in the record. A CBS representative testified that since WJRT would not be a "must buy" station it would be for the sponsor to determine whether he wanted it and he did not know how many would demand Flint.

57. The WJR-CBS affiliation contract options to CBS 63 hours a week for sponsored programs as follows: 10:00 a.m. to 1:00 p.m.; 2:00 p.m. to 5:00 p.m. and 7:30 p.m. to 10:30 p.m. In the past, CBS has not attempted to enforce strict compliance by its affiliates with the option-hour provisions of its contracts, and has never insisted that an affiliate carry a network program when that affiliate preferred to schedule a local program. However, the CBS representative could not state just what the CBS position would be if an affiliate elected to frequently and consistently carry a local series in lieu of a network series in option hours.

58. WJR proposes the following amounts of CBS programming in the option time segments:

[12866]

10 a.m. to 1:00 p.m. Segment

Sunday - 0 hours [18]
Monday - 1 3/4 "
Tuesday - 1 3/4 "
Wednesday - 1 3/4 "
Thursday - 1 3/4 "
Friday - 1 3/4 "
Saturday - 1

2:00 p.m. to 5:00 p.m. Segment

Sunday - 0 hours [18]
Monday - 2 "
Tuesday - 2 "
Wednesday - 2 "
Thursday - 2 "
Friday - 2 "
Saturday - 0 " [18]

7:30 p.m. to 10:30 p.m. Segment

Sunday - 3 hours
Monday - 3 "
Tuesday - 1 1/2 "
Wednesday - 3 "
Thursday - 1 1/2 "
Friday - 2 "
Saturday - 2 "

59. The Commission's decision of May 12, 1954 referred to the following DuMont programs which had been cited by WJR in support of its claim that it would render a new network service:

Title			
This Week in Religion	Sunday	5:00-6:00 p.m.	Network Sustaining
New York Times Youth Forum	Sunday	6:00-7:00 p.m.	"
Georgetown U. Forum	Sunday	7:00-7:30 p.m.	"
Youth On the March	Sunday	10:30-11:00 p.m.	"
Pentagon Washington	Monday	2:00 p.m.	"
Johns Hopkins Science Review	Monday	8:30-9:00 p.m.	"
Author Meets the Critics	Thursday	10:30-11:00 p.m.	"
Life Is Worth Living	Friday	8:30-9:00 p.m.	"

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[18] As of October, 1954, there were no commercial programs offered on CBS during the Sunday daytime option hours (10-1 and 2-5) or during the Saturday afternoon option hours (2-5) except for 1/2 hour between 12:30 and 1:00 on Sunday.

[12867]

The programming proposal in the modification application includes three of these programs totalling 1 1/2 hours (New York Times Youth Forum, Johns Hopkins Science Review, and Georgetown University Forum). These make up the 1.36% network sustaining programs proposed. At the time the modification proposal was advanced, DuMont had available five hours of network sustaining programs.[19] No CBS sustaining programs were proposed, although at that time CBS had 11 hours of such programs available. Many of the CBS sustaining programs, however, fell on Sunday afternoon when WJR preferred to present local programming.

60. In the comparative proceeding, WJR set forth 30 non-network programs, other than entertainment and news programs. In the modification application it has included all of these programs and, in addition, three new ones: A Service Club quiz program; Teen Canteen, a record and high school news program; and Youth Forum. In 12 of the original 30 programs no change is made. In 11 others the only change is in the hour of program presentation. These include: Mott Foundation for Adult Education, scheduled to commence at 1:15 p.m. rather than 12:30 p.m.[20] Michigan State College Farm Developments, scheduled to

start at 6:30 p.m. rather than 5:30 p.m.; One Moment Please to begin at 5:30 p.m. rather than 5:55 p.m.; Flint Spotlight, scheduled to commence at 7:00 p.m. rather than 7:30 p.m.; Junior Town Meeting, scheduled to commence at 7:00 p.m. rather than 8:00 p.m.; Crossroads-Michigan is to begin at 8:30 p.m. rather than 8:00 p.m.; Let's Get Around, scheduled to commence at 7:00 p.m. rather than 9:30 p.m.; This Is Flint will be from 2:30 p.m. to 3:00 p.m. on Sunday rather than from 5:00 p.m. to 5:30 p.m. on Saturday; The Hobby Shop will begin at 5:35 p.m. rather than 5:30 p.m.; TV Camera Club is scheduled to start at 6:45 p.m. rather than 6:15 p.m.; and Make Way For Youth will start at 7:30 p.m. rather than 8:00 p.m. In one program, Symphony at Work, the classification was changed from "recorded" to "live" because it will, as also proposed before, use locally produced film of symphony rehearsals, and was originally misclassified. The program In Our Opinion is changed from 12:30 p.m. to 1:30 p.m. on Sunday and its classification changed from commercial to sustaining. The starting time of Your Government is changed from 1:30 to 2:00 p.m. and the format is changed to make it a discussion rather than a talk program. Understanding Our World has been changed from live to recorded to permit use of a film series prepared by the University of Michigan. Wings Over Michigan has been changed in time from 10:00 p.m. Wednesday to 10:30 p.m. Thursday and in classification from live commercial to recorded sustaining to permit use of outside film on occasion. Know Your America has been reduced from 15 to 10 minutes and the time of commencement changed from 6:45 p.m. to 5:35 p.m. Two film programs not included in the above 30 have been changed from commercial to sustaining.

19/ By October, 1954, all of the enumerated programs had disappeared from the DuMont schedule except Life Is Worth Living, which WJR did not propose to present.

20/ Except as otherwise indicated, the changes in the time of presentation do not effect the day or days on which the programs are scheduled.

61. There are 10 non-network entertainment and news programs which have undergone the following changes:

(1) Koffee Klatsch, Monday-Friday, 10:00-10:30 a.m. has been eliminated.

(2) Children's Theater has been reduced from 1-1/2 to 1 hour.

(3) Women Today has been changed from "news" to "talk" in order to include interviews and information of a general nature which could not be included in a program limited to news.

(4) Cartoons has been changed from commercial to sustaining.

(5) Swingshift Cinema has been changed from commercial to sustaining.

(6) Man In the House was originally proposed as a film series on do-it-yourself projects. The program time was reduced from 15 to 10 minutes, the classification was changed from recorded to live, in the belief that it could thereby be more closely associated with community interests and the program was changed from commercial to sustaining.

(7) Dinner Date With Music changed to 5 - 15 minute programs per week instead of 6 - 10-minute programs each week.

(8) Sports Arena was reduced from 30 to 15 minutes and changed from a syndicated filmed sports show to a live talk program,

(9) Western Theater changed from commercial to sustaining.

(10) Barn Dance reduced from 1 hour to 1/2 hour.

62. As hereinbefore set forth, WJR proposes the same number of spot announcements in the modification application as in the original. Mr. Faust, who prepared this portion of the modification application, stated that his evaluation of the number of spot announcements approximated the number proposed in the original application and since such estimates are highly speculative, he decided to retain the same number originally proposed.

63. In its modification application WJR estimated revenues for the first year would be $800,000 and operating expenses $530,000, the

same figures listed in the original application. WJR estimated that the changed factors affecting revenues and expenses would balance each other out, and, because such pre-operation estimates are little better than educated guesses, left them unchanged.

[12869]

64. The original staff proposal contemplated the use of 52 persons. Mr. Faust's actual estimate of the staff required to effectuate the modification proposal was 49 persons, but he believed the 3 additional would be utilized on creative work and, thus, the staff proposed by the modification application remained at 52.

65. Transmitter location and coverage. The relocation of the WJRT antenna as proposed would effect the following changes in the resultant field intensities in the operation as compared with operation under the CP (Exh. 62).

	Clarkston (original CP)	Chesaning (present MP)
Miles to near side of Detroit	27.5 Mi.	72.0 Mi.
DBU at near side of Detroit	84.3 DBU	48.5 DBU
Miles to far side of Detroit	38.8 Mi.	83.5 Mi.
DBU at far side of Detroit	76.8 DBU	38.5 DBU
Miles to near side of Flint	19.3 Mi.	20.6 Mi.
DBU at near side of Flint	90.3 DBU	89.3 DBU
Miles to far side of Flint	25.5 Mi.	25.7 Mi.
DBU at far side of Flint	85.8 DBU	85.8 DBU
Miles to near side of Lansing	53.3 Mi.	40.6 Mi.
DBU at near side of Lansing	64.0 DBU	75.6 DBU
Miles to far side of Lansing	53.3 Mi.	44.4 Mi.
DBU at far side of Lansing	62.7 DBU	72.4 DBU
Miles to near side of Saginaw	50.0 Mi.	12.1 Mi.
DBU at near side of Saginaw	67.0 DBU	97.7 DBU
Miles to far side of Saginaw	54.0 Mi.	16.7 Mi.
DBU at far side of Saginaw	63.5 DBU	92.7 DBU
Miles to near side of Bay City	59.6 Mi.	24.2 Mi.
DBU at near side of Bay City	59.1 DBU	86.8 DBU
Miles to far side of Bay City	63.3 Mi.	28.3 Mi.
DBU at far side of Bay City	56.0 DBU	84.0 DBU

66. a) The following cities included within the Clarkston Grade A contour will lie outside both the A and B contours from Chesaning:

City	Population	City	Population
Detroit	1,849,568	New Baltimore	2,043
Ann Arbor	48,251	Mt. Clemens	17,027
Ypsilanti	18,302	Birmingham	15,467
Dearborn	94,994	Highland Park	46,393
River Rouge	20,549	Flat Rock	1,931
Wyandotte	36,846	Belleville	1,722
Hamtramck	43,355	Clawson	5,196
Trenton	6,222	Royal Oak	46,898
Yale	1,641	Plymouth	6,637
Richmond	2,025	Dexter	1,307
Marine City	4,270	Chelsea	2,580
Algonac	2,639	Northville	3,240
Romeo	2,985		

b) The following cities included within the Clarkston Grade B but outside the Grace A contour will lie outside the Chesaning Grade B contour:

City	Population	City	Population
Jackson	51,088	Saline	1,533
Manchester	1,388	Clinton	1,344
Tecumseh	4,020	Monroe	21,467
Dundee	1,975	Milan	2,768
Rockwood	1,044	St. Clair	4,098
Marysville	2,534	Port Huron	35,725
Croswell	1,775	Sandusky	1,819

c) The following cities outside the Clarkston A and B contours will be included within the Chesaning Grade A contour:

City	Population	City	Population
Mt. Pleasant	11,393	Carson City	1,168
Midland	14,285	Ithaca	2,377
St. Louis	3,347	Pinconning	1,223
Alma	8,341		

67. Operating from the Clarkston site (316 kw and 1000' above average terrain) the entire city of Detroit would be within the WJR principal city (77 dbu) contour. The various parts of Flint would be served with a signal of from 85.8 to 90.3 dbu[21]; and substantially all of the "Flint Trading Area"

21/ In the comparative proceeding the Clarkston site is shown as 17 and 24 miles from the respective Flint boundaries. This, and other minor inconsistencies, are based on variances in the two records. We deem none of the said variances to be significant to the decision reached.

[12871]

would be within its Grade A contour. The Grade A contour would either cut through or fall just short of the city of Saginaw. Bay City and Lansing would be within the Grade B contour, while Midland would not receive Grade B service. The Clarkston site is 19.3 miles from the nearest Flint boundary and 25.5 miles from the farthest Flint boundary[22], and 27 and 40 miles from the comparable Detroit boundaries. It is 54 miles from Lansing, 52 miles from Saginaw and 60 miles from Bay City.

68. Operating from the Chesaning site (316 kw, 940' above average terrain) WJRT would be 72.0 and 83.5 miles, respectively, from the nearest and farthest boundaries of Detroit, and 20.6 and 25.7 miles from the comparable boundaries of Flint. It would be 41 miles from Lansing, 12 miles from Saginaw and 24 miles from Bay City. Flint would be covered by a signal of from 85.8 to 89.3 dbu, and about 10% of the "Flint Trading Area" would receive only Grade B service. There would be included within the Grade A and B contours populations of 865,387 and 1,325,545, respectively.[23] Saginaw would receive a signal of greater than principal-city (77 dbu) intensity, and this signal over Saginaw would be stronger than that over Flint. The cities of Midland and Lansing would both be within the Grade A contours. The following is a comparison of the areas and populations to be served by the two proposals.[23]

Contour	Area (Sq. Mi.) Clarkston	Area (Sq. Mi.) Chesaning	Population Clarkston	Population Chesaning
77 dbu	4,480	4,230	3,296,265	668,817
Grade A	6,320	5,985	3,620,660	865,387
Grade B	10,800	11,180	4,302,550	1,325,545

Contour	Common Area (Sq. Mi)	Common Population
77 dbu	1,372	318,497
Grade A	2,603	398,629
Grade B	6,790	1,070,644

Under the original proposal, 49,054 persons not now within the Grade A contours of any station would receive a Grade A service. The modified proposal would include 41,142 such persons within the Grade A contours.

22/ The Commission's Rules require a signal of 77 dbu over Flint.

23/ The figures given are taken from an engineering affidavit attached as an Exhibit to the Joint Petition For Rehearing filed by Trebit and Butterfield in the comparative proceeding on December 28, 1954. On request of the protestants and without objection, the Examiner took notice of the said pleading.

[12872]

69. Integration of ownership and management. In the comparative proceeding WJR stated that, at the suggestion of Mrs. Parker, restrictive stock option agreements would be given to certain of its officers and directors in order to increase their stockholdings in the applicant for the two-fold purpose of providing incentive to management and integration of ownership and management. As appears from the modification application, however, in the intervening three years none of the named officers and directors have increased their stockholdings and some have actually reduced their holdings. Thus, there was no change in the interests held by Patt, Kramer and Dickenson; Leydorf disposed of all his stock. Cushing and Siebert reduced their holdings; and Moore remained without any stock in the corporation.

70. At the time of the comparative proceeding, Leydorf was vice president, director, and proposed as chief engineer for the television

station. In its Decision, the Commission pointed out that he would devote 80% of his time to the proposed operation in its Conclusion 9 that "While by no means decisive, WJR is entitled to some preference on this score" of integration. Leydorf, for personal reasons, resigned from the office of vice president and chief engineer on June 1, 1954, but would continue as director.

Diversification

71. After the close of the record in the comparative proceeding, Messrs. Patt, Kramer and Moore, officers and directors of WJR acquired a stock interest in television station WINT, Waterloo, Indiana. Their stock interest, individually and in the aggregate, does not amount to a majority nor are they officers or directors. Waterloo is a community of less than 2500 population, but Fort Wayne, Indiana, is within WINT's coverage area. The station is affiliated with Columbia Broadcasting System as its Fort Wayne outlet.

[12873]

The Economic Injury Issue

72. WKNX-TV is owned and operated by Lake Huron Broadcasting Corporation which is also the licensee of WKNX-AM, Saginaw, Michigan (unless otherwise noted, "WKNX" when used herein refers to the television operation). WKNX has been in commercial operation since May, 1953. There are three equal stockholders in the licensee corporation, one of whom is William J. Edwards, president and general manager, who testified in this proceeding. WKNX is a primary CBS affiliate which means that CBS has a right of first refusal on the station's optioned time. On the CBS rate card, it is listed as a "supplemental affiliate," not being a "must buy" for network advertisers.[24] The station is a secondary ABC affiliate. During the 1953-54 composite week WKNX carried 9 3/4 hours of CBS commercial programming, 3 hours of NBC commercial programming, one hour of DuMont commercial programming, and 3 3/4 hours of ABC programming of which 3 hours

was sustaining. During the week of June 5-11, 1955, it carried approximately 15 hours of CBS programming and 2 1/2 hours of ABC programs during the evening hours. During the fiscal year from May 2, 1954 to April 30, 1955, WKNX received from CBS payments of $43,307, about 13% of the station's net sales of $327,285. During this period, CBS payments to WKNX increased from $744 in the first week of the fiscal year to $1,041 in the last. In April 1955, the station's 1-hour class "A" rate was $225, having been increased from the $200 charged in 1953 when the station went on the air.

73. WKNX presently receives competition from WNEM, Channel 5, Bay City, Michigan, a primary NBC and secondary DuMont affiliate, which has a transmitter located three miles from the Saginaw city limits. Another competitor is Station WJIM-TV, Channel 6, Lansing, Michigan. Some Saginaw viewers can receive Detroit stations, and WWTV, also a CBS affiliate, claims coverage of Saginaw from Cadillac.

74. Mr. Edwards testified that, in the event the WJR modification grant is affirmed, WKNX will cease operations immediately. He is of the view that WJR would get all the CBS programs because no advertiser would buy both stations if it was possible to get essentially the same coverage with WJR alone, and the station would therefore lose all its revenues from CBS. Additionally, as a result of the expected loss of CBS programming, he believed that WKNX would lose all of its spot advertisements from national advertisers because such business is dependent upon network adjacencies. In the 1954-55 fiscal year national spot announcements accounted for $91,566 in revenues to the station, the major part of this sum being attributable to spots adjacent

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24/ The "supplemental affiliate" status of WKNX is essentially the same as the "basic optional" CBS affiliation contemplated by WJR. CBS would not terminate its affiliation with WKNX.

to CBS programs. Mr. Edwards also stated that the expected loss of CBS programming would result in the loss of the bulk of the station's audience, thus making the station unattractive to local and regional advertisers. In Mr. Edwards' opinion, the only practical substitute for network programming would be syndicated film which would cost the station at least $142,000 a year. WKNX also introduced the testimony of its economic consultant who stated that he did not regard ABC programming as a feasible substitution for the present CBS programming, and if WKNX were to lose the CBS programs, he could not recommend its continued operation.

75. The attitude of WKNX, as set forth above, is based in part on the experiences of other communities where VHF stations commenced operation in competition with existing UHF stations, and in part on its own experiences at the advent of Station WNEM. The record indicated that in many, but not all intermixed markets, existing UHF stations have suspended operations because they lost their network affiliation to newly established VHF stations with a consequent loss of business of the type anticipated by WKNX, paragraph 75, _supra_. When Station WNEM commenced operation, it took over an ABC program which had been theretofore broadcast by WKNX, together with ten non-network programs. Three or four sponsors cancelled spot announcements on WKNX, and the total local business loss amounted to approximately $1,840 a week. In July of 1955, a series of spot announcements for a watch manufacturer carried by WKNX were cancelled in anticipation of the start of WJR's operation, and an advertising contract with a brewery is cancellable if WJR should secure a CBS affiliation.

76. The WKNX television operation lost approximately $40,000 for fiscal 1954-55, in part attributable to the cost of increasing power in the fall of 1954. The loss was small in May and June, 1954, large in July (attributed by Mr. Edwards to the competitive effect of the advent of WNEM), and gradually decreased until a seasonal post-Christmas

decrease in business in January, 1955. In March and April of 1955, the last months reported in the record, the station achieved profitable operation for the first time. At least 78% of the TV homes in Saginaw and Bay Counties are capable of receiving UHF transmissions, and WKNX claims coverage of over 1,000,000 persons in a 23 county area.

77. Although two UHF channels are allocated to the community, WKNX is the only operating television station in Saginaw which had a 1950 population of 93,000. The record discloses that Saginaw has need for a local television outlet, but it does not indicate that such need differs in kind or degree from the need of communities similar in size and geographical location. As hereinbefore indicated, the transmitter of Station WNEM is located very close to Saginaw, and a principal-city grade signal would be placed over the community by Station WJRT.

[12875]

78. WWTV, operating on Channel 13, Cadillac, Michigan, is owned and operated by Sparton Broadcasting Company, a wholly owned subsidiary of the Sparks-Withington Company, which, among other things, manufactures television receivers. The station has been on the air since January 1, 1954.

79. Cadillac, the 400th United States market, has a population of 10,425. The station's coverage area generally consists of the northern half of the lower peninsula of Michigan, which is largely rural in character, containing many moderate size communities, but no large ones. As neither Cadillac nor any other community within the station's coverage area is the central city of a standard metropolitan area under the United States Census, the station bases its sales presentations to network and non-network advertisers on its coverage of the broad area described above. Within the WWTV's Grade A contour[25/] is an area of 9,590 sq. mi. and a population of 247,533, and the station presently provides the only Grade A service for 184,987 persons in an area of 7114 sq. mi. The Grade B area encompasses 14,870 sq. mi. and

455,421 persons. WJR's Grade B contour, operating as proposed in its modification application, would overlap the WWTV Grade A and Grade B contours to the extent of 56,671 (22.9%) and 165,525 (36.3%) population, respectively. However, the Grade B overlap would include only 26,950 (5.9%) persons not already included in the overlap of existing CBS affiliates. The percentages of area overlap would be 16.3% and 23.4%, respectively, indicating that the overlap would be in the more heavily populated areas within the WWTV contours.

80. In WWTV's market there is no large city, but there are many moderate-sized communities. In its sales literature WWTV lists within its Grade A contour the following communities: Cadillac, Traverse City (population 16, 974); Manistee (8,642); Ludington (9,506); Big Rapids (6,736); and Mt. Pleasant (11,393). Within its Grade B area it lists Alma-St. Louis (11,698); Greenville-Belding (11,104); Midland (14,285); Muskegon (48,429); Bay City (52,523); and Ionia (6,412).[26/] It also claims coverage of three northeastern Michigan markets: Petoskey (6,468); Cheboygan (5,687); and Alpena (13,135); and of Grand Rapids (176,515) and Saginaw (92,918).

81. WWTV is affiliated with ABC and DuMont as well as with CBS. However, CBS is its main source of network programs. Its network Class "A" hourly rate is $200. Over the period of WWTV's

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25/ Our findings assume the station's operation with the facilities authorized in its construction permit, 316 kw, 1640' above average terrain. We do not regard findings based on less than maximum operations or operations which the station utilized in the past as being material or relevant to this proceeding.

26/ Bay City, Muskegon and Ionia are not in fact within WWTV's Grade B contour.

existance, CBS has accounted for over 80% of the station's network programming, and in the last month reported, May 1956, approximately 85% of the network programming was CBS.[27/] WWTV is an optional affiliate of CBS,[28] and, for the most part, the station's own representatives sell it to advertisers on the CBS network. The station has shown a history of increasing network programming, especially CBS. From its inception, the station has had a history of gradually decreasing losses until December of 1955, in which month the station showed a profit for the first time. Between December of 1955 and May of 1956, the picture has been one of gradually and irregularly increasing profits. Revenues have had a generally upward trend and in April of 1956, reached a peak of over $44,000. The estimated revenues for May of 1956 were $49,000.

82. The record contains voluminous opinion testimony to the effect that, especially in small markets, substantial network programming is usually necessary for profitable operation and is often necessary for survival; and that, as between two stations which substantially overlap each other, the one with the greatest overall market will be preferred in the securing of network programs. The record shows that Station WJR would serve a substantially larger market from a population standpoint than does WWTV.

83. As indicated at footnote No. 2, supra, Inland Broadcasting Company, licensee of Station WTOM did not file proposed findings of fact or exceptions to the Initial Decision, nor did it avail itself of the opportunity afforded by the Commission's Memorandum Opinion and Order of March 7, 1956, to present evidence relative to the consequences to it of a grant of the WJR modification application. Under these circumstances, no findings relative to WTOM are possible.

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[27] On June 13, 1956, Sparton filed a motion for limited reopening of the record to permit the introduction of evidence relative to its operation subsequent to the close of the record. By a pleading filed June 18, 1956, WJR stated that it had no objection to the Commission's considering the evidence submitted by Sparton. Accordingly, Sparton's motion will be granted, and our findings are based, in part, on the evidence submitted with the motion.

[28] The WWTV-CBS affiliation would not be terminated.

Adjacent Channel Interference

84. Sparton Broadcasting Company also asserts injury to its Station WWTV as the result of adjacent channel interference from the operation of Station WJRT as presently contemplated. Extensive evidence as to the areas and populations affected was adduced. The Commission's Rules, however, make no provision for an electrically free channel on which a television station may operate. In the promulgation of its Sixth Report on Television Allocations, the Commission set forth the public interest considerations dictating the adoption of an engineered Table of Assignments. The Assignment Table was based in large part on a system of minimum station separations and it is stated therein that "These station separations, together with the station powers and antenna heights permitted by the Rules, will establish the nature and extent of the protection from interference to be accorded to television stations." Specifically as to adjacent channel stations the following appears at paragraph 167 thereof: "We have provided that the minimum mileage separation requirements should alone govern spacing of adjacent channel stations." No standard is established for the computation of adjacent channel interference. At paragraph 138 thereof the following appears: "The television Assignment Table and the Rules with respect to television, however, recognize no protected contours. Rather they are based on the concept of affording each station the widest coverage possible consistent with an efficient utilization of the spectrum and the satisfaction of the needs of the various cities and communities in the United States." As demonstrated by paragraphs 148, 151, 156, 157, 158, 159 and 164 of this report, it is recognized that service areas of television stations may be reduced to some extent due to interference. In fact, any adjacent channel interference as might exist here is largely occasioned by WWTV's having availed itself of the Commission's determination that the gains to the public through increased antenna height greatly outweigh any public detriment arising from adjacent

channel interference. (Paragraph 157, Sixth Report on Television Allocations.) It is thus apparent that there is nothing in the Commission's Rules which in any manner can be deemed to be incorporated in the television permits or licenses issued so as to provide an electrically free channel. The transmitter location proposed by WJR herein fully meets all requirements of the Commission's

[12878]

Rules. To deny a grant on the basis of adjacent channel interference to Station WWTV would not only be contrary to any previous Commission action and the express considerations set forth in the said Sixth Report, but would also detract from the greater public benefit to be derived through the use of the maximum power and antenna heights permitted by the Rules, despite such limited interference as might arise under the mileage separations provided. It is also to be noted that such interference as might here exist would result in no detriment to the public interest as it would be only a substitution of one service for another in areas considerably removed from both Cadillac and Flint. We see neither legal basis nor public interest considerations warranting consideration of the evidence adduced as to this interference.

[12879]

CONCLUSIONS

1. We have determined in the comparative proceeding released simultaneously herewith that the public interest would be better served by affirmation of our previous grant of the application of WJR than by the setting aside of that grant and its award to one of the other applicants in that proceeding. By our conclusions in that proceeding which, in the light of the Court's remand, was open to the protestants herein upon request to participate,[25] we have resolved certain of the principal matters here at issue. That this would be true was specifically recognized by protestants Lake Huron Broadcasting Corporation and

Sparton Broadcasting Company, respectively, in their petition for consolidation or deferral of action and opposition to the petition of WJR filed herein on November 15, 1956 requesting immediate issuance of a final decision. (See Memorandum Opinion and Order FCC 57 - 73, 14 RR 976.) In its action on these pleadings the Commission similarly recognized this fact, as had the Court in its remand of the comparative proceeding.

2. As reflected by the foregoing findings of fact, the evidence adduced herein deemed appropriate for consideration in substantial part varies only in minor respects with that adduced in the comparative proceeding. In that proceeding, as here, our findings reflect that in its program planning WJR gave consideration to specific local needs only to the immediate Flint area. The other applicants in that proceeding similarly so confined their planning. Various contentions have been made in this proceeding under issue (a) relative to whether protestants have carried their burden of proof. This issue as formulated by protestants was not adopted by the Commission, and in our view no evidence was adduced thereunder which would support a denial of the WJR application. While more complete program planning might have disclosed peculiar local needs of communities other than Flint and its immediate area within the Grade A and B contours of the station, it cannot be inferred that this would have been the case, and the failure of more complete planning cannot be deemed to establish that the programming proposed is not in the public interest.

3. The channel here involved under the Commission's table of allocations is assigned to the city of Flint. We have found the programming proposal advanced by WJR to be meritorious and superior to that advanced by the other applicants in the comparative proceeding. The only evidence in the instant proceeding as to specialized needs of communities other than Flint relates to the city of Saginaw.

25/ Lake Huron Broadcasting Corporation did seek and was granted authorization to participate in that proceeding.

Flint is the subject community, and the primary consideration with respect to program planning is the Flint planning referred to supra. Whereas an ideal proposal might give consideration to such needs as investigation disclosed were not being met by Saginaw's local facility, as well as to individualized needs of other communities, the failure of such comprehensive consideration would not support a conclusion that the programming proposed was not in the public interest. Such a conclusion would have required denial of all applications in the comparative proceeding. Such considerations may properly be a comparative factor under some circumstances, but they do not constitute a disqualifying factor, as urged herein by protestants. In the comparative proceeding we have deemed the programming proposal of WJR on an overall basis to be one that would serve the needs and interests of the area to be served. The record in this proceeding fully supports that conclusion, and accordingly we reach the same conclusion herein.

4. We have also, in the comparative proceeding, resolved adverse to protestants herein the allegations advanced as to misrepresentations and concealment from the Commission by WJR of material facts with respect to the station proposed in its original application for construction permit. (Issue C) The evidence in that proceeding as to this issue was even more extensive than that adduced herein and virtually all evidence here presented was there duplicated. We find no evidence here which could in any manner affect the conclusions there reached, conclusions which it would serve no useful purpose to here repeat in detail and which are here specifically referenced. In brief, we there concluded that at the time of the Commission's Decision of May 12, 1954 "WJR intended to abide by its proposals made during the original hearing." We also concluded that on June 21, 1954, when WJR filed its opposition to the petition for reconsideration, its plans and efforts were directed toward construction at the Clarkston site with DuMont affiliation. We further found neither concealment nor poor judgment of a

nature which would reflect adversely upon WJR's character as a permittee. We further concluded that, were our determination otherwise, WJR's reliability would not thereby, in view of WJR's excellent past record before the Commission, be substantially diminished. The record in this proceeding serves only to confirm these conclusions for the reasons given in our decision in the comparative proceeding adopted on this day. The record in the instant proceeding also fails to support the further allegation of protestants that WJR's original change from CBS to DuMont in October of 1952 was activated solely by the desire to obtain an advantage in the comparative hearing and that WJR never actually intended to affiliate with DuMont. The evidence establishes that when WJR originally filed it had two primary objectives; a network affiliation and a transmitter location which would afford service to the largest possible market. From the site originally proposed

it was assumed without detailed investigation that a CBS affiliation would be available. When it was discovered that the duplication of coverage with the CBS Detroit affiliate made that affiliation improbable, WJR was faced with the alternative of moving its transmitter site to reduce the duplication, with a consequent loss in market, or seeking a new network affiliation. Investigation of the DuMont situation at that time convinced WJR that, although DuMont was not as strong a network as CBS, the opportunity for unduplicated coverage made it a more desirable affiliation. This decision was based on the DuMont status and prospects as of the fall of 1952, and, even if CBS had been available, it preferred the DuMont affiliation to a largely duplicated CBS affiliation. We conclude that the record herein establishes nothing more than that WJR's appraisal of this network's prospects at that time was incorrect, and that the declining situation of DuMont led to the subsequent efforts seeking affiliation with another network. The inherent advantages of an unduplicated service in the market originally proposed together with the record evidence could lead to no other conclusion.

5. As reflected in our findings (paragraph 12) the WJR amendment of October 25, 1952 made no change in estimated revenues or expenses although estimated operating costs were modified slightly thereafter. Protestants charge that, in view of the substantial change in program structure, WJR's explanation that it believed the various financial estimates affected by the changes in programming would approximately offset each other is so improbable as to be incredible. Estimates of revenues and expenses for a station yet to be constructed are in part based on factors such as equipment costs and salary costs which can be determined in advance with some degree of accuracy. Other factors largely rest in the judgment of the parties concerned arrived at by study of the market involved, other operations believed similar, past experience and industry practices. Protestants have adduced no evidence herein giving a basis for questioning these estimates. Nor have protestants set forth any logical reason as to why WJR would have misrepresented these figures. Its financial qualifications were in issue in the proceeding, and were subject to full exploration therein. No adverse evidence relative thereto was adduced. This charge fails for lack of record support.

5a. We see no significance to the evidence herein as to the failure of certain personnel to exercise their rights under the restrictive stock options held. Nor can significance attach to the fact that Mr. Leydorf, for personal reasons, elected to change his position in the organization. Neither matter rested in the control of WJR and no organization could reasonably be required to remain static over a period of three years. Moreover the integration factor was not a controlling factor in our ultimate determination in the comparative proceeding nor was the preference based solely, or even chiefly, on the participation of the individuals whose status has been altered. Thus, these facts could not be construed as constituting misrepresentation.

6. Our determinations in the comparative proceeding have similarly largely resolved the matters urged by protestants under issue

(b) in this proceeding. Those determinations would not have been made had we believed a grant of the WJR application was inconsistent with Section 3.607 of the Rules, the principles of the Sixth Report and Order, statements of Commission policy, or was in contravention of Section 307(b) of the Communications Act of 1934, as amended. The table of television allocations was compiled with the full mandate of Section 307(b) in mind. The Commission there attempted to make a distribution of frequencies among the several states and communities as to provide a fair, efficient and

equitable distribution of service to each. For the reasons set forth therein, it was believed that a table of allocations would best achieve this result and the channel here involved was allocated to the city of Flint, as the channels on which protestants operate were allocated to their respective communities. Section 3.607 of our Rules does nothing more than require that applications filed must request channels as set forth in Section 3.606 and only in communities listed therein or in any unlisted community within 15 miles of the listed community. In protestants' view, no station should be allowed to locate its transmitter so that it will not only serve the city to which it is allocated but will provide competition for stations assigned to other communities. Yet the Commission in its assignment principles sets forth as Priority No. 3: To provide a choice of at least two television services to all parts of the United States. We recognized that the geographical distribution of the people and cities of the United States does not lend itself to a simple rule for the spacing of stations. In appraising interference problems we also recognized that there would be an overlapping of service contours of stations on different channels where a concentration of cities was present which would largely offset any tendency to loss of service due to interference. Stated more simply, the Commission's primary policy has been to assure a nationwide competitive television service and, as effectively set forth by the United States Court of Appeals for the District of Columbia Case No. 1479, decided May 29, 1958, in Gerico Investment Company v. FCC, a license contains no express or implied terms insuring financial success or freedom from hurtful competition by developments occurring under the Act. The Commission cannot assure a choice of multiple services to the public and at the same time eliminate overlapping service areas whether between stations located in the same community or in different communities. Commission policy throughout the years has been to assure the greatest number of services possible consistent with sound engineering and allocation practices within the framework of the Act and the Rules promulgated thereunder. The fact that a proposal complies with Sections 3.685(a) and 3.610 of the Commission's Rules, as does WJR's, creates a strong presumption that the site selected is acceptable. Gulf Television Company, 12 RR 447, 470q. No evidence to the contrary has here been adduced. No allegations are made that WJRT would operate other than as a Flint station. In fact, protestants charge that its service is to be confined too closely to the needs and interests of Flint. Thus, there is no question present as to violation of Sections 3.607 of the Rules. The operation proposed being in conformance with the table of television allocations, no question is raised under Section 307(b) of the Communications Act. The applications submitted by WJR and all actions thereon have been in full compliance with all applicable rules. Accordingly, no violation of either our Rules or policy is present.

7. Fundamentally issue (d) arises out of protestants' allegations that WJR allowed CBS to select its transmitter site. The record establishes that at all times WJR has deemed a network affiliation essential to its operation. In view of the declining position of DuMont, it made vigorous attempts to secure such affiliation at Clarkston with each of the other national networks. When it became apparent that affiliation

was impossible at that site, WJR determined to move its site to a location which would eliminate the objections raised by the networks due to overlap with their Detroit affiliates. A site meeting all requirements of the Commission's Rules was eventually selected. This site also met all requirements of the CBS network prerequisite to affiliation. There is nothing inherently wrong in an applicant, where possible, establishing as one of the requirements of its transmitter site that it be one which will not constitute a bar to affiliation with the network of its choice, provided the site also meets the requirements of the Commission's Rules. To do so is not to abdicate responsibility for site selection to the network for the determinations leading to and the ultimate selection made remains with the applicant. The evidence here demonstrates only that after selection of the Chesaning site by the applicant, CBS considered its original objections to affiliation as having been eliminated and subsequently entered into such affiliation.

8. Sections 1.319(b) of the Commissions Rules and the doctrine of Ashbacker Radio Corporation v. FCC, 326 U. S. 327 (issue e) relate to the requirement that mutually exclusive applications must be accorded comparative consideration. Protestants contend that the WJR modification application constitutes a totally new proposal which must be the subject of a comparative hearing with the applications of Trebit and Butterfield. Our determinations in the comparative proceeding released simultaneously herewith, to which reference is made, fully dispose of that issue in the instant proceeding. The considerations set forth in paragraph 73 herein have resolved the matters encompassed within issue (f), it there being determined that the competitive effect of a grant upon existing stations is not here a relevant consideration. (See footnote 4 supra.)

9. The exceptions as to the economic injury conclusion (issue f) are denied on two separate and independent grounds. First, the evidence

fails to establish that protestants cannot effectively compete with the proposed WJR operation. Second, assuming such were established even to the degree that protestants were compelled to cease operation, the public would suffer no injury.

10. We find no evidence herein which in our view would support a conclusion that WWTV would in fact suffer the injury asserted. It is a VHF facility and presently operating at a profit. The area and population served, as reflected in our findings, is substantial. That advertisers would in fact cease the use of its facilities to the point that it would, for economic reasons, be forced to cease operation is speculation as amply demonstrated by Sparton's own position herein. Further, should it cease operation, the Commission on the basis of its knowledge of the industry, is of the view that such facility would not long remain unallocated to others.

11. A large degree of speculation is also present as to whether Saginaw would in fact be deprived of its local television outlet. Lake Huron's witness testified that immediately upon it becoming clear that the WJR grant would be affirmed Station WKNX-TV would cease operations. The evidence establishes that Lake Huron probably is faced with a loss of advertising revenues from its CBS programming and possible loss of spot advertising revenue from adjacencies to such programming. Its economic consultant testified that he would recommend discontinuance of operations and that he regarded the possible offsetting of any loss through the carrying of American Broadcasting Company network programs as improbable. Bases for this view were "major differences between NBC and CBS and ABC as far as affiliation policies are concerned and as far as advertising pressures are concerned." Factual evidence in support of these bases is set forth in the record. Evidence was also adduced as to the cost of replacement with film programming of the network programming expected to be lost, such evidence showing the cost would be substantial. Yet there are weaknesses in this evidence, and it is incomplete in light of the burden of proof on the protestants.

The record establishes that Station WKNX-TV would retain its CBS affiliation, as would WWTV. Thus loss of network revenues turns on the opinion testimony that advertisers would prefer the WJR station and would not buy both stations. Two instances, a watch company account and a brewery contract form the only evidence adduced to support this view. Further, WKNX-TV has not shown on the record that a primary ABC network affiliation would not in fact be available to it. There is no evidence as to methods utilized by Lake Huron to develop the advertising potential of its market or of the extent of such efforts. Nor is there evidence as to the extent of such potential. The communities involved, Flint and Saginaw, are each of substantial size. WKNX is Saginaw's only operating station; WJR's proposed station would be Flint's only station. The UHF conversion rate in the area at the time of the hearing had progressed to a relatively high percentage. Both WKNX-TV and WWTV were constructed and placed into operation with the licensees being fully aware that upon termination of the Flint proceeding they would be faced

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with competition from a local Flint station.

12. All evidence in the proceeding insofar as the economic injury issue is involved, revolves around a single point - that of competitive positions as to network programming sources. The evidence establishes little more than that protestants presently hold CBS affiliation agreements and have had available to them some programming from other network sources. They assert that the CBS programming is essential to their continued economic well being. WJR similarly is of the view that a network programming source is essential to its economic well being and, upon determination that the Dumont network could not provide such programming, modified its proposal to the extent necessary to also secure a CBS affiliation, thus becoming equal with protestants as to programming sources. The testimony of the CBS witness herein establishes that all would retain their affiliations. Protestants'

position is that with WJR having achieved such equality, their affiliations became of little, if any, value as advertisers will buy WJR only. From this point, all remaining evidence goes into the area of speculation as to the consequences of such competitive equality to protestants' stations and, upon the basis of such evidence we are requested to conclude that affirmation of the WJR grant would be contrary to the public interest because protestants' stations could not survive. Without more, the Commission could not validly arrive at such a conclusion. To do so would be to conclude that none of the stations could successfully operate without a network affiliation, that other network programming sources could not be utilized by protestants, that advertisers will in fact prefer the WJR service to that offered by protestants despite any rate or other differences that may be present, and that the potential of the markets involved has been developed to the utmost and could have no future growth. Protestants may be of the view that to develop such a record would be an onerous if not impossible burden. If so, it is a burden they voluntarily assumed and one which must be carried before the Commission could arrive at the conclusions requested under issue (f) herein. No protestant has carried this burden.

13. As our second ground for denial, issue (f) relates to the consequences of a grant to WJR on the ability of stations WKNX and WWTV to effectively compete. The significance of the economic injury issue lies not in the injury which may be occasioned to an existing station or stations, but in the injury to the public interest which may result therefrom, FCC v. Sanders, 309 U.S. 470; Carroll v. FCC, U.S. Court of Appeals for the District of Columbia, slip opinion, decided July 10, 1958. That is to say, the financial injury to an existing station

is not a matter of public concern, but, if the advent of a new service into a market unable to support both it and the existing facilities would result in a derogation of service by all the facilities, a legitimate question of public interest may be raised.

14. Stated briefly, protestants attempt to relate the economic injury they would suffer from the competition of WJR to the public interest by arguing that the loss of their stations would deprive Saginaw and Cadillac of their only existing television stations and would result in the deprivation of service to persons receiving service from their facilities.

15. WKNX has stated on the record that it would cease operations immediately, rather than suffer the losses it believes would be attendant on the inauguration of the WJR service. WWTV, while not unequivocally committing itself to abandon its operation has stated that it believes that the grant to WJR would create an economic situation wherein it would be impossible for WWTV to conduct a profitable operation. Thus, at its assumed worst (an assumption not supported by the evidence), it is a situation where an admittedly vigorous station will substitute its service for that of others unable to meet its competition. That Saginaw and Cadillac might be deprived of their television stations would be an obvious loss, but no more obvious than that Flint, a city of greater population than Saginaw and Cadillac combined, would be benefitted by the inauguration of its first television service. Like reasoning must be applied to the individuals who would gain or lose service in these circumstances. There is no mathematical formula by which such gains or losses may be weighed, and each case must be decided on its own facts. Saginaw itself would not be left without service, nor would it in fact suffer any loss in total services. Flint would gain its first local service. Should WWTV cease operation a population of 455,421 persons would lose a Grade B signal whereas a population of 1,325,545 persons would reside within the Grade B contour of the WJR station. Of the 455,421 population presently included within WWTV's Grade B contour 36.3% would receive a Grade B signal from the WJR station. A total of 247,533 persons would lose a Grade A signal from WWTV, but a total of 865,387 persons would gain a Grade A signal from WJRT. Accordingly, assuming the worst possible consequences, in overall

service the public would gain and there is no showing that any substantial area would be deprived of its only Grade A or B signal. In this instance, assuming that a grant to WJR would result in WKNX and WWTV leaving the air, we believe that the net effect on the public interest would not be adverse. In arriving at these determinations, we have recognized that WKNX-TV is a UHF station. Yet, as stated in the Matter of Amendment of Section 3.606 Docket No. 11748 (Hartford, Conn.-Providence, R.I.), while we are concerned with preserving UHF as a part of our nation-wide television

[12887]

system, our primary purpose ... is the effectuation of a television allocation in the particular communities and area involved that would provide the most satisfactory service to the public. We are not endeavoring to protect particular UHF stations from competition, nor is our primary objective the assistance of UHF. The ultimate test comes down to whether the allocation will, in our judgment, be likely to provide the best television service to the public." We have fully weighed the probability of loss of service and that one may be a UHF station, against the advantages derived from affirmation of the grant of the WJR application although we are of the view that the record does not establish that there would or must in fact be a loss of service of protestants' stations. We are of the view, first that protestants have not established the economic injury asserted; secondly, if it were established, the public interest would remain unaffected.

16. Nor do we find merit in protestants' position that the Sixth Report and Order, insofar as it implements Sec. 307(b) of the Communications Act, would protect them from economic injury which might destroy them. Protestants premise this contention on the argument that, if they should be forced to suspend operations, Saginaw and Cadillac will be deprived of the facilities allocated them under the Sixth Report, and, thus, the purposes of Sec. 307(b) will be thwarted. The essential

weakness of protestants' position lies in the fact that, if we were to accept it, Flint would be deprived of the service we have determined to be most in the public interest for it. The actual function of our plan of television allocation under Sec. 307(b) is set out at paragraph 6, of our conclusions, supra; it does not include protecting a service in one community from the economic competition of a service in another community unless there is also some overriding public interest consideration. As hereinbefore set forth, no such consideration is presented in the instant situation.

17. Under the ultimate issue, we conclude that protestants have brought no matters before the Commission, and we are unaware of any not asserted, which in any manner demonstrate that the grant of the application here at issue was not in the public interest, convenience and necessity. Nor is there any record evidence indicating that WJR is not qualified to receive the grant made. We conclude that it is so qualified, and that the grant made would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, This 15th day of July 1958, that our action of April 14, 1955 granting the above-entitled application of WJR, Inc. IS AFFIRMED; that our action of June 8, 1955 staying the effective date of the grant IS TERMINATED; that the said grant of April 14, 1955 IS MADE EFFECTIVE IMMEDIATELY, and that the said protests here in ARE DISMISSED and the proceeding terminated.

IT IS FURTHER ORDERED, That the petition of Sparton Broadcasting Company to reopen the record filed on June 13, 1956, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris
Secretary

[SEAL]

Released: July 16, 1958

APPENDIX

Rulings on the Exceptions to the Initial Decision[1]

The following exceptions are granted as reflected in the decision, insofar as they are relevant,material, supported by the record and non-argumentative:

WJR Nos. 2, 3, 4, 5, 6, 9, 10, 11, 13, 14, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 32.

Broadcast Bureau Nos. 1, 2, 3, 4, 5 and 6.

Sparton Nos. 18, 31, 32, 36, 37, 42, 48, 55, 59, 62, 66, 69, 78, 93 and 99.

Lake Huron Nos. 4, 7, 9, 16, 20, 21, 31, 39, 49 and 72.

The following exceptions are denied as immaterial to the Commission's decision, except as reflected in the decision:

WJR Nos. 7, 8, 12, 15, 16, 17 and 19.

Sparton Nos. 2, 3, 4, 15, 16, 17, 19, 22, 23, 26, 28, 29, 30, 34, 35, 40, 45, 46, 47, 49, 50, 52, 53, 54, 57, 61, 63, 64, 68, 73, 74, 77, 81, 89, 100, 104, 106, 108, 111, 114, 115, 116 and 117.

Lake Huron Nos. 1, 2, 10, 13, 19, 22, 24, 25, 26, 27, 28, 29, 32, 33, 41, 43, 45, 47, 48, 53, 56, 58, 67, 68 and 69.

The following exceptions are denied, except as reflected in the decision as irrelevant to the Commission's decision.

WJR No. 19.

Sparton Nos. 27 and 72.

Lake Huron Nos. 17, 18, 50, 51 and 52.

The following exceptions, except as reflected in the decision, are denied as without adequate support in the record, or as without proper record citation:

WJR Nos. 1, 21 and 31.

Sparton Nos. 24, 25, 33, 38, 41, 43, 51, 56, 57, 58, 65, 68, 84, 85, 90, 91, 92, 94, 96, 97, 101, 102, 103, 106, 109, 110, 112, 114, 118 and 122.

1/ The Commission notes that many of the exceptions in this proceeding do not comply with the requirements of Sec. 1. 154 of the Commission's Rules. However, where possible, the Commission has ruled on so much of the exceptions as may be regarded as presenting a proper point for Commission consideration. Where applicable, exceptions appear in more than one category of rulings.

[12889]

Lake Huron Nos. 3, 15, 18, 23, 24, 28, 42, 55, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 80 and 81.

Except as reflected in the decision, the following exceptions are denied as argumentative, as speculative, as seeking conclusionary material in the findings of fact, or for lack of specificity:

Sparton Nos. 44, 56, 70, 75, 105, 113.

Lake Huron Nos. 37, 38, 40 and 42.

Except as reflected in the decision, the following exceptions are denied for reasons set forth or referred to in the text of the decision, or as rendered moot by subsequent events:

WJR No. 33

Sparton Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 54, 60, 61, 67, 71, 79, 80, 81, 82, 83, 85, 86, 87, 88, 90, 91, 92, 95, 98, 105, 107, 112, 119, 120 and 121.

Lake Huron Nos. 5, 6, 8, 11, 12, 14, 26, 28, 30, 34, 35, 36, 53, 54, 57, 60, 61, 62, 63, 64, 65, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82 and 83.

Except as reflected in the decision, the following exceptions are denied as requested findings already adequately reflected in the Initial Decision:

Sparton Nos. 1, 20, 21, 39, 49 and 76.

Lake Huron Nos. 44 and 46.

[12890]

ERRATA

The Commissioner's Decision in the above-entitled proceeding released on July 16, 1958 (FCC 58-661, Mimeo No. 60883) is corrected in the following particulars:

(1) Page 1, footnote 1, line 4 - the words "contemporaneously herewith" are deleted, and the words "July 11, 1958" are substituted therefor.

(2) Page 3, paragraph 3, lines 10 and 11 - The words "is released contemporaneously herewith" are deleted, and the words "was released July 11, 1958" are substituted therefor.

(3) Page 28, footnote 21 - The entire text of the footnote is deleted, and the entire text of footnote 22, page 29 is substituted therefor.

(4) Page 29, footnote 22 - The entire text of the footnote is deleted, and the entire text of footnote 21, page 28 is substituted therefor.

(5) Page 32, paragraph 75, line 9 - The figure "75" is deleted, and the figure "74" is substituted therefor.

(6) Page 37, paragraph 1, line 2 - The words "simultaneously herewith" are deleted, and the words "July 11, 1958" are substituted therefor.

(7) Page 38, paragraph 3, line 13 - The word "best" is added at the end of the line.

(8) Page 38, paragraph 4, line 24 - The words "this day" are deleted, and the words "July 11, 1958" are substituted therefor.

(9) Page 41, paragraph 8, line 8 - The words "simultaneously herewith" are deleted, and the words "July 11, 1958" are substituted therefor.

[12891]

(10) Page 41, paragraph 8, lines 9-12 - The words "The considerations set forth in paragraph 73 herein have resolved the matters encompassed within issue (f), it there being determined that the competitive effect of a grant upon existing stations is not here a relevant consideration. (See footnote 4, supra.)" are deleted.

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]

/s/ Mary Jane Morris
Secretary

Released: July 21, 1958

[12918]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee dissenting; Commissioners Craven, Ford and Cross not participating.

1. The Commission has before it for consideration a petition for rehearing of its decision of July 15, 1958, filed by Lake Huron Broadcasting Corporation on August 11, 1958, as well as pleadings filed in response thereto.

2. It is noted that Lake Huron has directed its petition not only to this proceeding, but also to the Commission's decision of July 9, 1958 in the basic comparative proceeding which resulted in the grant of construction permit to WJR (Dockets 10268, 10269 and 10270). The text of the petition does not distinguish which arguments are directed to the Commission's decision in the instant proceeding, which to the decision in the comparative proceeding, or which to both.

3. The question of consolidating the two proceedings was determined by the Commission in its Memorandum Opinion and Order of January 23, 1957[1] wherein it expressly denied such a request by Lake Huron. The instant pleadings seek to explain such an apparent disregard of the Commission's Order denying consolidation by stating that

matters in the two decisions are interrelated, that the two decisions are to some extent cross-referenced, and that its action in the instant petition was in the interest of brevity. It further points out that it filed 15 copies of its petition for utilization in this proceeding and an additional 15 copies for use in the comparative proceeding.

4. The Commission normally would not be disposed to ignore allegations material to the disposition of its proceedings for purely technical errors in the mode of presentation. However,

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1/ The Commission's views on consolidation were set forth in FCC No. 57-74, Mimeo No. 40440, a Memorandum Opinion and Order adopted in the comparative proceeding on January 23, 1957, and released on January 24, 1957. That action was referred to in FCC No. 57-73, Mimeo No. 40439, a Memorandum Opinion and Order contemporaneously adopted and released in the instant proceeding.

the instant petition incorporates one of the very evils the Commission attempted to avoid when it denied Lake Huron's petition on the ground that it would lead to confusion and misunderstanding "inimical to an orderly disposition of both cases." A careful perusal of the subject petition leaves the Commission in some doubt as to which decision or portion of decision the various arguments are addressed. Sec. 1.191(d) of the Commission's Rules, promulgated pursuant to that portion of Sec. 405 of the Communications Act of 1934, as amended, which provides that "Rehearings shall be governed by such general rules as the Commission may establish," states ". . . Each such petition [for rehearing] shall state with particularity in what respect the decision, order, or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any findings of fact must specify the pages of record relied on." Clearly, the Lake Huron petition which does not even state with particularity to what decision its various parts are directed, fails to comply with the above rule.

5. Moreover, the subject petition raises no relevant arguments

which have not been previously presented to the Commission, and alleges no new facts other than the establishment of auxiliary studios in Flint by two non-local television licensees. The testablishment of these studios is neither material nor relevant to the issues in this proceeding. Such facts could be contended to be of significance only in a proceeding requiring a determination of the need of Flint for the proposed service (it is unnecessary for us to here decide whether such facts would actually be material or relevant in such proceeding), and no issue in the instant proceeding requires such determination. Therefore, these allegations furnish no valid reason for a waiver of the Commission's Rules in order to entertain the subject petition.

6. Accordingly, the Petition for Rehearing filed on August 11, 1958, by Lake Huron Broadcasting Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris
Secretary

[SEAL]

Adopted: September 8, 1958

Released: September 10, 1958

[Tr. 71]

volume 3

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

Tuesday, December 18, 1956

* * * *

The above-entitled matter came on for hearing, pursuant to recess, at 10:00 o'clock a.m., in room 1420, New Post Office Building, Washington, D. C., before Honorable Herbert Sharfman, Hearing Examiner (The Presiding Officer).

APPEARANCES:

(As heretofore noted)

* * * *

[Tr. 124]

The Presiding Officer: Let me ask this as a general matter: Under the issues in this case is it contemplated that Trebit or Butterfield will have any direct cases?

Mr. Dempsey: I don't so understand it. As I recall, Mr. Eagan stated that he assumed he had the burden under both of the issues at the last conference.

Mr. Eagan: I don't think so.

The Presiding Officer: Let's clear that up. I just would want that matter disposed of here. The issues read of course as if they are directed towards WJR alone, but the order speaks about the consideration of WJR's application on a comparative basis. Do the other parties, that is, Trebit and Butterfield, propose to rely upon the evidence in the previous comparative hearing, merely reintroduce that as it were perhaps or whatever other way it would be possible to get it in this record and rest?

Mr. Cohen: We are in a rather anomalous position, Mr.

[Tr. 125]

Examiner. WJR of course seemingly is not relying on the record it made and we now understand that what we are in competition with in this hearing is a modified construction permit, which modification has occurred subsequent to the date--I don't mean to get into our argument, but it has occurred--subsequent to the date in which we filed a petition for relief, which the Court granted, and that is what we are now here before you on.

On the other hand, WJR has by modification, or amendment, or variance, or what not--I don't know--has some other type of proposal. I don't assume you would entertain a motion to amend the Trebit and Butterfield applications.

Nevertheless, we are in a position where we are in competition or in a comparative hearing with some animal which was not present when we tried our case.

Mr. Eagan: Could I respond?

The Presiding Officer: Yes, Mr. Eagan.

Mr. Eagan: I don't think that this question can be decided until after all the evidence is in, but I don't consider this to be a question of taking our modification application proposal and saying is it better than or worse than what Trebit and Butterfield is proposing. I don't consider that to be involved at all. What I consider to be involved is that they complain of the fact that some changes occurred

[Tr. 126]

in our proposals and they said because of those changes that has washed away the preferences that were originally given to WJR. This hearing is to determine what changes were made in the area specified and then do those changes affect the original comparison of the three applicants. That is what I consider to be involved here.

As to who has the burden, I don't think that is so easy to state in a precise manner. I don't think it is on us any more than it is on them. In fact I think it is probably on them, because they are the ones that alleged that these changes should bring about a different result than the original comparative grant, and they have the burden of showing why. We are going forward and showing what these changes are and also evidence in relation to issue two.

The Presiding Officer: Mr. Eagan, suppose the ultimate decision is adverse to you. Let's just assume that the decision is that WJR's modifications are of such a character that they impair the preference that was given it, to the extent that it is no longer the preferred applicant, but one of the other two applicants obviously is to be preferred then.

What would be the decision in this case? Could there be then a comparision between Trebit and Butterfield, or would the issue in this case merely be that WJR's comparative preference has been so injuriously affected that it is no longer entitled to preference?

[Tr. 127]

Mr. Eagan: Assuming your premise, you have to go on and conclude the preference between Trebit and Butterfield, but at that point, if that did occur, we would then have the right under the Court's opinion to petition that this record be reopened to bring into play the great changes that have taken place with respect to their proposals.

Mr. Cohen: Mr. Eagan has given a very fine description of the due process the Court said we are entitled to get, it seems to me. I would like to follow the Examiner's reasoning just a bit and ask Mr. Eagan, if I may, or with due indulgence ask the Examiner, what application will you grant if you come to that conclusion that Mr. Eagan's client is to be recommended?

The Presiding Officer: I am at a loss, frankly, Mr. Cohen, under the present issues. I had stated in the previous hearing conference that I thought this was a new comparative hearing, but I see in reading these matters that it is somewhat of a truncated and circumscribed comparative hearing.

Mr. Cohen: Emasculated wouldn't be a bad word either.

The Presiding Officer: That has connotations that perhaps we shouldn't indulge in here.

Mr. Cohen: It has some nostalgic feelings for us.

Mr. Eagan: All I can say is we think the Court's opinion was erroneous, but we were overruled so we have to do what the

[Tr. 128]

Court told us to do and this is what they told us to.

Mr. Cohen: The question posed to you is not an idle one because it does have a great deal to do with the question your honor has raised, because we are also in the position where the Commission has now held that Mr. Wilkinson's client is a party to the proceeding and he will admit and every else in the proceeding will admit that his interest flows from the fact that this application involves a change of site, which we did not contend with in our comparative hearing before the Commission prior to the final decision.

Mr. Wilkinson: Not solely change the site; also change the network.

Mr. Cohen: Exactly. Its presence here is predicated not on the application with which Trebit and Butterfield were in comparative hearing, but with some entirely new animal. We have referred to the new animal before the Commission and before the Court because of the impact it has had on the validity of the grant WJR originally was given. At that time that we took our actions before the Commission, WJR did not have a modified construction permit. We are relegated back to a hearing in this proceeding from the point of that error and at that point there was no modified construction permit. These are some of the questions your honor will have to deal with.

The Presiding Officer: Is this really a sort of show

[Tr. 129]

cause proceeding why the preference of WJR should be maintained? Obviously if it is held that WJR's position has not been materially affected, it seems to me that is an end of the matter. Of course when I say it is an end of the matter, that probably rules the second step. If it is, however, held that the modifications that WJR made were of such a nature that its preference can no longer be maintained, well, what is the situation then?

Mr. Cohen: The Court of Appeals has already held that these were substantial changes that have been made.

The Presiding Officer: Is all that is involved here then merely an unnecessary hearing to determine that these were substantial changes?

Mr. Cohen: You are getting very close to the petition we filed with the Commission, Mr. Examiner.

Mr. Eagan: The Court made it quite clear that that is not what they said yesterday.

Mr. Dempsey: I object very strenuously to any attempt by Mr. Eagan or anyone else to interpret the word "stayed" as denied as an opinion by the Court.

The Presiding Officer: It is an interlocutory matter.

Mr. Dempsey: I think, if the Examiner please, we do have a very basic question here. If I correctly understood Mr. Eagan, and had I so understood the Commission's order as he said that he did, I don't think that we would have filed

[Tr. 130]

anything in Court or we would have objected to the proceeding under the October 17 order, if it means what I think he just said it meant, but if it means that I don't see how the Commission acted to permit Mr. Wilkinson's intervention, because unless this is a proceeding which, if you decide WJR should prevail, results in an affirmance of the grant of their M. P., Lake Huron has no place here, because their only interest is in the grant of that M. P.

The Presiding Officer: Do I gather, Mr. Dempsey, that you gentlemen, that is, Trebit and Butterfield, object to a further comparative hearing since you have already had one comparative hearing in this case and that this present matter should not be converted into a second comparative hearing where all the contending questions are considered?

Mr. Dempsey: If the Examiner please, without trying to argue it I am trying to state what I think is the basic position we have taken.

The Presiding Officer: Mr. Dempsey, let me ask you not the basic position that you have taken before the Court, but your position assuming that these issues were the proper issues in the matter. Let's assume that these issues as the Commission has formulated them are a proper construction of the Court's mandate. What then do we do in this case?

Mr. Dempsey: Are you asking how I would then construe these issues?

[Tr. 131]

The Presiding Officer. No. No. Let's assume that the issues are, say, exactly what they mean and they are reasonably understandable.

Mr. Dempsey: As I understand, Mr. Eagan says that the issues mean one thing and if they mean that then obviously the intervention is improper, and so it is a question of whether they don't mean something other than what he said, and we are trying to answer the question as to what do you grant at the end of this proceeding if you think WJR should win whatever there is to win. I think it is hard to escape the inference from the Commission's order that it is the M.P. that is going to be enthroned as a result of a further grant to WJR if it gets one.

Mr. Rollo: Let me express my comments on Mr. Dempsey's views. I think the thing is reasonably simple. What the Commission has ordered is that you take evidence now with respect to these two issues. In other words, you go into the changes through evidentiary hearing between the original proposal that was involved in the original record and the changes that were involved in the modified application. The modified construction permit has been granted and still stands.

After you have finished that comparison, looking into the facts between those two changes--this now is further hearing--you are adding on to the old comparative record.

[Tr. 132]

Then you must review the record to determine whether in the light of these changes that have occurred in the WJR proposal there should be a change in the Commission's original decision. If you determine that there is no need to make a change in the original decision and WJR is still entitled to the preference, that is the end of the matter. You issue an initial decision setting forth the changes and giving your reasons why they don't upset the original decision.

On the other hand, if you find that the changes are such that WJR is no longer entitled to a program, then you simply go ahead and make findings and conclusions with respect to which of Trebit and Butterfield should get the preference.

The Presiding Officer: Maybe that is what it should have been.

Mr. Dempsey: None of this is argument. It is just an attempt to clarify the position.

Supposing the Examiner finds that your new site is far and away better than your old site, very different from the old one, but much better than the old one. Does he grant or deny your original application?

In other words, what does he do when he finds there is a difference? Is that a reason for denying your old application, or a reason for granting your modification? That is the thing I think we are trying to get to.

Mr. Fitzpatrick: Wasn't that a question between yourself

[Tr. 133]

and Judge Bazelon discussed yesterday? Doesn't it appear that the Court might shed some light on that when they rule on the pleading?

Mr. Dempsey: I hope so.

Mr. Fitzpatrick: I hope the Court does shed some light, since it appears that the parties feel light is necessary.

Mr. Dempsey: I hope it does, but I think we have the problem of it going ahead now of going ahead without the benefit of whatever light will be shed by the Court. Our position is of course that the modification application shouldn't be in this. It just happened to be the paper in which the information was filed, but that isn't what I understood to be the position of WJR and I am trying to explore the question, assuming that we could stipulate right now that there is a major difference between the original WJR and the new proposal, what follows from the fact that there is a major difference.

Mr. Rollo: If we could stipulate that, which of course we don't agree with, but assuming that that were possible, then it is up to the Examiner to determine whether those major changes to which we have stipulated are sufficient to effect the original decision. They may or may not. They may have decisional effect and yet be a major change. If they don't have decisional effect, the original preference would

[Tr. 134]

still stand.

The modified application, the permit, is not part of this hearing, as I understand it.

Mr. Dempsey: On that basis, is it your view that if there is a major change, your original application because it would have to be radically changed should be denied, or is it your position that the change has been authorized by the acceptance of the modification application so that your right to make a change isn't in issue here? It is a legitimate rather than an illigitimate change?

Mr. Rollo: Right.

Mr. Dempsey: In that case one thing you have to have for any kind of a modification permit is a change. You don't get an M. P. unless there is a difference, so if you have those differences legitimatized by the acceptance of the M. P. application and the action on it, what are we interested in proving that it is different from the other one?

The Presiding Officer: Have you agreed in your petition?

Mr. Dempsey: We alleged there that you weren't going ahead with your other one and you had nothing but a right to go ahead on the old one. But the fact that you have made changes, it seems to be of very little significance.

Mr. Eagan: That part of your petition that alleged that these changes affected the original basis of the grant to us is the part of the petition that the Court said the Commission

[Tr. 135]

shouldn't have denied, that the Commission should have had an evidentiary hearing. The question on the changes is not whether we are authorized to make them or not. The question is do those changes affect the decisional basis of our May 14 decision? There is no question of whether or not the modification application should be granted or denied, and I agree with you that Lake Huron has no business in here and you are asserting that in Court and so am I.

Mr. Cohen: Do you intend to off comparison program-wise, for example, between your modified proposal and the Trebit proposal, for example?

Mr. Eagan: You get into this I think: The question that we did change our program. So the question is did those programming changes effect in this case the Commission's findings of preference for us because we proposed this and that in the way of equipment and program. So you get into comparing our modified proposal to our original proposal and then say are those two compared to your original proposal to determine whether or not it affects the decisional basis.

Mr. Cohen: Do you in effect--and I haven't a chance to study these adequately--show a comparison between what you now propose under your modified permit and what we proposed in the hearing, Trebit and Butterfield?

Mr. Eagan: That is already in the record. I put it in there only for the convenience of the parties, Lester. We

[Tr. 136]

could have confined it to showing how our modified compared to our original. The record already contains how our original compares to yours. All I did was take those facts out of the record and put them here for the convenience of the parties.

Mr. Dempsey: Let me ask you, without asking you to concede anything about the conclusion or the factual basis, you presented to the Commission as a ground for preference the fact that you are going to bring a new and unique network service to the Detroit area. I don't believe anyone is suggesting that your present proposal for CBCS is bringing new and unique network service to Detroit. Does that adversely affect your original application, or is it allright because you are entitled to make a change? That sort of thing is what I think we have to know.

Mr. Eagan: We never argued that we were entitled to a preference because we were providing a new and unique network service to Detroit. We argued we provide a new and unique and distinct program service to Flint and the entire area to be served, which included Detroit, that program consist of non-network programs and network programs.

Mr. Dempsey: I am just asking you to assume that I correctly state your contention.

Mr. Eagan: The Commission, in any event, whether we assert as I say, or whether we assert it as you say, never gave us a preference on that, so my analysis would be that

[Tr. 137]

that doesn't affect the decisional preference at all that was given us because we were never given a preference for that alleged superiority.

Mr. Dempsey: Let me ask you there, because I think it is a rather important point, do you consider the ground on which the Commission refused a preference to Butterfield or to Trebit as having anything to do with the decision?

In other words, did it turn as much on the rejection of contentions that were made for preference, as it did on the acceptance of some of those you made?

Mr. Eagan: That is in vacuum. I suppose in some sense it maybe did. I just don't know. You get into mental processes.

The Presiding Officer: You were given a preference unquestionably on studio superiority, Mr. Eagan. I think it is more convenient to talk about studios rather than programming. Suppose it is shown in this case that your leased studios, the new ones, will not be able to present your proposed programs to the same extent as your original proposed studios. What would be the effect of that sort of decision?

Mr. Eagan: Assuming your premise?

The Presiding Officer: Of course.

Mr. Eagan: Then you have to look at to what part did the studio play in the overall preference in the original decision, and that part having been disturbed, how does it

[Tr. 138]

affect the whole preference that was given WJR. It is a case of weighing. It is a judgment process.

Mr. Dempsey: Are you entitled to have consideration at all on the basis of your new proposed studios, or simply on the basis that you are not going to provide the old studios. It seems to me you are getting consideration of your M.P. application if you are to consider what is proposed there as a substitute or in lieu of what was originally proposed.

Mr. Eagan: You have to consider the modified proposal because the Court so ordered, but by considering what is in it you are not considering the question of whether the modification application should be granted or denied. We are stuck, if we can use that word, with what the Court ordered. We don't agree with what the Court ordered, but they ordered it, so we will have to go along with it.

Mr. Dempsey: Did they order in your view the permission to grant continuing effect to WJR authorization if it found that what you are proposing in your M.P. than what either Trebit or Butterfield proposed in their original applications?

Mr. Eagan: You get into language troubles there. I wouldn't say precisely what that. I would state it as I have already stated: That you have to look at these changes that have been made in the areas mentioned in the issues and determine on the basis of the evidence adduced respecting those changes how if at all those changes affect the basis of the

grant, the original grant to WJR. Does it disturb those preferences to the point where the preferences are all washed away and because they are washed away then Trebit or Butterfield is better than we are? It is that simple.

Mr. Dempsey: Then if you are not getting a hearing on the M.P. I don't understand it.

Mr. Eagan: On that extent the Court ordered it.

The Presiding Officer: Mr. Dempsey, as I gather, is objecting to any consideration of your alleged superiorities as affected by the M.P. He objects, as I understand it, to the Commission's considering that your original proposal will be improved by the M.P.

Mr. Eagan: Let's take an example. It has to be hypothetical. Suppose in the original decision that we were never given a preference, say, for--

The Presiding Officer: Let's say studios.

Mr. Eagan: Say we were never given preference for a studio and then in this proposal we are proposing a much better studio than they proposed before. I don't say that we could get the benefit of that and say, "Now, although before we weren't entitled to a preference, now we are." I don't think we could argue that successfully.

The Presiding Officer: I think that answers some of it at least.

Mr. Dempsey: If the Examiner please, it doesn't quite

[Tr. 140]

answer it really, because here is what disturbs me about the present order. I don't see the significance of differences, if we are to go beyond the question of whether there is a difference and see whether the difference and new proposal is one that would merit a grant, because to all intents and purposes that is just a comparative hearing between the proposal in the M. P. and our original ones. In other words, if you first find there is a difference and then you say it is all right to have a difference, it may affect whether they get a grant or not, depending on whether the new and different proposal is better or worse than ours. That is just an old fashioned comparative hearing and I have some difficulty in understanding why the Court said "ascertain differences" if the differences are of no significance.

The Presiding Officer: Yes. The issues here certainly in re-reading them are rather cryptic. I had thought when we discussed it last time that a comparative hearing was contemplated, but I can't under the present issues say that this is a comparative hearing of the three applicants.

As I have indicated before, to my mind, the most these hearings are are sort of show cause upon WJR to indicate why the modifications did not affect its application that was granted at the hearing.

Now even then these issues don't say anything about a choice. All they say is determine in light of the facts. Do

[Tr. 141]

they mean the facts in issue number one, or do they mean all the facts, whether the time at which WJR filed its modification reflects adversely upon WJR's character and fitness as a licensee.

There is no final catch-all issue in which it is stated that the hearing examiner or the Commission should then, on the basis of all the evidence, either grant or reject WJR's application or grant or reject either of the other two applicants.

Mr. Eagan: Refer to the language of the preceding page which directs the examiner to prepare a supplement and prepare an initial decision.

The Presiding Officer: I realize that, "Which in light of the evidence to adduce some of the evidence herein after specified the grant of WJR's application will be reconsidered in a comparative basis with the applications of Trebit and of Butterfield."

Mr. Dempsey: There is still an ambiguity. When it says application, does it mean the M. P. application or the original application?

Mr. Eagan: I think it means the original application. I don't think there is any doubt about it.

Mr. Hancock: Then how are you going to grant something which is no longer in effect?

Mr. Eagan: You are getting into language difficulties.

[Tr. 142]

Mr. Hancock: We sure are.

Mr. Eagan: I mean it, that are created by the Court's opinion.

Mr. Hancock: I don't think it is created by the Court's opinion at all. I think it is created by the facts of this case, as to where we are. Do I understand you that in the event WJR should win as a result of this hearing that the grant would be made of the original application, or of the M. P. application, or of what?

Mr. Eagan: It has already been granted that it has never been set aside. All it would mean is that they are again for the third time reaffirming the May 14 grant which today is outstanding and does not have to be granted. It just would mean that it still stands and it is that simple and you don't have any problem.

Mr. Cohen: You don't propose to build that station.

Mr. Dempsey: How can the Examiner find that because you are proposing something, assuming that he makes the findings, radically different in that application that it ought to be affirmed.

Mr. Eagan: I have no trouble with that. The question is whether this decision is still sound in view of the changes, and you asked in your petition for rehearing and that is what the Court granted and here we are.

Mr. Dempsey: One objection to a proposal in a comparative

[Tr. 143]

proceeding that would seem to have merit is that it is not feasible, can't work, and wouldn't be made to work by the applicant if it is granted. Is that open to us, or is the fact that it is not going to be built, not going to be operated as proposed originally and going to be done in a different way, a benefit to WJR? Or a detriment to them? If they have leave to make these different proposals and get a grant of the different thing, this is a comparative hearing with the M.P. If the fact that there are differences is to be a basis for setting aside without regard to whether they are good or bad things, but just they are different things, basic in a substantial way, then that I think we ought to understand is the issue. I am sure we can get through this hearing in very short order if that is all we have to prove.

Mr. Eagan: I think the thing you are forgetting when you try to make all these analogies--you are trying to make analogies to the original comparative hearing. That isn't what we have. What we have here is a rehearing. A rehearing is not like an original.

Mr. Dempsey: The statute says it shall be conducted in exactly the same way.

Mr. Eagan: 402(h) says that the only new evidence of the parties in this proceeding at this time is confined to what the Court ordered, and we have already had the Commission determine the question of whether these issues are in compliance

[Tr. 144]

with what the Court ordered. The Commission said yes, they are.

Mr. Dempsey: Now we are trying to unravel the mystery of what theory.

Mr. Eagan: I think we are trying to argue now how the Examiner should weigh the evidence.

Mr. Hancock: I think it has an impact on the evidence that comes in too, very definitely.

The Presiding Officer: Of course, whether Trebit and Butterfield are going to introduce anything or have a right to introduce anything here.

Mr. Cohen: Subsequent to the Court order certain things took place. The Court order involved an error by the Commission when they denied our joint petition of December 28, 1954. That is all the Court did. It dismissed without prejudice our other appeals.

Now, since that time they have enough modification not only to file, but granted, and we have a Commission order which allows another party to intervene in this proceeding because of that adverse interest in that modified grant and that is the falacy of the argument Mr. Eagan has made.

The Presiding Officer: At the last session I thought this was a comparative hearing and I had rested my supposition on that language that Mr. Eagan referred to in the first page of the order. Today I have been centering my attention

[Tr. 145]

primarily on the issues themselves, which are certainly not as revealing as they might have been, but I am frankly at a loss to determine what sort of an order I might enter even though it is assumed that ultimately it will be held that the modifications of WJR have so affected or impaired its points of superiority that it can no longer be considered the preferred applicant.

Mr. Fitzpatrick: I have not joined into this prior to this, but I would want to point out that we have already stated the Broadcast Bureau's interpretation both of the Court's decision and the Commission's order of designation, and there we have stated that the purpose of this hearing was to afford petitioners, namely, Trebit and Butterfield, an evidentiary hearing on the changes in WJR's original proposal as reflected in its modified M.P. application, and that at the conclusion of the hearing the Commission, but the Examiner first of course initially, must decide whether these changes require a reversal of its original decision favoring WJR, and we further said that we did not see how this could be accomplished without considering the affect these changes have on the Commission's original evaluation of the comparative proposals and that is the way we envision this case.

The Presiding Officer: Would I have authority then to hold that Trebit is then better than Butterfield or Butterfield than Trebit, or despite all these changes that WJR is still

[Tr. 146]

entitled to comparative consideration, assuming that they are still better than Trebit and Butterfield?

Mr. Fitzpatrick: If you found that they were still better than Trebit and Butterfield, I believe you would find for them.

Mr. Dempsey: If the Examiner please, that raises the same question. Are we trying to prove a variance that is fatal with their original application, or are we trying to prove that they have a new, different, and probably very good proposal here. In other words, is the variance all we are to prove and on the proof of that do you act because of the existence of a variance in essential and substantial matters, or do you go on and say, "I will now treat the variance as appropriately before me by way of application," and that I don't think is answered in the Broadcast Bureau's analysis just made by Mr. Fitzpatrick.

Mr. Fitzpatrick: I thought I had answered it. I didn't think that we were studying the question of variance. I think the question of variance and abandonment and need for amendment was argued and we stated in our pleadings it has been argued before the Court, and the Court did not adopt the argument that the applicants--

Mr. Hancock: The Court did not rule on it, though.

Mr. Fitzpatrick: May I finish? Yesterday I sat down and listened to some interesting conversation between Mr.

[Tr. 147]

Dempsey and Judge Bazelon. I mentioned this previously here. Maybe the Court will come out and clarify in its own mind what it intended to do. I can only tell you what my interpretation is from its decision and from the Court's order. If the Court adopts the argument that you put forward yesterday that when they determine the differences, then you can argue that they should hold that the application has been abandoned, if the Court holds that, then maybe your argument will be adopted on the present pleadings you have there, but I don't think on the basis of the present decision that it can be said that the Court ruled that way. I think the Court said you asked for a further comparative hearing and that is what we are giving you.

Mr. Cohen: We are now having a comparative hearing apparently with a modified construction permit, not the one with which we are in contest.

Mr. Dempsey: I understood Mr. Ohlbaum to say to the Court yesterday that the Commission construed its order as providing a comparative hearing between WJR's modification and our original application. I was of the view he said that is the way the Commission construed its order, and that is what we said to the Court, and I think I am correct. We of course argue that that is not an improper view to take, that that is what the Commission said.

Mr. Fitzpatrick: Is my position different from

[Tr. 148]

Mr. Ohlbaum?

Mr. Eagan: I think Mr. Ohlbaum's position is as you have just stated and I know that our position has never been that.

Mr. Dempsey: I don't see how the intervention can be explained otherwise.

The Presiding Officer: Yes. Of course it must be assumed that the modification is a complete edict in this case and otherwise WKNX certainly would have had no standing in the premises here. Maybe it is not necessary at this moment to decide this matter, but I am not at all clear in my mind, as I was at the last meeting we had here, as to what is the position to be taken regarding these issues, and to repeat, I have thought that that first page of the order in response to Mr. Dempsey's last time was a proper basis for the construction of the order, that is, that this was a comparative hearing, but in view of the issues in this case I just wonder what my authority is and whether actually all it is is a show cause order why WJR's preference should not be considered either effected or affirmed as a result of the modification.

Mr. Eagan: I think the latter is a good summary.

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[Tr. 153]

Mr. Dempsey: We would also of course. I think there is a basic question about— first of all, I understand we are not permitted to amend our application in any way. Whether or not the evidence that would be offered by WJR on the assumption that this is a comparative proceeding with an M.P. would require or justify some evidence about some facet of our application, that hadn't been stressed earlier because it is not needed to be stressed in considering comparison with the original applications I think we have to reserve until we see the case. I don't know whether under the issues it would be admissible. I think there may be difficulty, or further difficulty, in restraining us unduly.

The Presiding Officer: Mr. Wilkinson, do you contemplate putting in any affirmative evidence in this case?

Mr. Wilkinson: I think we are in the position that Trebit and Butterfield have indicated, that we will have to see what changes are produced first, whether we think there are other changes that are not brought forward by WJR, and not knowing exactly the theory of the evidence that is being adduced in this proceeding, whether it is for one purpose or another

[Tr. 154]

purpose, whether any changes can be gone into as far as Trebit and Butterfield are concerned, we are at a little bit of a loss to know just how to proceed in this case too.

The Presiding Officer: Are you a party in interest so far as Trebit and Butterfield is concerned, or are you a party in interest only insofar as WJR is concerned?

Mr. Wilkinson: It is my contention that we are a party in interest and that we are now a party to the entire proceeding.

The Presiding Officer: I assume that you are a party to the entire proceeding, whatever the proceeding is of course, but--

Mr. Dempsey: Required to be against WJR and for one of us or both of us.

Mr. Fitzpatrick: I think he is a party and I think the general counsel in the filing of this pleading he filed in the Court, petition for rehearing, where he told the Court about some of these problems, and the Court didn't act favorably concerning his petition--I think it is clear that under the rules and under the Act that there can't be any evidence taken with regard to the Trebit and Butterfield applications.

The Presiding Officer: There cannot?

Mr. Fitzpatrick: Cannot be. That is the position of the Broadcast Bureau,; any changes that may have taken place.

[Tr. 155]

If they wish such or someone else, they should go to the Court and reopen the record to that extent. The Court might want to do so. I don't know.

The Presiding Officer: So that we are limited to hearing only evidence about the changes of WJR?

Mr. Fitzpatrick: That is the position of the Broadcast Bureau.

The Presiding Officer: I wasn't worried so much about that, but as to what would be the ultimate ruling in this case.

Mr. Fitzpatrick: I think I indicated my position on that also earlier.

The Presiding Officer: That the only ruling can be that either WJR maintains its grant or is denied its grant?

Mr. Fitzpatrick: No. I think we said that after the changes are disclosed there will be a re-evaluation of the preferences given to WJR and then the Commission will reconsider its grant to WJR, and if the preferences are then so deluded that WJR does not stand before the Commission as the best of the three applicants they can so hold and one of the other two applicants who then stands before the Commission in a better position can win the case. I am sorry if I hadn't made my position clear.

The Presiding Officer: I believe the question though is also whether Trebit and Butterfield are precluded from

[Tr. 156]

putting in any evidence in view of the changed situation. I can conceive of some disposition on their part to establish their own superiority in the face of WJR's changes which they may not have been disposed to do in the light of the previous evidence in the case.

Mr. Fitzpatrick: We pointed out those problems, or should I say the general counsel in a petition pointed out those problems to the Court in this type of case and it did not receive favorable action.

Mr. Cohen: This was in the motion for rehearing before the Court after the May 14 decision. Immediately after the decision of the Court of Appeals the general counsel asked for what really was clarification--it was called a petition for rehearing under the rules, but it was in effect a petition for clarification, and the Court denied it.

The Presiding Officer: Yes.

Mr. Dempsey: On behalf of Trebit we opposed the petition because we didn't believe there was going to be any comparative hearing and there wouldn't be any need for us to put in any evidence. We, rather, thought the opinion precluded it, but there is some doubt on that now. I think you have a rather curious situation, that one of the applicants is permitted to amend without limit. The others are frozen, can't even meet the amendment.

The Presiding Officer: I realize that too.

[Tr. 157]

Mr. Dempsey: Put in evidence to show that they could counter the amendment.

The Presiding Officer: Yes. There is no question about it but that this whole proceeding has some anomalies in it, to say the least.

Mr. Hancock: That is an understatement, Mr. Examiner.

The Presiding Officer: In view of the Court's intercession in this case, I certainly don't want to express anything stronger about it.

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[Tr. 158]

Monday, January 7, 1957

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The above-entitled matter came on for further hearing, pursuant to recess, at 10:00 o'clock a.m. in Room 1230 New Post Office Building, Washington, D. C., before Honorable Herbert Sharfman, Hearing Examiner (The Presiding Officer).

[Tr. 162]

* * * *

Mr. Ockershausen: One other point I would like to raise before we start taking the testimony. We would like

[Tr. 163]

to get a view from you or a ruling, if possible, as to the question of whether this is a hearing on application of WJR for modification of construction permit which is granted, outstanding, or pending, and whether or not the facts that might be adduced here are for the purpose of comparing the proposals made in that application with the existing record and existing application of Trebit, and I believe I speak for Butterfield, also.

Mr. Hancock: Butterfield joins in that request.

The Presiding Officer: Is there any response to that request for a ruling from the Examiner, Mr. Eagan?

Mr. Eagan: My response is that we have discussed this question many times and I don't think it is necessary or appropriate for the Examiner to make such a ruling.

The Presiding Officer: The Commission has spoken, I think.

Mr. Eagan: The Commission has spoken. We have issues. At the proper time, the Examiner will have to apply the evidence to the issues, but this is not the proper time. I think it would just be a waste of time to get into another discussion on that.

Mr. Fitzpatrick: I see no need for any ruling on your part at this time. We have exposed the thinking of all the parties along this line at one time. Your views, I presume, are the same as they were the last time, as have been expressed in the record.

[Tr. 164]

The Presiding Officer: Yes.

Mr. Cohen: I think that very exposure of views to which Mr. Fitzpatrick adverts makes it abundantly clear that if we are to have any cohesion or coherence in this proceeding it would be desirable to grant the request that Mr. Ockershausen has made.

The Presiding Officer: Mr. Cohen, I feel, however, that we have had voluminous argument on this matter and the Commission has already spoken on the point, and I also should refer to the fact that the Commission on January 2, 1957, issued an order in which it stated that despite the pendency of certain interlocutory pleadings, the taking of testimony in this proceeding shall commence on January 7, 1957; that is today.

I don't think it is necessary for me to make any ruling on the point that Mr. Ockershausen adverts to. I think we are all familiar with the sides that have been taken by the parties in this case. The parties obviously don't agree upon the scope of this hearing and what the issues are supposed to mean or even the power of the Commission to designate these issues in view of the court's mandate.

However, the Commission has spoken on the matter and apparently the court has also made some interlocutory mention, at least, of the matter itself in the request for stay that was argued before, so I think we should go ahead today with

[Tr. 165]

the taking of evidence from WJR.

Mr. Ockershausen: I hope I made myself clear. I would like to have that in the form of a motion and a ruling on the motion, and is that your ruling?

The Presiding Officer: My ruling is that it is not necessary for me to make a statement such as you requested, Mr. Ockershausen. That is the ruling.

Mr. Ockershausen: I note my exception on the record.

The Presiding Officer: And that exception is undoubtedly joined in by all other parties. It is not necessary to take specific exceptions to adverse rulings, but they will be understood.

Mr. Fitzpatrick: I think possibly your statement that the exception to your ruling is joined in by all other parties would not be appropriate. I wouldn't take an exception.

The Presiding Officer: No, no; all parties who joined in Mr. Ockershausen's motion. You are right.

Mr. Cohen: I don't want to continue this unduly, but I did want to make reference to two things that were stated by you. One was that the matter was referred to by the court. I think the record ought to be clear that the only thing the court has done in recent months on this subject is to deny a request for stay and that no decision has been made to the best of my knowledge on the merits.

The Presiding Officer: Let me interrupt, Mr. Cohen. I

[Tr. 166]

tried to say it was interlocutory and perhaps I did improperly interpret the effect of the court's decision there.

Mr. Cohen: If there is guidance in what the court has done, we haven't secured it.

The other thing I wanted to refer to is the fact that the Commission has spoken. If any of the parties in the room could tell us where we could look for that statement by the Commission, it might be of help to us. We don't know what reference there is to the Commission's action.

The Presiding Officer: The Commission has said we are going to go ahead on January 7, 1957, with the taking of testimony in this proceeding, and the Commission has issued an order of designation setting forth the issues in this proceeding which have been discussed at previous sessions here, and I think we have exhausted the topic to the extent possible.

Whatever I attempt to do here, I imagine, isn't going to throw any great light on the subject, nor will it satisfy the parties, so let's go ahead with the taking of testimony here and see where that leads us.

Mr. Kramer?

Whereupon,

WORTH KRAMER

was called as a witness and, after being first duly sworn, was examined and testified as follows:

[Tr. 167]

DIRECT EXAMINATION

By Mr. Eagan:

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[Tr. 185]

Q. I will ask Mr. Kramer the question that I just made in the form of a request for stipulation. Did WJR, on May 14, 1954, issue a press release which stated that, among other things, it planned to commence construction at its Clarkston transmitter site within 60 days of the press release? A. Yes.

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[Tr. 190]

Q. I will repeat the pending question which was with respect to your letter of June 5, 1954, to Mr. Doering. Will you tell me what, if anything, you said in your letter with respect to your plans for going on the air at your Clarkston site? A. I wrote Mr. Doering that our target date was September first, 1954, and that we requested his cooperation in assisting us in meeting the target.

Q. That was the target date for what? A. For going on the air.

Q. Was that a true statement that you made? A. It was.

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[Tr. 212]

Mr. Eagan: Spell that last name.

The Witness: C-a-m-p-e-a-u. -- had initiated discussions with Mr. Lyford concerning CKLW's desire to affiliate with DuMont. We learned that Mr. Lyford mentioned that he preferred affiliation with WJR, and I believe it was at that meeting where Mr. Lyford advised us --

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[Tr. 240]

By Mr. Eagan:

Q. Why was it that you wanted these brochures prepared? A. We wanted them prepared to sell either CBS or NBC on the prospect of affiliating with WJRT at the Clarkston site.

Q. What kind of affiliation did you have in mind? A. At that point we were disturbed at the apparent lack of DuMont programming which was in prospect and we weren't truly too particular about what kind of affiliation we would have with either of them, but primarily we felt that we could get some kind of supplementary affiliation with either one of the two networks.

Q. Would you explain what you mean by the word "supplementary"? A. Supplementary simply means that if a CBS or NBC network program is not carried by the outlet in that area it might possibly be secured by WJRT.

Q. What outlets did they have in the area concerned? A. CBS had WJBK-TV in Detroit. NBC had WWJ-TV in Detroit. Each of them had stations out of state as well.

Q. Can you recall when, if at all, you presented this brochure to CBS? A. I believe I can. The brochures were completed by the agency around July 5 and these were taken to New York by

[Tr. 241]

Mr. Patt and myself and shown to CBS officials on July 7.

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[Tr. 263]

[Tr. 266]

Tuesday, January 8, 1957

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[Tr. 267]

DIRECT EXAMINATION -- Continued

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[Tr. 294]

By Mr. Eagan:

Q. Could you tell us the substance of what was told to Mr. Lyford by you and Mr. Patt?

[Tr. 295]

A. Yes. The substance was as I previously mentioned.

Q. Would you restate it? A. Yes. That he felt that it was going to be necessary for us to halt construction, that we were not certain that we were going to but we were practically certain that we were going to halt construction in order to take a new look at the over-all picture.

Mr. Lyford stated that, despite his solicitations by Ted Campeau, CKLW, he still preferred WJR if WJR could be on the air by fall. He stated that a great part of DuMont's difficulty had been the securing of outlets for DuMont programming and that that was a real consideration as far as he was concerned in the matter of selecting an affiliate in the southeastern Michigan area.

* * * *

[Tr. 297]

* * * * A. We decided, Mr. Patt and I, that it would be necessary for us to halt construction at the Clarkston site.

Q. And what action, if any, and when, did you take as a result of that decision? A. I flew back to Detroit and called Mr. Jones into my office the next morning, July 9th, and instructed him to take all steps to halt construction.

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[Tr. 299]

Q. You reached, at this point, a decision to suspend construction at Clarkston? A. Yes, sir.

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[Tr. 322]

Q. What was the result of this meeting with ABC? A. The result was that both Mr. Kintner and Mr. Jahncke indicated that there was too severe overlap between their Detroit affiliate and our Clarkston site for them to have any interest in it.

Q. I think we take up next NBC, again who you talked to and what the result was. A. Yes. We talked with Mr. Bannister, who was Vice President in charge of Station Relations for NBC, and he brought into the conference Mr. Knode, I think is the way he pronounced it, K-n-o-d-e, who worked with him in Station Relations.

Q. What was the subject matter of your conversation? A. We had this formal presentation, suggested selling or at least trying to sell the affiliation with WJRT at the Clarkston site.

[Tr. 323]

Q. And what was the result of this meeting with NBC? A. The result was that Mr. Bannister and Mr. Knode told us that the amount of overlap was much too severe for them to give serious consideration to our proposal.

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[Tr. 329]

Q. What was presented by WJR to CBS? A. Another argument as

[Tr. 329]

strenuous as we could make it urging affiliation with us at the Clarkston site.

Q. And what was the result? A. The result was that while Mr. Van Volkenburg had earlier been somewhat intrigued by our proposal, he had changed his point of view and the result was that CBS told us that they could not possibly consider affiliation with us at the Clarkston site.

* * * *

[Tr. 364]

Q. Mr. Kramer, the pending question is, what was said

[Tr. 365]

by whom at this September 8 meeting and what decision, if any, was reached? A. Mr. Patt said to the group that as a result of a recent telephone conversation with Mr. Akerberg he was confident that he could secure for WJRT a CBS affiliation should we move our transmitter site.

Q. And what decision, if any, was made at that meeting? A. The decision was made at that meeting to file a modification application to move WJR's transmitter site.

Q. From where to where? A. From Clarkston to Chesaning.

* * * *

[Tr. 393]

Q. I direct your attention to the subject of WJR's Flint Studios, and ask you whether or not you recall any telephone conversation you had with Allen Campbell some time prior to April 30, of 1954? A. Yes, I recall such conversation.

Q. Could you tell me when it was? A. It was shortly prior to April 30, actually prior to the time, I believe, that WTAC-TV went off the air.

Q. C ould you tell me the substance of the conversation? A. Yes. He approached us with the proposal.

Q. When you say "us", we are talking about a conversation between you and Mr. Campbell?

[Tr. 394]

A. He talked to me about the possibility of our being interested in the WTAC-TV studio facilities, and indicated that he was planning to go off the air, that it was his desire to minimize his losses, but he felt that we would be interested.

Mr. Eagan: In that connection, I would like to request a stipulation that the Commission records show, according to the telephone checks that I have made, that on July 8th, 1952, Trendle-Campbell, which I will refer to as WTAC, filed an application for Channel 16 at Flint, which was granted on November 19, 1952; and that on November 26, 1953, WTAC-TV commenced operations, according to the Commission's records; and, according to the Commission's records, the construction permit was deleted August 10, 1954.

Mr. Hancock: When did they go off the air?

Mr. Eagan: That doesn't show in the Commission records, but my understanding is that they went off the air shortly -- well, let me ask the witness.

By Mr. Eagan:

Q. Do you have any recollection as to when this station went off the air? A. My recollection is that it is April 30 that they ceased Broadcasting.

Mr. Eagan: I think that is mine. I don't think that that is in the Commission's records. It just shows the date that the construction permit was deleted.

[Tr. 395]

May we have a stipulation as to the basic facts I have enumerated

Mr. Hancock: We do.

Mr. Cohen: We so stipulate.

The Presiding Officer: All parties so stipulate.

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[Tr. 411]

Wednesday, January 9, 1957

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[Tr. 412]

Mr. Fitzpatrick: With your permission, Mr. Examiner, may I make a preliminary statement?

The Presiding Officer: Certainly, sir.

Mr. Fitzpatrick; With reference to the filing and processing of the 701 application, the application for extension of completion date, I attempted to do some research into this matter and I would like to state that the Mimeo No. 14440 referred to yesterday in the record was not a public notice of a tendering for filing of the application, but was a public notice of the acceptance of the application for filing, and that I have discussed the matter with staff members in charge of accepting applications for filing in the Broadcast License Division of the Broadcast Bureau and have been informed that no public notice is given of the tendering for filing of applications requesting extension of completion dates, which require action by the Chief of the Boardcast Bureau, staff action rather than action by the Commission, and that to their knowledge the only applications that frequently do require staff action and that are reported as having been tendered for filing are transfer and assignment applications because at that time the staff members are not

[Tr. 413]

certain whether it requires Commission or staff action.

Also, I was informed and I will make this statement--I told Mr. Dempsey I would--that at that time in December of 1954, the time of the filing of the 701, the Broadcast License Division, Iehl's office, was then moving from the eighth to the seventh floor to their present quarters, and that there was some confusion at that time concerning where applications were and what became of them for a week or so.

I thought that I ought to make that statement, and Miss Iehl did state to me that she had telephone conversations and inquiries by Mr. Ockershausen in Mr. Dempsey's office during that period of time concerning whether or not such an application had been filed and that she recalls on one occasion she made a personal check and informed Mr. Ockershausen on that occasion that it had not been filed because she could not and did not locate such an application, and that on the other occasion she gave him the same information based on the knowledge she then had.

* * * *

[Tr. 416]

WORTH KRAMER

* * * *

DIRECT EXAMINATION (Resumed)

By Mr. Eagan:

* * * *

[Tr. 418]

Mr. Dempsey: The date is June 23rd?

The Witness: Yes, sir.

By Mr. Eagan:

Q. I believe you started out by saying he also discussed with us--

[Tr. 418]

A. Mr. Campbell also informed us of the equipment picture within the building; the fact that it was certainly not paid for as of that writing, and pretty much gave us the situation as it pertained to the building itself, to the

[Tr. 419]

leasehold improvements, and to the technical equipment within the building.

Q. What action, if any, did you take as a result of this meeting? A. Mr. Patt and I felt that it was a pretty confused picture as far as who owned what, and we referred the matter to our General Counsel in Detroit to look into.

Q. Who is your General Counsel in Detroit? A. Dickinson, Wright, Davis, McKean & Cudlip. I believe that is the total.

Mr. Dempsey: Any or all of them members of the Board?

The Witness: Selden Dickinson is the member of the Board who is also General Counsel.

By Mr. Eagan:

Q. What, if anything, occurred on July 30, 1954, with respect to this subject matter? A. On July 30th WJR signed a lease with Mr. Pemberton, the owner of the building itself. It was a 10-year lease with option to purchase.

Q. What was the effective date of the lease? A. The effective date of the lease was August 1, 1954.

Q. When did WJR's television staff first occupy the premises? A. On September 1, 1954.

* * * *

[Tr. 529]

Thursday, January 10, 1957

* * * *

[Thursday, January 10, 1957]

[Tr. 608]

Mr. Dempsey: The next sentence, if the Examiner please, a question which Mr. Cohen adverted to earlier, that there is nothing in the application shown as indicating any budget for studio expansion, and I think it has uniformly held that an applicant can't boost itself by unlimited, unrestricted expansion. Its application is confined to what it proposes to build with the money it proposes to use as shown in the application.

The Presiding Officer: You mean in the modification application there is no statement regarding expansion of the studios?

Mr. Dempsey: There is no budget provision for it.

The Presiding Officer: But is there a catch-all item?

Mr. Dempsey: You can't have catch-all items of that kind because you must make a finding of financial ability based on what you show that you are going to spend and what you propose it is going to cost. There is no cost item for this.

[Tr. 609]

The Presiding Officer: Under the discussions that the Commission used to indulge in with regard to the Evansville issue, it was held that if the applicant could go to some other budgetary item, even though not specifically designated for a certain purpose, it would be sufficient.

Mr. Dempsey: May I recall the Evansville problem? There there was a hearing based on a finding that the applicants were financially qualified and the question was raised whether the program proposals of the applicant could be carried out within the budget set-up in the application, and the Commission permitted, and the Examiner specifically ruled to that effect, inquiry to be made about whether the program budget would encompass the program proposal, but that had no relation, I suggest, to the question of whether when they say "We are going to build Building X, and we have $100,000 for Building X, and that is what it is going to cost," that you can construe the Commission as having found that it also included Building Y, which will cost $2 million, out of funds not shown and out of a budget not even mentioned.

The Presiding Officer: Of course, if it is something not shown at all in its application--

Mr. Dempsey: No showing at all of any construction or expansion of the studio.

Mr. Hancock: The applicant shows that the studios are to be leased.

[Tr. 610]

Mr. Eagan: It also states in the application that it will expand the studios.

Mr. Hancock: I recognize that. I am talking about the financial showing.

Mr. Eagan: No one has seriously questioned our financial ability and what you are complaining about now is that we are going to spend less and not more on a building.

Mr. Dempsey: This is a very serious problem. We are going to a comparative hearing under the ruling over our objection with an applicant which has a proposed building expansion to any extent he needs to meet. He can add 50 more studios, 100,000 offices, 1000 more cameras, because he was careful to say he will meet whatever exigencies may arise without ever showing a quarter he would devote or set aside for that application.

This is a rubber application under Mr. Eagan's approach.

Mr. Eagan: I think there is a freezing point, but the freezing point is not as of the time the application is filed, but as of this hearing.

The Presiding Officer: Is the freezing point $767,000? Can you expand your studios up to the amount that you had proposed in your original application?

Mr. Cohen: That presents a very serious question, as to what application you are hearing, Your Honor. We are going to have all sides of the cake here in just a few minutes.

[Tr. 611]

The Presiding Officer: WJR has said, "We will expand our studio as needed to provide the locally originated program service proposed." That is in the modification application.

Mr. Cohen: Yes, sir, and in that same application they show you what money they are going to spend.

The Presiding Officer: In excess of $225,000, entirely for these studios; still considerably below the original studio proposal.

Mr. Eagan: I think one thing that might be helpful is that this application was not filed for authority to make the change in the studio site. We didn't have to file any application to get that authority. We were permitted to change it without any prior approval of the Commission whatsoever.

The reason that the application was filed was because it was desired to get authority to change the transmitter site, and in connection with filing the application, they ask you, "Have there been any changes in your original proposal," and it was in answering those questions that we said, "Yes, there has been this change; there has been that change," and that is how this comes in, so in context, all of this arguing really has no relationship.

Mr. Dempsey: You are suggesting that a silly question deserves a silly answer?

Mr. Cohen: What you just said applies to every case,

[Tr. 612]

Mr. Eagan. There is no requirement with respect to the studios. Yet, do you know of a comparative proceeding where a person can specify a $50,000 studio building and then come to a hearing with a million dollar proposal?

The Presiding Officer: That is not what is being done in this case.

Mr. Eagan: That isn't what we are talking about. You have to have a construction permit before you construct.

[Tr. 612]

Mr. Dempsey: You have to know how high they go in order to beat the showing of the other applicants.

Mr. Eagan: We don't claim that we filed this modification application in order to create for ourselves preferences that didn't before exist. We didn't even think of that because at that time we were the successful applicant. Why should we be worrying about that.

Mr. Dempsey: It is very plain why you are worrying, that you can get by with a shoddy second-hand operation after having gotten the grant on the basis of a very elaborate building, and you are now relying on this language to let you off the hook.

The Presiding Officer: Is it your objection that this isn't specific, his proposal to expand the studio building?

Mr. Dempsey: That is correct; that that statement in the application is meaningless except to the extent that it can be implemented in the budget, within the budget required

[Tr. 613]

to be given by the form.

Mr. Fitzpatrick: Would that objection include objections to their showing an addition to the studio building, Studio B, and scenery storage and workshop, in Figure 1?

Would that necessarily be elastic if that was their definite plan at the time they filed their modification application? I think that can be established. If that was the case, I have no objection to that type of showing. I would object to this elastic rubber showing, as you call it.

Mr. Dempsey: If the Examiner please, we filed a joint petition for rehearing and WJR filed an answer to it. I think in that answer it described the facilities that it conceived to be proposing, that it was proposing to the Commission, and I think this is quite a different thing.

* * * *

[Tr. 616]

A. DONOVAN FAUST

resumed the witness stand and was examined and testified further as follows:

DIRECT EXAMINATION--Continued

*   *   *   *

[Tr. 617]

The Presiding Officer: We were on page 5 of the exhibit, at that sentence, "In the event WJR decides to exercise its purchase option..." How about that sentence, gentlemen?

Mr. Dempsey: I thought Mr. Fitzpatrick raised some question earlier this morning.

Mr. Fitzpatrick: I asked the witness for a breakdown.

Mr. Eagan: He asked qualifying questions on that. I suppose the point at which to pick up--

Mr. Hancock: Obviously, Mr. Examiner, we object to that

[Tr. 618]

on the same basis that we discussed this morning.

Mr. Cohen: We have raised a very substantial objection that that $225,000 figure, as I understood from the testimony, was based upon some $100,000 on improvements and extensions and enlargements and we have pointed out that even though we do not concede that we are in hearing with a modification application, to the extent that this is offered pursuant to the modification application, it is not supported by that application. This is at variance and if offered on that basis it is clearly inadmissible.

Mr. Eagan: I do not understand there is any variance. The application stated on its face that the studios would be expanded as needed. As of the time that this hearing was ordered those were the plans of the applicant and for the purpose of this hearing we agree that the plans have to be frozen as of that time. That does not mean that there is any variance. These are the facts.

Mr. Dempsey: If the Examiner please, may I ask Mr. Eagan at what date he freezes everything?

Mr. Eagan: As of the time that this hearing was ordered by the Commission.

Mr. Dempsey: October 17.

Mr. Wilkinson: 1956.

Mr. Eagan: With respect to their plans as of then. I would be willing to freeze it as of then for the purpose of

[Tr. 619]

this hearing.

The Presiding Officer: Does that $225,000 comprehend what is shown on Figure 1 of Exhibit 90, the floor plan, Mr. Faust?

The Witness: Would you repeat that, please.

The Presiding Officer: Does the figure of $225,000 cover the expansion that is shown or is covered by figure 1 of Exhibit 90?

The Witness: Yes, it does.

The Presiding Officer: That is all?

The Witness: That is right.

Mr. Cohen: There is no showing in this application about any money to be spent.

Mr. Eagan: The application did not call for it. It was not an application seeking authority to build a building or anything else.

Mr. Cohen: Where did we get the figure in this application about what you were going to spend on your studio building? It is an application for a construction permit. You are not building the one you said you were going to build. You are building something else. Somewhere we ought to be told what he proposes to do.

The Presiding Officer: He has told us what he proposes to do. The question now is whether you can show what the cost of that is.

Mr. Cohen: You show it in your application, Mr.

[Tr. 620]

Examiner.

The Presiding Officer: As Mr. Eagan points out, the kind of application they filed at that time was not the sort that required them to show it.

Mr. Dempsey: On the contrary, it does request an answer on that point.

The Presiding Officer: On the application for modification?

Mr. Cohen: The application is not one iota different than the one filed for the original application.

Mr. Dempsey: 301 has the same questions.

Mr. Eagan: It has the same questions but the same questions have different meanings in relation to different requests. This was a modification application and the only thing we had to get prior authority for from the Commission was the change in site. We did not have to file an application to do anything with respect to the studio building or anything with respect to network affiliation. We filed an application because we requested prior authority from the Commission before we moved our site and that application asks as an informational question just like the form 701 does in connection with this modification application, "Have there been any changes in the proposals previously advanced," and we set forth what the changes were. It is in that context that this reference was made.

Mr. Dempsey: May I suggest the Examiner look at the

[Tr. 621]

application that you are describing?

The Presiding Officer: Let me look at it.

Mr. Cohen: Would you like to see it, Mr. Examiner?

The Presiding Officer: Yes, if I could, please. I notice that from Section 3 of the modification application which was a modification of BPCT-967 and was filed on December 16, 1954, in this box, "Acquiring, remodeling or constructing buildings." This is stated, the answer is,

[Tr. 621]

"See Exhibit F-1, Trans. Building"--which I assume means transmitter--and "$197,974," and in another box, "Other items."

Mr. Cohen: You left out "Studio leased," which is a way of explaining that you do not have to pay any money to build it.

Mr. Hancock: I might say--and I will stand corrected--that that figure of $179,000 some odd is the figure that appears in the original record for the cost of the transmitter building. It has nothing to do with the studio.

The Presiding Officer: How about that $72,500 in other items? To what does that refer?

Mr. Cohen: It certainly does not refer to building a new studio.

Mr. Dempsey: If the Examiner please, if you look on Exhibit F-1, page 3, you will see there that it says, "As shown in Exhibit 21-F, Docket No. so and so, applicant proposed to construct the studio building at an average estimate of $766,821, and a transmitter building at an

[Tr. 622]

average of $179,974. There has been no change in applicant's plans with respect to its transmitter building except as to location and the number, $179,974, is referred to solely as a transmitter building. They are going to lease the studio building.

Mr. Eagan: We might read the lease.

The Presiding Officer: What is the next paragraph? It says as I read it, "In an effort to expedite commencement of operations of station WJR the studios of Station WTAC-TV were leased and the equipment purchased as stated above. These studios are modern in every respect, having been constructed in late '53. Station WTAC-TV has since surrendered its construction permit. Applicant also has an option to purchase the studio building for $125,000. It is now engaged in installing additional equipment to provide the flexibility contemplated in its original plans and will expand the studios as needed to provide the locally originated program service proposed."

Mr. Dempsey: Where is the amount of money?

The Presiding Officer: The amount of money is not shown there.

Mr. Eagan: I do not think that is a fatal defect.

The Presiding Officer: I wonder if that is a fatal defect.

Mr. Cohen: If it is not, what is the roof on Mr. Eagan's

[Tr. 623]

showing?

The Presiding Officer: The roof is in Figure 1. Mr. Dempsey.

Mr. Dempsey: There is no roof in Figure 1. Naturally the roof blew off before Figure 1 was put in. Is that not true, Mr. Faust?

Mr. Eagan: That is known as a double entendre.

Mr. Hancock: Mr. Examiner, may I state something further? At least to me, I think this points up the very point in issue here. You will recall that the MP application was filed by WJR on December 16 shortly after the Commission released its order denying the petitions for rehearing filed by Butterfield and Trebit and modifying its decision of May 14. On December 28, 1954, after the filing of that MP by WJR, Trebit and Butterfield filed a joint petition directed to basically the facts which have been disclosed by this MP application. That joint petition was responded to by WJR. The Commission's action with respect to its treatment of that joint petition was the only appeal that the Court of Appeals decided and that we are now back on in this proceeding. The record that the Court had before them in connection with that one appeal, the one appeal which they decided and which is now before us, had before it WJR's response to the joint petition by Trebit and Butterfield in which they there disclosed what their idea of their studio proposal would be. That is a part of this record.

[Tr. 624]

It is a part of the statements of WJR as to what this new studio proposal is. Now, I have pointed that out to you and called it to your attention. It is Exhibit No. 1 in this record to WJR's response to the December 28 pleading that I just mentioned which was filed on January 7, 1955. It is Exhibit 1

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1 to that pleading. I think that merely a look at that exhibit, the representations of WJR at that time as to what we were confronted with, and a comparison of that exhibit with what they now come forward and show you as their studio plan, shows clearly what we are confronted with here. There has obviously been some more juggling, some more expansion so that they can show entirely different floor space than we showed before, different locations of the buildings, more rooms. I submit it is a different layout altogether.

Mr. Cohen: If the Examiner please, they are the plans that were before the Court of Appeals and referred to in page 13 of the decision of the Court of Appeals in this very case.

The Presiding Officer: Mr. Eagan, are you not frozen by what was previously shown?

Mr. Eagan: Not at all. At that time, as of then, that is how they planned to make the additions that they referred to in their application. That was in January of 1955. In April of 1955 the Commission denied this petition so WJR went forward as a permittee and in going forward they made certain

slight changes in how those additions would be put on. That planning and work was carried forward and those changes were in the form that they are shown in Exhibit 90 prior to the time that the court reversed the Commission and prior to the time that the Commission ordered this hearing, and the question asked by the Court is, what are our plans as of the time, I would say, that the Court reversed. Certainly, I would say as of the time that the Commission ordered the hearing. That is what they want to know, what are our plans. That is what we are showing you.

If they want to argue that these plans differ from what was planned as of a year prior to this time they are perfectly free to do it and I do not intend to say that they cannot; but that does not mean that I cannot show what the issues call for now.

Mr. Wilkinson: Mr. Examiner, the issue here as specified in the October 17 order is to determine the differences between the proposals advanced by WJR, The Goodwill Station, et cetera, in its original application and those proposals advanced by it in its application for modification of its construction permit.

The Presiding Officer: That is right.

Mr. Wilkinson: They interpreted what they were proposing in their MP in responding to Trebit and Butterfield's petition and now they are trying to come forward and put another

[Tr. 626]

interpretation on the MP.

Mr. Hancock: That is exactly the point I was making.

Mr. Wilkinson: That was not granted until sometime in April, the MP. They had no right to construct under that MP under Section 319 of the Act and as soon as the grant of the MP was made it was protested and then we had our suspension or stay that we talked about this morning, so that I do not see any opportunity for changing from the MP and the response they have made here as a justification to the Trebit and Butterfield petition.

Mr. Fitzpatrick: Its opposition, which is similar to Mr. Wilkinson's, that the Court, when it ordered that the Commission will conduct further hearings on the points of difference between WJR's original and modified proposals, that it was the proposal as reflected in the modification application and as the party WJR then proposed it and that is reflected, of course, as to what their proposal was, in the pleading refered to by Mr. Hancock.

In reference to that, I would like to point out one sentence of the Court's decision on page 13 of the slip opinion where they say, "These comparative contests must turn upon concrete proposals tested through the hearing process not upon facile and untested afterthoughts."

The Presiding Officer: Yes, Mr. Eagan, I am just wondering about this matter. In fact, I am greatly impressed by

[Tr. 627]

the argument that the proposal which was set forth or in a sense set forth in the modification application which was the one referred to by Mr. Hancock as Exhibit No. 1 to your answer to your motion to dismiss in opposition to joint petition is the proposal with which you are to be charged and that you cannot subsequently increase your studio proposal. I do not see how we can get floor plan Figure 1 into this record in view of the previous plan.

Mr. Hancock.

Mr. Hancock: Mr. Examiner, so that it is all in one place, we have made reference to the Court's opinion. We have been discussing this very subject. I would like also to make reference to footnote 21, which appears on page 13 of the Court's opinion in which they said, and I quote: "The fact is that the original studio would have provided about one-fourth more floor space than those newly proposed and that two of the original studios were two-story rooms providing 27-foot ceilings while the newly proposed building is a one-story structure."

Mr. Eagan: We are not stuck with the mistaken finding of fact by a Court of Appeals which does not take evidence and that statement of the Court of Appeals is false.

The Presiding Officer: I see. Regardless of what the Court said, there is apparently a representation by WJR that its expansion will be of a certain degree.

[Tr. 628]

Mr. Eagan: Mr. Examiner, I do not agree with it. I will make a statement and then I am going to have a ruling. The application said that it will be expanded to the extent necessary to effectuate the programming proposed. As of the time we filed the pleading those were the then plans. We were a permittee. We were not stopped from saying this is as far as we will every go. As a matter of fact, we did not stop there. The facts are that planning continued after that date and it evolved into the state that is present in Figure 1 of Exhibit 90 before the Court ever acted on the appeals.

The Presiding Officer: Mr. Eagan, why should you be stopped even with this plan? Why could you not go even further than this?

Mr. Eagan: I am not arguing whether I could or not.

The Presiding Officer: Your argument is that you could improve to the extent necessary to effectuate your program proposals.

Mr. Eagan: My argument is simply that up to the time at least that the Commission ordered this hearing, we can show what we had done in conformity with our application, namely to expand it to the extent necessary to effectuate programming, for the purpose of this hearing. Now, as to whether we can go further, I am not arguing one way or another. I am just saying that we can go that far.

Mr. Dempsey: Sufficient unto the day.

[Tr. 629]

The Presiding Officer: Well, it might be.

Mr. Eagan: I might say that I cannot go any further anyhow, because the plans have not changed.

The Presiding Officer: I see. It might be that a literal reading of the statement in your application in that Exhibit F-1 of your application where you say that you will expand the studio in order to effectuate your program plans would--

Mr. Eagan: To the extent necessary.

The Presiding Officer: To the extent necessary, would permit an unlimited showing here, but this in effect is a comparative hearing.

Mr. Eagan: I am not arguing that it permits it. I am arguing that it permits us to show the degree to which our planning had crystallized as of the time this further hearing was ordered.

Mr. Cohen: Bearing in mind that we, Butterfield and Trebit, by your own ruling, both of us are committed to proposals we made in 1952. We are not allowed to change them. As I recall the Butterfield testimony we talked about expansion. It would be a fine holiday if we started talking about changing our program structures at this time.

Mr. Dempsey: If the Examiner please, our position is that WJR, after the Commission's decision, repaired the defects which we had contended should have been found by the Commission and upon which the Commission should have based a denial of

[Tr. 630]

WJR originally. Not content with that, they now want to repair additional defects which the Court of Appeals found in their modified proposal and say as of today that is as far as they need to go because until more defects are pointed out they do not have to make any change.

* * * *

[Tr. 631]

Mr. Fitzpatrick: To your knowledge, when was the decision made to include that as part of the proposal of WJR?

The Witness: The time this was approved or decision was made and approval gotten from Mr. Pemberton to construct the additional space--Mr. Pemberton was the owner of the building--was May 9th. I gave testimony this morning that in the fall of 1956 this was prepared and I was speaking of the specific floor plan as shown in this exhibit, not the original discussions or original rough drafts or anything of that nature.

Mr. Fitzpatrick: You said May 9th. What year?

The Witness: 1956.

Mr. Dempsey: May I ask Mr. Faust what was approved on May 9th? It was not this, I take it, because this was not in existence on May 9th.

The Witness: That is true. The addition was approved in substance.

[Tr. 632]

Mr. Dempsey: Before we get to what was approved that is not shown in the exhibit, when was this particular drawing approved? When did it come into existence?

The Witness: As I have testified, I cannot recall exactly when this was made by our architects. It was sometime in the fall.

Mr. Dempsey: Sometime in the fall of 1956?

The Witness: '56. However, it was drawn from rough sketches that had been made somewhat prior.

Mr. Dempsey: These dates become significant, if the Examiner please, and then I think we ought to have what was approved and what is a rough sketch as of some earlier date.

Mr. Fitzpatrick: I think we should have that information.

Mr. Cohen: I might say that the testimony was not confusing this morning. I thought it was very clear. The question was asked and the answer given.

The Presiding Officer: Do you gentlemen contend that WJR is stopped from going beyond what is shown in Exhibit 1 on the opposition and motion to dismiss to which Mr. Hancock made reference? I just want to know.

Mr. Dempsey: We have serious reservations as to whether he can go that far, much less further.

The Presiding Officer: Let us assume for the purposes of argument at least at this point that that is one high point.

Mr. Dempsey: May I answer your questions? If you take

[Tr. 633]

a look at that figure attached to the opposition, our position is that under the rulings which constitute the running objection basis here everything except the dotted lines showing excrescences on the top part of the building and one on the right-hand side they could talk about, but those dotted lines which say nothing except "Proposed future addition," would not be included.

The Presiding Officer: That is what the Court of Appeals referred to as "facile afterthoughts," or "permits a facile afterthought to be shown."

Mr. Dempsey: That is correct.

Mr. Eagan: I do not know that that is what they were referring to.

Mr. Fitzpatrick: I do not think so either. I did not intend to give that impression.

Mr. Dempsey: I do not want to say they are facile.

Mr. Cohen: I do not concede they are facile.

Mr. Hancock: I do not wish to belabor this point, but the position of Trebit and Butterfield here is that we are parties to this proceeding and we have some rights. There is quite a disagreement as to what those rights are, but certainly nobody can argue that they are not at least the rights which the Court gave us by saying to us that the Commission made a mistake when they denied your December 28 joint petition in the manner in which they denied it and based that decision

[Tr. 634]

upon certain facts which were facts of record before them then alleged by us in our joint petition and by WJR in its response. Now certainly, certainly our rights--and I do not think there can be any dispute--are defined clearly to that extent. Now we come to this hearing and we are faced with an entirely different set of facts.

The Presiding Officer: The Court merely held that the Commission should have taken into account the changes that were proposed by WJR and because of those changes there was no proper comparative hearing--this is a paraphrase--between two parties.

Mr. Dempsey: May I say it is a paraphrase with which I distinctly disagree.

Mr. Eagan: And I disagree.

The Presiding Officer: I was trying to say something off the cuff. It may be completely erroneous, but the question I am now asking is, did the Court hold in that opinion to which reference has just been made that WJR is held to a certain measure of change from its original proposal?

Mr. Eagan: No, sir. They asked the Commission to hold a hearing to find out what the changes were in the area specified and that is what we are trying to show you.

Mr. Wilkinson: And the Commission specified two issues and in each case they said the difference between the proposals advanced originally and those advanced in its

[Tr. 635]

application for modification of permit. That is No. 1. No. 2 is to determine in light of the facts whether the time at which WJR filed its modification application reflects adversely upon WJR's character.

Mr. Eagan: May I point out that again we are fly-specking. This figure 1 that was attached to our pleading in response to their December 28, 1954, pleading is substantially the same floor plan as is now shown on Figure 1 of Exhibit 90. Figure 1 of our pleading showed two future additions, one above Studio A and one to the right of the building. All that has happened is that on the future addition that was shown to the right of the building it is picked up and moved so that it is on the top of the building so that you have one square building. As to the total space within the four walls of each proposal with plant additions I do not know what the figures are, but by looking at them it is obvious there that there is hardly any real difference.

Mr. Fitzpatrick: There is a difference because I studied it to see what it was.

Mr. Eagan: There is no substantial difference, so why not put them both in and let the parties argue whatever they want as to what it means.

Mr. Cohen: Are there others to put in too, on that basis? Just because you say they are not substantial and we do not agree--

[Tr. 636]

Mr. Eagan: I am not arguing that, but you can ask the witness any question you want and anybody can make any deduction they want.

Mr. Cohen: That is a theory of evidence admission I have never heard of.

Mr. Fitzpatrick: May I be heard?

[Tr. 636]

The Presiding Officer: Yes.

Mr. Fitzpatrick: The Broadcast Bureau's position would be that, in view of the fact that a Exhibit 1 referred to in the opposition to the joint petition filed by the parties for the reopening and rehearing does appear to be substantially at least similar to Figure 1 and in view of the fact that the witness has testified now that the decision was made to make the changes that appear in Figure 1 from what the WTAC studios were at the time of the purchase on a date prior to the Court's decision, we would not object to the showing. In other words, our position is that it is not apparent and does not appear that WJR has attempted to better its position in light of the Court decision as to the further hearing and what type of hearing it had to be. That would be our position.

Mr. Dempsey: With respect to Mr. Fitzpatrick's last remark, the date of the Court's decision as distinguished from the date on which the case was submitted to the Court on a record not to be changed, it seems to me that the date on which it was submitted, not the date of the decision, is the

[Tr. 637]

significant date. Secondly, on the basis of the witness's testimony, Figure 1 was non est on the date the Court decided. It was never drawn until the fall. The Court decided in the spring so that on Mr. Fitzpatrick's test, nothing that he said has the least bearing on the admissibility of Figure 1.

Mr. Eagan: The witness testified that the plans were approved and that the actual physical drawing was not made.

Mr. Fitzpatrick: My understanding of the witness' testimony is Mr. Eagan's understanding.

Mr. Cohen: You did not listen to the witness this morning then.

Mr. Dempsey: This was not drawn until the fall. He said there were certain rough drafts submitted. I might mention that I disagree very radically with Mr. Eagan about the relative similarity of this Figure 1 and the attachment to the opposition of the petition for rehearing. There there were two areas outlined by dashed lines which were called "future additions." Here there are heavy lines and an indication that it is a completed structure and among the things shown to exist in there is a sponsor's booth which Mr. Faust used in his comparison as a plus for WJR and a detriment for Butterfield and Trebit.

Mr. Eagan: I do not think the case is going to turn on who has a sponsor's booth.

Mr. Dempsey: You went to a lot of trouble to put it in.

[Tr. 638]

If you will move to strike it we can save a lot of time.

Mr. Eagan: I will not move to strike it.

The Presiding Officer: I think what Mr. Wilkinson pointed out must be kept in mind: That it is the difference between the proposals in the original application and those in the modification application that is controlling here.

Mr. Dempsey: I would like to add to that that Section 402(h) of the statute said that the record before the Commission after remand shall be the original record except to the point that the Court permits a departure. It is clear that this case is being remanded for a consideration of matters contained--and I do not suggest that they cannot be elaborated or explained--in the MP application; but not for an amendment of that application or changes in the proposals contained.

* * * *

[Tr. 639]

Mr. Dempsey: There is no question about availability. I would like to ask that official notice be taken of all of the petitions for rehearing and responses thereto that were filed in this proceeding, not so far as the statements therein contained being taken as proof of the facts stated, but as statements binding on the parties and being true representations of what they said to the Commission.

The Presiding Officer: Such notice will be taken. The suggestion has been made by Mr. Eagan that we get both of these plans, that is the Exhibit 1 plan attached to the opposition and the floor plan in Figure 1 attached to Exhibit 90 into the record here, and that obviously there will be no finding at this time, but that the receipt of those two findings would not be an indication that WJR would be permitted to demand a finding that its studio proposals had attained the degree shown in Figure 1. Would that be a fair summary of your position or have I added something to it, Mr. Eagan?

Mr. Eagan: I am not sure, but I at this time offer to

[Tr. 640]

add to our Exhibit 90, and I will label it as Figure 1-A, that which was identified as Exhibit 1 to the response we filed to the December 28, 1954 joint petition of Trebit and Butterfield, and I offer it as showing the degree to which WJR's plans had cemented themselves as of that date and Figure 1 would show the plans as the witness has testified in this proceeding.

Now, as to whether we get the benefit or however you want to phrase it, whether for the purpose of this hearing you have to consider Figure 1 or Figure 1-A, we say you can consider them both. I will withdraw the original of 1-A and substitute copies at the next hearing session.

(THE DOCUMENT REFERRED TO, BEING FIGURE 1-A, WAS ADDED TO WJR EXHIBIT NO. 90.)

Mr. Dempsey: If the Examiner please, we have no objection. Of course we have already requested and you have already granted the request that Figure 1, attached to WJR's Exhibit, be made a part of the record as a proposal of WJR. Nothing is added to that by Mr. Eagan's statement. What we are now doing is objecting to Figure 1 of Exhibit 90.

The Presiding Officer: I understand.

Mr. Dempsey: I do not think the fact that he agrees that another thing should be admitted is an answer to the objection raised to the admission of Figure 1.

The Presiding Officer: I have serious doubts, too, whether Figure 1 is to be the basis for a finding, that is on

[Tr. 641]

whether WJR has improved its studios or intends to improve its studios so that its program plans can be effectuated; that is, how it plans to improve them. I see no real objection to having both of these figures in the record here with the understanding that the finding that is going to be made is at the present moment still in doubt.

Mr. Dempsey: If the Examiner please, we are trying to get a ruling. We do not think we ought to be in doubt about your ruling. This is either admissible or it is not. We ask you now to rule not to accept it and not tell us you are not going to rule until some indefinite date in the future.

The Presiding Officer: I am not prepared at the present moment, in view of WJR's statement in their application filed December 16, 1954, in Exhibit F-1 that they propose to expand their studios as needed to effectuate their program plans or something to that effect, to rule that they are precluded from showing what that expansion will be.

However, I also am taking into account the fact that the Court said that facile afterthoughts are not to be taken into account and I do not want to preclude WJR from arguing, if possible, that they are permitted to show that their expansion up to the extent shown in Figure 1 is the one that is to be considered here.

Mr. Dempsey: I do not object to them arguing that, sir. I am only asking that now they have made their argument, you

[Tr. 642]

make a ruling. I want to call to your attention what Mr. Hancock read, that the Court characterized the problem in footnote 21 on page 13, as follows: "The fact is that the original studios would have provided about one-fourth more floor space than those newly proposed and that two of the original studios were two-story rooms providing 27-foot high ceilings, while the newly proposed building is a one-story structure."

Mr. Eagan: That statement was not made subject to cross-examination. It is not evidence in this proceeding and it has no bearing whatsoever. The only thing that the Court's opinion controls on this proceeding is that it results from the Court's order and you are not bound by any so-called alleged findings of fact which in fact are not findings of fact by the Court of Appeals.

Mr. Dempsey: I think it is fairly plain that the Court's understanding was that that is the record which within the meaning of 402(h) is the only record open on this point.

Mr. Eagan: They said that a hearing should be held to determine what the facts are. Why would the Court order a hearing if they are making findings of fact? That does not make sense.

The Presiding Officer: What is the record that was before the Court of Appeals on which this decision was made?

Mr. Dempsey: That was a proposal. I think the Court

outlined in this area precisely what the proposal was. The area left open was to determine what the effect of the change and the extent of the change would be, but not to send it back to permit them to make a lot of new proposals, which is Mr. Eagan's suggestion.

Mr. Eagan: We make no new proposals.

The Presiding Officer: They say that they would expand as needed.

Mr. Dempsey: Can they put in a new one now, if that is your ruling? Then let me take an exception and let us go on.

The Presiding Officer: Let the ruling remain as I have stated it: That is, that Mr. Eagan has introduced Exhibit 1, which was attached to the opposition and which is already in the record for that matter, and in addition Figure 1-A to Exhibit 90, and I have stated what conditions I have hinged the receipt of those documents with.

Mr. Cohen: Will you rule on that motion to strike from page 5?

Mr. Dempsey: Do I understand that you now rule that Figure 1 is admissible?

The Presiding Officer: I have ruled that Figure 1 is admitted into this record, Mr. Dempsey.

Mr. Eagan: And Figure 1-A.

The Presiding Officer: And Figure 1-A, which is Exhibit 1. That is the way it is designated. All right. Now we are back on page 5 of

[Tr. 644]

Exhibit 90.

Mr. Cohen: And our motion to strike the last sentence of the first paragraph starting, "In the event WJR decides..."

The Presiding Officer: We are still talking about the amount of costs and there is no place in the application for modification filed December 16, 1954, apparently, where that $225,000 figure was shown, Mr. Eagan.

Mr. Hancock: That is correct.

Mr. Eagan: As I understand, they said they would make improvements as necessary and did not attempt to put any dollar value on what the improvements would cost.

Mr. Hancock: Could I ask a question so that I will know whether we are going in the same direction?

The Presiding Officer: Yes.

Mr. Hancock: Is it for us now to understand that if this sort of evidence and Figure 1 of Exhibit 90 are admitted, that WJR is in the position before the Examiner at this time that, had they wanted to, they could have now come in and proposed the very studio that they proposed initially in this proceeding?

Mr. Dempsey: I think the question is addressed to you, Mr. Examiner.

[Tr. 644]

Mr. Fitzpatrick: That is a hypothetical question. I do not think the Examiner has to rule.

The Presiding Officer: I do not know how I could be

[Tr. 645]

called upon to answer that. The question in my mind, Mr. Hancock, is how far could they go. Could they have gone to $776,000 to improve this WTAC studio or are they stuck at $225,000?

Mr. Hancock: Where do they get the $225,000?

Mr. Eagan: It is a little like the Supreme Court. They never pass on a constitutional question unless it is presented to them.

Mr. Dempsey: If your ruling is that they could say anything or everything and if that is your ruling, I might as well say we could close the record now because they could do everything.

Mr. Fitzpatrick: That was not my understanding. Could I state my understanding?

The Presiding Officer: Yes.

Mr. Fitzpatrick: My understanding was that the Examiner had studied the modification application and the statements made therein, had studied the Figure 1-A that is now part of this record and as to what the representations of WJR were at the time, it was raised before the Commission decided it and studied Figure 1 and the respects in which there were any changes from Figure 1 and Figure 1-A to show the good faith of the applicant as to what its proposal actually was at the time its modification application was before the C ommission on these questions of changes. That is my understanding.

[Tr. 646]

Mr. Dempsey: If it is my understanding that Mr. Fitzpatrick comes anywhere close to what you have decided and if your ruling constitutes good faith competitions, I would like to take an exception to your ruling.

The Presiding Officer: I certainly said nothing about good faith.

Mr. Eagan: I do not know that there is any issue on good faith.

The Presiding Officer: There is an issue on good faith in regard to the timing and so forth.

Mr. Eagan: If that is how you characterize the timing, all right.

The Presiding Officer: It seems the question now is whether we can consider any cost figure at all, $225,000 or any other figure.

Mr. Cohen: Mr. Examiner, Mr. Eagan has said that this is not important, that he can prove any amount he wants because--

Mr. Eagan: I did not say that.

Mr. Cohen: May I finish?--because this is not the part of the application that is critical. He said he was not required to show that and is not now bound. In his caution he also said there were many things that you had to fill in in an application but did not become critical from the standpoint of variance, and, if I may complete, for example, he said such matters as the disignation of network was such a matter

[Tr. 647]

that need not be put in and if it were put in was not the critical criterion.

Mr. Eagan: I never said anything close to that.

Mr. Cohen: I think we will check the record.

Mr. Eagan: I said we did not have to file an application in order to get authority to change a network.

Mr. Dempsey: Were you saying you told the truth in the application, or do not have to be held to those figures?

Mr. Cohen: That is the point.

Mr. Eagen: I never asserted that.

Mr. Cohen: You said you did not have to file an application to change your network.

The Presiding Officer: One at a time.

Mr. Eagan: Those are two different things.

Mr. Cohen: So that it is your statement that with respect to those areas where you have an answer those answers are not critical. Is that what you said?

Mr. Eagan: I do not know what you mean by "critical." I think every time you make a representation to the Commission it should be a truthful and accurate representation whether called for by the Commission or not. Any time you make any representation anywhere any time you should be truthful.

Mr. Dempsey: Are you bound by what you said here?

Mr. Eagan: That is so ambiguous.

Mr. Dempsey: Can you change it freely?

[Tr. 648]

Mr. Eagan: In what respect? Do you mean that if we file an application like this and say we are going to lease a building and put additions on it that we cannot ever put on any additions except those we had in mind at the time the application was filed? In that sense we are not bound.

Mr. Dempsey: We are talking about a hearing on this application. You said in answer to certain questions you would do so and so. Now you are saying you do not have to pay any attention to it.

Mr. Eagan: I am not saying that.

The Presiding Officer: One at a time, gentlemen. The reporter cannot take two people at one time.

Mr. Cohen: You cannot now come in under this device and put in a showing concerning $100,000 worth of improvements to a building that were not set forth in the application.

The Presiding Officer: What about that point, Mr. Eagan? Was there any requirement that you set that forth in the application in order that you should be able to show it at this time?

Mr. Eagan: I just do not know on that. I would not take a position because I have not studied that question. I am saying that the application was truthful. It represented the truth at the time it was made and I am saying that they planned at that time to add to it to the extent necessary and I am saying that, as we have put in evidence, that prior to the

[Tr. 649]

Court reversal they had decided to enlarge the building to the extent shown on our exhibits; and I am also saying that that plan would involve the costs that the witness has already testified to. That is all I am saying.

Mr. Dempsey: As I understand it, WJR's position is that it can file any application it pleases if at the time it says "That is a good idea," and is perfectly free to change at any time in the future it decides to make a change, notwithstanding it is in a hearing testing whether that application is a proposal. All these are commitments for future action. There is a self-executing release.

Mr. Eagan: Anything any applicant has ever proposed is subject to change in that sense.

Mr. Dempsey: Mr. Eagan, I think you are reasonably familiar with Commission practice and you know that your applications that are filed in comparative and noncomparative proceedings are not subject to free change.

Mr. Eagan: Who said "free change"? I said there has never been an application filed in the history of the Commission that did not relate to future operations.

Mr. Dempsey: That is entirely correct.

Mr. Eagan: And when there is future operations that there was not some change made. That is the facts of life. We all know that and it does not involve misrepresentation.

Mr. Dempsey: You can write your own ticket at any stage.

[Tr. 650]

Mr. Eagan: You proposed programs in '52 that you cannot carry out because they no longer exist. In that sense it is a change.

Mr. Dempsey: Are you sure of that?

Mr. Eagan: You proposed some programs that do not exist.

Mr. Dempsey: No, we did not. We were careful.

The Presiding Officer: This $225,000 figure is obviously related--

merely stating the opposites, of course--to the material shown on Figure 1, is that correct, Mr. Faust?

Mr. Dempsey: Would you repeat it?

The Presiding Officer: The $225,000 figure covered the improvements to the studios that are contemplated under Figure 1-A?

Mr. Eagan: It includes them.

Mr. Dempsey: No.

The Presiding Officer: That is what I would like to know.

The Witness: If the Examiner please, the $225,000 figure is the figure which would be represented in accomplishing the floor plan shown in Figure 1 of Exhibit 90.

The Presiding Officer: That is Figure 1.

Mr. Cohen: If you bought the property.

By Mr. Eagan:

Q. Are the costs any higher based on Figure 1 of 90 than they would be if they were based on Figure 1-A of 90?

[Tr. 651]

Mr. Dempsey: I do not think Mr. Faust is qualified.

The Presiding Officer: He is not a building expert, is he?

Mr. Dempsey: First of all, I do not know that he knew anything about 1-A, as now designated, and I will not accept on the present record his qualifications to give an estimate of cost on construction.

Mr. Eagan: If you read the quotation that you ask judicial notice be taken of, you will find that Mr. Faust is familiar with 1-A.

Mr. Wilkinson: We are getting into this variance which I think is substantial. In Section 3 of the modification application the studio was "to be leased." Now, this $225,000 figure, as Mr. Faust testified to this morning, includes $125,000 for the building in the event they purchased the building rather than leased it, plus another $100,000 for certain improvements, certain additions and so on.

Mr. Eagan: Are you saying by inference that there is no reference to the $125,000 option purchase price in the application? It is in the application.

Mr. Wilkinson: I am saying you are ceasing to give effect to a representation made December 16 that the studio was "to be leased."

The Presiding Officer: It also said "to be expanded."

Mr. Eagan: There was an option to purchase for $125,000

[Tr. 652]

The Presiding Officer: It also says it is to be expanded to effectuate the programs proposed.

Mr. Wilkinson: I realize that. Supposing I was leasing space at RCA but also the contract gave me the option to purchase that entire building for $40 million or something. Now, the Commission has granted this MP application. That grant has not been set aside. The Commission would be saying, "True, you have an option contract to purchase the RCA building for $40 million, but you have not yet exercised that option. We do not need to go into your qualifications as to whether you can pay $40 million and still run this station because you say for the moment you are going to lease space in the RCA building for $100 a month."

The Presiding Officer: Is there any question about WJR's financial qualifications in this?

Mr. Wilkinson: But the Commission has approved and made a grant and if they are allowed to vary it on this record, how can you go back to the Commission to raise the question whether they would or would not have been financially qualified?

Mr. Fitzpatrick: How can you say they are varying it? They have not said they are going to exercise the option.

Mr. Dempsey: If they are not going to this should be stricken.

The Presiding Officer: They would be committing waste to improve a building which they did not own.

Mr. Dempsey: This says in the event it exercises the option to purchase they will then have $100,000 worth of improvement plus $125,000 for the purchase price. Our whole point is that they have represented not that they are going to purchase but that they are going to lease.

Mr. Fitzpatrick: What is the materiality of this sentence them?

Mr. Dempsey: It should be stricken. That is what we are arguing about.

The Presiding Officer: Is there any place where they said that they are going to have an option to purchase the building?

Mr. Eagan: You have read it into the record.

Mr. Dempsey: That was descriptive of the agreement but the representation was they were going to lease it.

Mr. Wilkinson: The contract had the clause that they were going to buy but they say they are going to lease for the time being.

The Presiding Officer: This is part of the application Exhibit F-1 in which they state --

Mr. Dempsey: They state that they are exercising the lease not the purchase provisions of the contract in the part of the application that requires them to tell the Commission what they are going to do.

The Presiding Officer: What is the difference?

[Tr. 654]

Mr. Dempsey: They originally proposed a building costing three-quarters of a million dollars. They said they had the money. They demonstrated a great reluctance for spending that for the benefit of the public. They came and said to the Commission, "We have a lease deal." The Commission said, "All right. We will grant your MP." They are now trying to say they are going to buy.

The Presiding Officer: They also told the Commission they had an option to buy.

Mr. Dempsey: They never told the Commission they were going to buy. They described a contract of lease and an accurate description of that included a statement of an option to buy. There is nowhere in that application a statement. As a matter of fact, the exact contrary is represented, that they were purchasing. The statement is they are leasing and therefore there is no money ascribed in the application for improvement of buildings.

The Presiding Officer: Mr. Dempsey, I do not know the terms of the lease, but I assume that if as a lessee WJR attempted to improve the building, they would be guilty of committing waste whether ameliorative waste or any other kinds.

Mr. Dempsey: I do not care what kind of waste it is. I am saying if you read the application, it says we are spending zero dollars for improving studios. We are leasing studios. This exhibit says what will happen if they buy. Whether or not

[Tr. 655]

they are going to buy, nobody knows but at least they cannot on this record claim credit as a purchaser when they have a grant as a lessee.

Mr. Eagan: The sentence says if they were to exercise the option.

Mr. Fitzpatrick: That is why I question the materiality of the sentence in the event they do something in the future.

Mr. Dempsey: In the event they buy another building costing $10 million.

The Presiding Officer: You have not exercised your option yet. Is there objection to striking that sentence?

Mr. Dempsey: We do not object.

The Presiding Officer: I do not mean you. I am talking about Mr. Eagan. Let us strike that sentence and avoid all of this argument.

By Mr. Eagan:

Q. Let me question the witness if he has knowledge of how the planned improvements were to be accomplished and paid for.

Mr. Dempsey: I object.

Mr. Hancock: I object.

Mr. Eagan: It is relevant to what you just said. The application said they planned to improve it, if possible, as necessary.

Mr. Dempsey: If the Examiner please, I object to the

[Tr. 656]

witness saying anything about planned improvements. The application says they are going to lease certain property. They have leased it. The application shows that they are going to spend zero dollars on improving it in the portion of the application that deals directly with that point. If they have other and different plans they ought to modify the application before it can be put in evidence.

Mr. Eagan: Are you saying that you cannot improve a building on a lease arrangement?

Mr. Dempsey: You cannot get credit for it in an application like this.

Mr. Cohen: We object to the question.

The Presiding Officer: Getting back to Exhibit F-1, they say that applicant also has an option to purchase the building for $125,000 and will expand the studios as needed to provide the locally originated service proposal. I cut out a few words.

Mr. Cohen: If they contemplated using that language to show the Commission that they intended to spend money to modify that building, it should have been contained in that application in Section 3. It is not in that application. It is bad enough to be in competition with an application that was filed subsequent to the close of our hearing and we do not consent to that. It is infinitely worse to find ourselves combating evidence at variance with that application.

[Tr. 657]

Mr. Eagan: There has been no evidence at variance. I am asking a question. The application stated that they would have additional improvements to the extent necessary. I am asking them how they planned it. If his testimony is at variance with the application you can rule it out. Let us get his testimony.

Mr. Dempsey: If the question deals with whether they are going to spend a dollar, the amount they contend they are going to spend is found in Section 3 of this application. If he is talking about something he can do for free, I am not objecting.

Mr. Eagan: It says, "To be leased," does it not?

Mr. Dempsey: So it shows your operating cost which includes the lease price, I assume, if you are accurate and truthful.

The Presiding Officer: It says you will expand the studios as needed to provide the locally originated program service as proposed. I have already ruled that you would be able to show the expansion. I have not ruled definitely as to the limits of that expansion showing. I really am concerned, Mr. Eagan, whether you can show any dollar amounts under your application.

Mr. Eagan: I have not even asked for a dollar amount on this figure phase.

The Presiding Officer: What was the question now pending?

[Tr. 658]

Mr. Eagan: The question was, how, if at all, were they going to finance the planned improvements.

Mr. Cohen: I object.

The Presiding Officer: What does that mean except dollars?

Mr. Eagan: I do not ask for a total dollar value. If they object and you sustain it, all right. I will move on.

The Presiding Officer: The objection is sustained.

Mr. Eagan: I make an offer of proof that if allowed to testify the witness would testify that the landlord has agreed that these extensions would be put on and that the amount would be reflected in the lease. This is my offer of proof.

Mr. Dempsey: If the Examiner please, I want to call attention to the fact that the offer of proof is not responsive to the sentence stricken.

Mr. Eagan: I did not claim it was.

Mr. Dempsey: Which had to do not with what happened under the lease, but what happened under a purchase.

The Presiding Officer: That is true.

Mr. Eagan: I did not claim this was the same subject.

Mr. Fitzpatrick: I have a question as to whether the offer of proof was responsive to the question.

The Presiding Officer: The question is, how do you expect to finance the addition or the expansion, and that was objected to. That was sustained. Mr. Eagan made an offer of

[Tr. 659]

proof that it was to be done under the lease arrangement with the landlord. In other words, as I gathered, that the landlord would finance the expansion.

Is that correct, Mr. Eagan?

Mr. Eagan: It would be reflected in the rental; yes, sir. I move we take a five-minute recess.

[Tr. 681]

Thursday, January 17, 1957

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[Tr. 688]

DIRECT EXAMINATION -- Continued

By Mr. Eagan:

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[Tr. 712]

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Mr. Dempsey: If the Examiner please, we have had handed to us by Mr. Faust a set of what appear to be the original floor plans for WTAC prepared by Fred W. Gilford, a registered engineer, and bearing the date May 15, 1953, revised June 5, 1953, with another number under it, and perhaps another revision, 9-29-53. These bear some additions in red pencil and in ink.

Mr. Faust has stated, but I am not sure whether it was on the record so I will ask him if it is not an accurate statement, that with respect to the additional structure all of the partitions shown on your Figure 1 and 1-A were in place when you came with the company in September of 1954?

The Witness: Yes.

Mr. Dempsey: So there is no change in the interior of the present structure that has been made at all?

The Witness: No.

Mr. Dempsey: We are raising no question about the present structure in view of that statement.

However, a portion of Figure 1, which purports to show new construction not yet commenced and which differs from Figure 1-A in indicating proposed new additions, is quite different from the indications drawn on these plans.

As I understand it, these are the only papers that were in existence last spring at the time the matter was discussed at the director's meeting and this Figure 1 was for the first

[Tr. 713]

time prepared this fall for this hearing.

The Witness: Yes. The plans you have before you, Mr. Dempsey, my rough sketches, served as the basis for our discussion in which the addition was approved in substance by Mr. Pemberton and Mr. Kramer.

Mr. Dempsey: If the Examiner please, we would like, in view of this, to renew our objection to Figure 1, insofar as it purports to show anything other than the existing structure, because the portion so shown was for the first time put on paper in this form this fall for this hearing.

The Presiding Officer: I think we have had sufficient discussion at our last session. I do not think we ought to go into much discussion now.

I said I would admit Figure 1 and Figure 1-A with the condition that it was no finding that WJR was to have the benefit of anything as a result of Figure 1. It is merely to have them both in the record so that WJR can make appropriate arguments on it, Mr. Dempsey.

Mr. Dempsey: At that time, if the Examiner please, the testimony was that working plans had been presented to the board and approved in the spring of 1955. Figure 1, with respect to the new construction, was simply a more formal representation of that.

I think that this drawing shown us by Mr. Faust indicates that there are very substantial differences in the proposed

[Tr. 714]

new construction, and that aspect which was not clear in the record before caused me to renew the objection.

Mr. Eagan: I never so understood the record before, and like the Examiner said it has been argued and I think that the rules made previously should stand.

The Presiding Officer: Yes, I feel that way, Mr. Dempsey. I realize what the situation is.

Mr. Dempsey: I do not desire to reargue the previous ruling as long as it is clear on the record that to the extent it might have been based originally on the statement that the matter had been considered and approved at a board meeting in the spring of 1955, that is not a support for the exhibit.

The Presiding Officer: Are we finished with Mr. Faust as far as pending requests are concerned?

* * * *

[Tr. 715]

CROSS EXAMINATION

By Mr. Hancock:

* * * *

[Tr. 719]

Q. So that am I correct that when you left this meeting that was held in Detroit on or about September 9, 1954, it was your understanding that WJR would probably move its transmitter site and change its program proposal at least to the extent that it would change its network affiliation? A. I think that is a correct statement.

Q. When did you receive specific instructions first to prepare a new program proposal? That is, approximately. A. I had the instructions to go to work on familiarizing myself with the existing schedules sometime between that time, September 9, and the time when I came to

Washington, and by a telephone call from Mr. Patt. I can't recall exactly what day that was. I have no record.

Q. When did you come to Washington? A. September 21 and 22.

Q. September 21 and 22? A. Yes.

Q. So that between September 9 and the time you came to Washington, am I correct in understanding you to the effect that you did review the old proposal, that is, the original program proposal, with a view in mind of then changing it to a different affiliation operating from a

[Tr. 720]

different site? A. Yes. I believe I did make that evaluation, although no instructions had been given by Mr. Patt at that time to do anything.

Q. What did your evaluation consist of, what did you actually do? A. I believe it was a rather cursory examination of what replacements would be made by CBS programming and how the schedule could be rearranged to accommodate the CBS programs since there were quite a few more of them Dumont had offered.

Q. In other words, did you take a current CBS schedule and see what was offered there and compare it with the previous program schedule of WJR? A. Yes.

Q. You testified that you came to Washington on or about September 21. Who came to Washington with you? A. Mr. Patt and Mr. Jones.

Q. I believe you testified that you met with your Washington counsel. A. Yes.

Q. How long were you in Washington at that meeting? A. We were here overall two days.

Q. What did you do after that meeting, return to Flint? A. Yes.

Q. When did you receive specific instructions from Mr. Patt or

[Tr. 721]

some other official to prepare a new program schedule? A. It is pretty hard to define exactly when he said, "Now you go sit down and prepare a new schedule." It was evolved in a general manner from the time I started evaluating what CBS would do with the original proposal.

Q. Yes. So as of September 9, from that day forward until the new proposal was finally formulated you were engaged, at least part of the time, in evaluating the matter and determining how and in what manner the program proposal would be changed? A. Yes, sir.

Q. When it came to specifically putting down on paper what the new proposal would be, did you receive any specific instructions? A. As to the preparation of the schedule I would not characterize it as setting down on paper, but as to the preparation of the schedule Mr. Patt told me to retain all the local live programs that had been proposed before. He also told me to not include CBS programs that were then being carried by WKNX-TV alone. There was some discussion as to whether the program schedule prior to these instructions would accommodate the various organizations in Flint and outside of Flint.

Q. Let us go back. I am now talking about specific instructions as to program types and classifications. Mr. Patt specifically instructed you, as I understand your testimony, to retain the previously proposed

[Tr. 722]

local live programs. A. Yes.

Q. He told you to include the CBS schedule insofar as you have described the manner in which you would do so. That is, omitting the programs that KNX was broadcasting. A. Yes.

Q. Did he give you specific instructions with respect to your film programs as to whether they would be retained or modified, or in what manner? A. There were no instructions to my recollection, Mr. Hancock, on film programming. I know there was some discussion at the time that obviously by adding the CBS Network schedule that there would be less film programming, but that seemed a rather obvious assumption.

Q. Did you receive any instructions to the retention of the same percentage of programming as to type? I am thinking of discussion, education, talks, sports, et cetera. A. My recollection of Mr. Patt's order was to retain the same character and balance to the schedule as had been previously proposed.

Q. Is it your understanding that that instruction included a directive to you to maintain basically the percentage of educational, discussion, religious and agricultural programs that had been previously proposed?

[Tr. 723]

A. That was my interpretation of it.

Q. To summarize, then, your instructions, at least as you interpreted them and the manner in which you carried them out, were to retain the same previously proposed local live programs and to retain the same basic percentages of programming as to types, meaning, of course, educational, religious, et cetera? A. The effect given would be that, although I recall no specific discussion pertaining to adhering to a percentage figure.

Q. I thought you just testified that you interpreted that discussion to mean to maintain the same balance as had been previously sponsored or put forward. A. Yes, Mr. Hancock. That is why I say the effect would apparently be the same, but I want to have it clear that there was no instruction to me to come up with X percentage for any figure.

Q. Other than your local live. A. That is right.

Q. Were you instructed to retain not only the percentages of your local live but also the specific programs? A. First, I would like to, if I might, correct any impressions the last question might have given that I was told to keep the same percentage of local live programming. The instruction was to keep the same local live programs.

[Tr. 724]

Q. Mr. Faust, how could you keep the same local live programs and not keep the same percentages? A. You could not, Mr. Hancock, but I wanted to make it clear that percentage was not mentioned.

Q. When were you given these instructions with respect to the preparation of the new schedule, approximately? A. To the best of my recollection immediately following the meeting in Washington, and I seem to recall some discussion of this nature when we were here in Washington.

Q. That was during the September 21 meeting, or about September 21? A. Yes.

Q. As I understand the schedule which you have submitted in one of these exhibits, you also proposed some Dumont Network programs, did you not? A. Yes, sir.

Q. Did your instructions include the inclusion of Dumont as well as CBS? A. Yes, sir.

Q. Specifically, what was your instruction with respect to Dumont? A. Mr. Patt told me he understood that some Dumont programs would be available to us, at least on a secondary basis, and that in making up the schedule to use Dumont programs.

[Tr. 725]

Q. Did you have at that time a Dumont affiliation? A. I had no knowledge of it.

Q. Was it your understanding that you would, however, enter into an affiliation agreement with Dumont? A. It would be my expectation that Mr. Patt told me to include their programs in our schedule.

Q. Was it your understanding, then, that that would include, of course, an affiliation agreement with Dumont for the programs that you were carrying? A. Yes, sir.

Q. Did you have an affiliation agreement at that time, in September of 1954, with CBS? A. I recall no agreement had been signed at that time.

Q. But you were told that such an affiliation agreement would be forthcoming, as I understand it, or at least to include CBS assuming that a CBS affiliation would be available. A. Yes, sir, that is a more proper statement.

Q. Does WJR now have an affiliation agreement with the Columbia Broadcasting System? A. Yes.

Q. Do you have a copy of your affiliation agreement -- A. I do not have it.

Q. -- with you? A. No, sir.

Mr. Hancock: Do you have a copy of that, Mr. Eagan?

[Tr. 726]

Mr. Eagan: We might have one in our files. It is on file with the Commission.

Mr. Hancock: That is not available to us, though, Mr. Eagan, the Commission files.

Mr. Eagan: The last time, over our objection, the Examiner produced it. Our objection was that we did not think it ought to be produced without the consent of CBS as also a party to the contract. We don't have any objection ourselves.

My recollection is that it was produced in the protest case.

Mr. Hancock: I do not think it was.

The Presiding Officer: Off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

Mr. Hancock, you may proceed.

By Mr. Hancock:

Q. In the preparation of the new program schedule, did you also have before you a current Dumont Schedule, as well as a current CBS schedule? A. Yes.

Q. Do you have those with you, Mr. Faust, the ones that you used? A. No, I do not.

Q. Do you have them available so that you can produce them?

[Tr. 727]

A. I could not speak with certainty whether we still have them. We used

Broadcasting Magazine or Television Age. I don't even recall exactly which one. It was for the latest month available showing the television schedules. * * * *

[Tr. 747]

Q. Am I to understand it then that as of your Washington meeting in mid-September you have at least a draft of your new program schedule that ultimately became your program schedule in the MP Application? A. Yes, with later changes.

Q. Of what did that draft consist? Just titles or program descriptions as well? A. This draft consisted, to the best of my recollection, of only those programs that we had specified earlier, as far as live programs are concerned, and of the certain Dumont and CBS programs that we were hoping to carry. * * * *

[Tr. 750]

Q. Am I to understand then, Mr. Faust, that your schedule was actually prepared then in September? A. The first draft was, yes, sir.

Q. And was that basically what you ultimately came up with? A. I believe that is a fair statement. There were several changes made in it because Mr. Mitchell and I spent considerable time working on it after I returned from Washington * * * *

[Tr. 790]

Mr. Hancock: Could the record show, Mr. Examiner, that by agreement of counsel for the applicant WJR and, I believe, the Broadcast Bureau, as well as the other participants in this proceeding, that portions of the CBS affiliation contract --

The Presiding Officer: Will you identify it further, Mr. Hancock.

Mr. Hancock: Between that network and WJR, the Goodwill Station, Inc., for Television Station WJR-T, Flint, Michigan, filed with the Commission on May 31, 1955, and specifically Paragraphs 2 (a), 2 (b) and 3, be copied physically into the record at this point. * * * *

[Tr. 983]

[Monday, February 11, 1957]

WORTH KRAMER

was recalled as a witness, and having been previously duly sworn, resumed the witness stand, and upon examination, testified as follows:

[Tr. 984]

CROSS EXAMINATION

By Mr. Hancock:

* * * *

[Tr. 987]

Q. As I recall your direct testimony, your first knowledge of the availability of that or possible availability of these WTAC studios came to you as a result of a conversation, or a telephone conversation perhaps, from Mr. Campbell some time prior to April 30, 1954; is that correct?
A. That is correct.

Q. Where were you when Mr. Campbell called you, if you recall?
A. I was in my Detroit office.

[Tr. 988]

Q. Was Mr. Campbell in Detroit at that time? A. I think he was.

Q. After your telephone conversation with him, did you have a personal conference on that date? A. No, sir.

Mr. Eagan: You mean of course with Mr. Campbell?

Mr. Hancock: With Mr. Campbell, yes.

The Witness: No, sir.

By Mr. Hancock:

Q. As a result of this conversation with Mr. Campbell, was it your understanding that these studios were or would be made available to you if the right arrangements for them could be made? A. Yes. I could elaborate on that, Mr. Hancock.

Q. Would you, please? A. His call indicated that he planned to cease operations and that would, of course, make available the studios to anyone.

He certainly indicated it would be available to us if we could make the right arrangements, that is correct.

Q. After this conversation, did you talk with anyone in the WJR organization with respect thereto immediately? A. I am certain I made known informally to associates of mine that I had had such a telephone call, sir.

Q. Do you recall whether or not you talked specifically

[Tr. 989]

with Mr. Patt about the WTAC studios? A. I am certain I talked to him - - I am not certain it was right after the phone call, but I am certain I related that information to Mr. Patt - - probably the next time I was on the phone with him.

Q. What, if you recall, was the substance of your conversation with Mr. Patt? A. Simply to advise him of the call and to indicate that Mr. Campbell was interested in minimizing his losses and that he had made an offer to get together with us for possible acquisition of the property.

Q. As I understand it, the next formal action that was taken in connection with the WTAC studios was at a May 20th, 1954, WJR board meeting. Is that not correct? A. I think that is the first formal action taken in connection with it; yes, sir.

Q. Prior to that board meeting, was any decision made by you and Mr. Patt as to whether or not should pursue the WTAC studio matter with the intention of ultimately acquiring it?

The Witness: I do not get that question. Could it be reread?

The Presiding Officer: Yes, read the question.

(Thereupon, the Reporter read the pending question.) A. I think certainly we discussed the matter prior to

[Tr. 990]

the board meeting. I think it flows from that that if we were discussing it, it would certainly be with a view to possible pursuit of that.

By Mr. Hancock:

Q. So that even prior to the board meeting, as far as you and Mr. Patt were concerned as the chief executive officers, your recollection is that you intended to pursue the matter and if possible ultimately to acquire it? A. That is certainly correct.

Q. At this May 20th, 1954, board meeting, did you make any recommendation to the board with respect to the acquisition of the WTAC studio? A. Yes, we did.

Q. What recommendation did you make? A. My recommendation, as I recall it, Mr. Hancock, was that we would pursue negotiations with Allen Campbell on it, on the basis of its making it possible for us to possibly get on the air earlier through the acquisition of that studio.

Q. Then as I understood you, your previous testimony as well as the exhibit which was the formal minutes of the board meeting of this day, that at that meeting as a result of the discussion with respect to the acquisition of WTAC studios, the board took formal action specifically authorizing the negotiation looking towards the acquisition of these

[Tr. 991]

facilities, did it not? A. It took action. I am not certain that the proper wording of that action is "negotiation".

Q. I think the word was "negotiation." A. It was either "investigation" or "negotiation."

Q. What was done, or what did you do after this date, May 20, 1954, with respect to the investigation or negotiation for the acquisition of WTAC studios; and if you can recall, Mr. Kramer, I wish you would recite it to me step by step insofar as you can recall it. A. I am going to have to refer to some pencilled notes, if you don't mind.

Q. Not at all. A. My notations reflect that Mr. Moore and Mr. Siebert and myself met with Allen Campbell on June 1, 1954.

Q. Where was that meeting held, Mr. Kramer, if you recall? A. It was held in Detroit. Mr. Campbell's offices are in Detroit.

Q. At your offices or at Mr. Campbell's offices? A. I can't recall.

Q. What happened and with what results in this June 1, 1954 meeting? A. As I recall it, that was again an investigation situation. I might add that it required considerable investigation

[Tr. 992]

investigation because of the various vagaries of it, who owned what, as far as the building was concerned.

Actually, Mr. Campbell in that meeting, as I recall it, gave us information concerning the fact that the building itself was the property of Mr. Pemberton. I think he told us somewhat about the situation with RCA and the equipment and something about the leasehold improvements that were within the structure.

Q. So that your negotiations included the acquisition of some personal property -- I am talking about equipment for television -- as well as the real property, the studio building itself, did it not? A. Yes.

Q. So what, if you recall, happened after June 1 with respect to negotiations for this studio? A. I think that Mr. Patt and I met, I think, with Allen Campbell somewhat later. I can't recall the date.

Q. What was the purpose of this meeting? A. To simply make it better known to Mr. Patt what the situation was as regards the building and the materials within it. It was, I believe, following this meeting that we felt it necessary to refer the matter to our general counsel in Detroit, Mr. Dickinson.

Q. Did you refer that to your general counsel? A. Yes, sir.

[Tr. 993]

Q. Was not the purpose of that reference, however, to make sure as to the title, not only of the real but also of the personal property, so that any arrangement which was ultimately, or any contract which was ultimately made, would properly include the equipment or the real property in question? Wasn't that the basic reason for submission to him? A. Yes, the checking of the title and so on. I think that is an accurate summary.

Q. Were any other meetings held in connection with the studio? A. I might simply and more specificallly say that that meeting was on June 23rd, between Mr. Patt and myself meeting with Allen Campbell, if that is appropriate for the record.

Q. Just so the record will be clear, and I believe it is, Mr. Kramer -- you are referring to notes that you have made yourself in connection with these various matters? A. Yes, pencilled and handwritten notations I am referring to. This is some time ago.

The Witness: May I have the question, please?

(Thereupon, the Reporter read the pending question.)

A. I have no specific notation on meetings, Mr. Hancock, until the meeting where we reached agreement with Mr. Pemberton on the building itself.

[Tr. 994]

By Mr. Hancock:

Q. When was that? A. I believe that was on July 30th, is the date we signed our lease.

Q. That was the date that you actually signed the document? A. That is right, sir.

* * * * * *

[Tr. 996]

Q. When did Mr. Leydorf leave WJR? A. He still is a director of our company.

Q. I was going to qualify that question.

[Tr. 997]

A. Yes.

Q. I mean when did he lave the employ of WJR as a vice-president and chief engineer? A. My recollection is that it was August of 1954, Mr. Hancock. There was a period of time prior to that that he was on what you might term terminal leave or sabbatical or whatever you might want to call it.

Q. Approximately when did that leave begin, if you recall? A. It was a very substantial period of time, but I do not recall the exact date that it started, sir.

Q. Did Mr. Leydorf participate with you in connection with the acquisition of the WTAC studios? A. No, sir.

Q. Was he consulted in any fashion with respect to this acquisition? A. I don't think "consulted" is the proper word. I am certain he was advised of it. He was a director of our company. He knew about it.

Q. Did you advise or consult with your counsel in connection with the acquisition of the WTAC studio and, of course, the change in studio plans from the original hearing? A. I am certain we consulted with counsel but probably not until such time as we had -- and again I

[Tr. 998]

am trying to reconstruct -- decided we either would or wouldn't acquire.

Q. But you don't recall any specific consultation in that regard? A. No, I can't say that I do.

[Tr. 1002]

Mr. Hancock: I think we can probably stipulate that you would say, Mr. Eagan, that Mr. Leydorf resigned by letter dated August 17, 1954,

to be effective September 1, 1954. I think those are the facts which I have found in the previous exhibits.

Mr. Eagan: I think that is what the record shows, but you might ask the witness.

By Mr. Hancock:

Q. Is that correct, Mr. Kramer? A. Yes.

Mr. Eagan: And if Your Honor wants to include it, a statement that the Commission was advised of this.

Mr. Hancock: Yes, the Commission was advised of this on form 231 under date of September 13, 1954.

Mr. Eagan: Is is so stipulated.

By Mr. Hancock:

Q. Mr. Kramer, you testified that Mr. Leydorf had nothing to do with the negotiations for and the acquisition of the WTAC studio which commenced some time prior to April 30, 1954, and I am speaking now as an operating officer, not as member of the board of directors. Is that correct? A. It is. He was an operating officer at that time, however.

[Tr. 1003]

Q. But he was never consulted - - A. He was on leave.

Q. But he was never consulted as an operating officer with respect to this matter? A. That would be correct, yes.

Mr. Wilkinson: Do I understand that he was on leave from what you just said?

The Witness: Yes, but my point is I don't know exactly the date that he started terminal leave, Mr. Wilkinson.

By Mr. Hancock:

Q. Would it be as far back as January, 1954? A. I don't think so. I think it was somewhere between there and May, between January and May, 1954, but I couldn't pinpoint down the exact date.

Q. Is it correct then that at least as of May, 1954, the time of

[Tr. 1003]

decision, let's say, on May 14th, Mr. Leydorf was on leave; and while still technically an operating officer, he held office of vice-president, he was not operating as such at the time? A. I think that is a fair statement, yes.

Q. You say he was on leave during this period of time, and we have already stipulated that he resigned by letter of August 17.

Did you as a WJR principal know that he was going to resign when he went on leave?

[Tr. 1004]

A. No, sir.

Q. When was your first knowledge of the fact that Mr. Leydorf was going to resign? A. Again I can't place a date on that, Mr. Hancock.

The Presiding Officer: Did you know before he submitted his resignation on the 17th day of August, Mr. Kramer?

The Witness: Yes, for some time.

By Mr. Hancock:

Q. For some time prior to that? A. Yes, for some time prior to that.

Q. Was it as far back as the time of the decision in mid-May of 1954? A. No, it was not.

Q. Did Mr. Leydorf have anything to do with the selection and acquisition of the Chesaning site? A. No, sir. I don't believe he did.

Q. Did Mr. Leydorf have anything to do with the halting of the activities at the Clarkston site in July, 1954? A. No, sir.

Q. Was he consulted either by you or Mr. Patt with respect to the decision to halt these activities at that time? A. I can't testify as to Mr. Patt's contact or lack of contact at that time. I did not.

* * * *

[Tr. 1012]

Q. Do you know whether or not, Mr. Kramer, at the time of decision in this case, May 14, 1954, and also that is the time that WJR could in fact have made or entered into an affiliation agreement with Dumont at that time or shortly thereafter? A. I believe we could.

Q. And WJR, did it ever offer to enter into a network affiliation agreement with Dumont? A. Never entered into one.

Q. I understand that, yes. Did you ever offer to enter into one? A. I believe the strict answer to your question would be no.

Q. Did you ever so much as discuss specific terms with respect to possible network affiliation, and I am talking about rates and the details. A. Yes, we did.

Q. What details did you discuss with respect to such agreement? A. We discussed the possible rate that would be charged for the facility network-wide. We discussed the usual contract features, the standard Dumont contract.

Q. But it was more of a discussion rather than a specific one looking to actually signing the document? A. No, I wouldn't characterize that way, Mr. Hancock. We were seriously discussing the matter of possible affiliation with Dumont, and I wouldn't consider talking over the rate would be casual. I don't think it is casual if it is nuts and bolts in the affiliation contract.

* * * * * *

[Tr. 1021]

Q. Just what did you have him do? A. His instructions were to seek a number of sites from the standpoint of CAA clearance and to give us an opinion on those that were free of CAA problems and those that were not, as I recall it.

Q. In this connection, did you specify certain areas or specific sites, or just how did you go about it? A. I didn't go about it. Mr. Jones did, and my understanding of his efforts was that he had certain properties or coordinates around Davison and around Owosso and up near Chesaning that he was to check and report to us on whether or not there would be CAA problems.

[Tr. 1021]

Q. How did you determine the three areas that you would make your search of for a new site? I am referring specifically to the Davison, the Owosso, and the Chesaning area. A. How did we determine it?

Q. Yes, how did you determine that those were the three areas that you would explore? A. One of the primary considerations was, of course, the site selection which would provide a high quality signal for Flint and also provide as minimum overlap as possible with the major networks.

[Tr. 1028]

Q. Mr. Kramer, is Mr. Horning, or Honrung stil with WJR? A. Hornung, no.

Q. When did he lave, approximately? A. I would have to check that. I don't remember the date of his departure.

Q. All right. Would you check that over the noon recess also? A. Yes.

Q. How about Mr. Cushing? Is he still with WJR? A. No, he is not. He has retired under WJR's pension trust retirement plan.

Q. When did he retire, do you know? A. I will have to check that for you.

Q. What about Mr. Large? A. He is still with WJR.

Q. He is still with WJR? A. Yes.

Q. What about Mr. Wells? A. He is still with WJR.

[Tr. 1031]

Q. As I understand it, your whole decision was not to disclose any of these matters until after the petition for rehearing had been acted upon? A. The characterization of "disclosure" I am not sure I agree with.

Q. Disclose them to the Commission. A. I see what you mean. We decided not to file until the Commission had decided upon the petition for reconsideration.

Q. Did you also decide not to notify the Commission? You say you decided not to file. Was there any other means of disclosure to the Commission? A. Only through the 701 which has been previously mentioned and which contained it.

Q. But am I correct that the basic decision was to not advise the Commission of these changes until after they had acted upon the petitions for reconsideration in whatever vehicle you were going to use to advise them? A. That is correct, sir.

* * * * * *

[Tr. 1034]

By Mr. Hancock:

Q. Would you put those answers on the record, then, please Kramer? A. You asked, I believe, Mr. Hancock, when Dale Hornung left the employ of WJR. That was March 4, 1954.

[Tr. 1035]

You asked the date of Cushing's retirement from WJR. That was September, 1955.

* * * * * *

[Tr. 1043]

The Presiding Officer: Is that clear, then, gentlemen, as to what the procedure regarding Mr. Kramer is?

All right, then, Mr. Wilkins, have you any questions of Mr. Kramer?

Mr. Wilkinson: Yes, I have, Mr. Examiner.

By Mr. Wilkinson:

* * * * * *

[Tr. 1060]

Q. Mr. Kramer, have you had an opportunity during the recess to supply me now with the date that the Clarkston site was purchased? A. Yes, I have, Mr. Wilkinson.

Q. Will you give me that information for the record? A. April 13th, 1954.

Q. That was the date it was transferred by your real estate agent to WJR, The Goodwill Station, Inc.; is that right? A. Yes, sir.

Q. However, acting as the agent of WJR, what date did he purchase the property on your behalf? A. That I will have to again --

Q. You gave me the April 13th date. A. Oh, that date is March 23rd, Mr. Wilkinson.

Q. 1954? A. 1954.

Q. Now, that was some six weeks or more before the final decision was released granting Channel 12 to WJR; is that correct? A. Yes, sir.

Q. In other words, the purchase did not result from the grant? A. It was purchased prior to the grant, sir.

Q. And action ratifying that was done by a meeting of your Board of Directors on May 20th; is that correct? A. Yes. That is correct, sir. It was ratified on May 20th.

Q. Have you any written memoranda to pinpoint this date of your first telephone call from Mr. Campbell regarding the WTAC-TV studios? A. No, I have no written memorandum on that. My recollection is that, as I have just testified, it was just prior to April 30th, 1954.

Q. And how do you fix that date? A. Simply by recollection.

[Tr. 1062]

Q. Without associating it with any other development at that time, such as the time the station went off the air? A. That, sir, is correct. I recall in the conversation his stating to us that he did plan to go off the air.

Q. So the telephone call was some time before he actually went off the air? A. Yes, sir.

Q. And that was a development prior to the public announcement of the May 14th grant; is that correct? A. Yes, sir.

* * * *

[Tr. 1064]

Q. And I believe it has been your testimony in another proceeding that had a contract been tendered to you, during the first ten days of June of '54, you would not have signed the contract; is that correct? A. You mean a DuMont contract?

Q. A DuMont contract. A. I think that is probably correct, sir.

* * * *

[Tr. 1065]

Q. And were you satisfied with the progress of DuMont up to May 14th, 1954? A. We were of the opinion that they had certainly an opportunity for growth, Mr. Wilkinson.

[Tr. 1070]

Q. You have no doubts that if you had decided to go ahead at Clarkston and build and meet a date around the 1st of September or the middle of September, you could have gotten a DuMont affiliation? A. No, I have no doubt of that, sir. I believe we could have.

Q. And did Mr. Lyford indicate that he would prefer to have WJRT to CKLW for certain reasons? A. Yes, sir.

Q. And just for this record, what were a few of those reasons, the major ones? A. The major reason was the fact that they preferred an American station to a Canadian station.

Q. And why? A. As I recall it, because, for one thing, the CBC required certain things, certain clearances, which would affect network clearance; secondly, that CBC had no beer advertising, and that was undesirable from the network point of view.

Q. You intended to keep the door open with DuMont as long as you could, didn't you, in that summer of '54? A. Yes, we did.

Q. And you asked Mr. Lyford to advise you if and when they finally affiliated with CKLW? A. We did.

Q. And that is when you received this letter dated July

[Tr. 1071]

21 in response to that request to be kept advised? A. Yes, sir.

Q. And you could have stepped in at any time and gotten the affiliation? A. Prior to that?

Q. Yes. A. Yes, I believe we could, sir.

Q. And when you ordered activities at the Clarkston site to be shut down on July the 9th, did you have in mind, as one of a number of things to be considered in taking a look at this whole situation, the possibility of changing transmitter locations? A. At that time, as I believe we previously testified, we halted these activities in order that we might take a relook at the over-all situation, Mr. Wilkinson.

Q. And did the over-all situation include the possibility of shifting transmitter location? A. That certainly was one.

That was one of the possibilities. Another one was the possibility of independent operation. And so on.

Q. And since the studio lease agreement is not an exhibit in this record, did that lease provide for a ten-year period cancellable on one year's notice? A. It did.

Q. At a rental of $865 per month?

[Tr. 1072]

A. That is awfully close to the figure. I believe that is the figure, Mr. Wilkinson, yes.

* * * *

[Tr. 1079]

Q. You were not at the New York meeting with CBS on August 24th to 27th? A. I was not there, sir.

[Tr. 1080]

Q. But that is when Mr. Patt reported back that if you shifted to Chesaning you could get a CBS affiliation; is that correct? As a result of those meetings? A. I think that is nearly correct. I am not sure that he mentioned Chesaning at that point.

Q. But a site northwest of Flint? A. That is right, sir.

Q. And not on the outskirts of Flint, either. It had to be north? A. That is correct, yes.

Q. In the meantime, the management of WJR had had conversations with their Washington attorneys about changing sites and changing networks and programming, prior to the August 24th to 27th meeting; is that correct?

Mr. Eagan: May I have the question read?

(The question was read by the reporter.)

Mr. Eagan: What is "in the meantime"?

The Presiding Officer: I was going to ask what that meant, too.

Mr. Eagan: I thought maybe I had missed it. I really don't understand.

Mr. Wilkinson: I talked about the special Board meeting of August 17, and I asked questions about the August 24th to 27th meeting that Mr. Patt had had in New York and reported back that he could have an affiliation in Chesaning.

[Tr. 1081]

But I said in the meantime, before that meeting of the 24th to 27th, you had had discussions, had you not, with your Washington counsel?

Mr. Eagan: And who is "you"?

Mr. Wilkinson: "Management," I think I said at one time, "of WJR."

The Witness: I think I can say personally that I did not have, but it is my understanding that Mr. Patt did have.

By Mr. Wilkinson:

Q. And that is prior to August 24th? A. Yes.

Q. In a meeting which was held on September 8th, by the officials of WJR, that was an informal rather than a formal Board meeting? A. That is correct. It was not a Board meeting.

Mr. Eagan: May I suggest a five-minute recess?

The Presiding Officer: All right.

Before we do that, Mr. Wilkinson, let me ask: Is it going to be inconvenient to you?

Mr. Wilkinson: No.

(Short recess.)

The Presiding Officer: On the record.

Mr. Wilkinson: I might say on the record, Mr. Examiner, the reason I am going through this in this form is because the protest record is not a part of the record in this proceeding,

[Tr. 1082]

and there are certain facts that Mr. Kramer testified to in that proceeding that I do deem relevant to this proceeding, that have not heretofore been fully covered.

The Presiding Officer: All right, sir.

By Mr. Wilkinson:

Q. As I understand your testimony, at this meeting of November 8th where the management officials of WJR were present, you were advised by Mr. Patt that if you moved to Chesaning you would get a basic operational CBS affiliation? A. Yes, sir.

Q. And it was determined by management certainly by the time of that meeting that you would therefore shift your site to Chesaning? A. Yes, sir.

Q. And that, of course, meant an abandonment of your operation at Clarkston? A. That is correct, sir.

Q. And instructions were given to prepare an application to show a new site, a new network affiliation, and so on, in due course? A. Sir?

Q. I say: And instructions were given to your engineers and to your attorneys to start work, to be filed in due course, at a proper time to be decided upon, an application with the Commission for a change of site, change of network affiliation,

[Tr. 1083]

and other attendant changes? A. That is correct.

Q. It was decided at that meeting, was it not, that in view of previous conversations which Management had had with their Washington counsel, this modified application was not to be filed until the May 14th grant was reaffirmed; is that correct? A. That was certainly our understanding and our intent.

Q. And Patt indicated to you at that meeting that there was a timing factor involved; is that right? A. I am not certain that it was at this meeting that he indicated that to us.

That had been indicated to us, and certainly that was the situation at that time.

But I just don't want to say that at that meeting he did say those specific words.

Q. But there had been previous discussions of this matter in August with your counsel? A. That is true.

* * * *

[Tr. 1092]

Tuesday, February 12, 1957

* * * *

[Tr. 1093]

CROSS-EXAMINATION -- Continued

By Mr. Wilkinson:

Q. Mr. Kramer, when we recessed last evening I think we had gone over the fact that on September 8 it had been determined by the operating management of WJR to prepare in due course and file an application for change of transmitter site from Clarkston to a point north and west of Clinton, is that correct? A. Yes, sir.

Q. And you did not attend the Citizens Flint meeting on September 15? A. I did not.

Q. But you did have a report from Mr. Faust? A. Yes, sir

Q. Then on October 1, 1954, you sent Mr. Patt certain corrections that you proposed to a press release to be issued

[Tr. 1094]

if and when the May 14 grant was reaffirmed. Is that correct, Mr. Kramer? A. I had such a revision prepared. I am not sure it was October first.

Q. Do you recall who prepared the original draft of that press release that you underscored and added certain words to? A. Yes, I think it was prepared under Mr. Patt's instructions. It is quite probable that Mr. Quello, our public relations director, did some writing on it, sir.

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[Tr. 1096]

Q. Mr. Kramer, that proposed press release went through another revision, did it not, at a later date? A. That I could not answer unless I was able to check that against any future release we might have issued, sir.

Q. You are not personally aware at this time of any new draft around October 25, 1954? A. At this present time I am not aware of it. Yes, sir.

Q. Are you aware of a subsequent draft of November 26, 1954? A. I simply want to be sure, Mr. Wilkinson. I know

[Tr. 1097]

that we were in the process of preparing a statement to be published in the Flint Journal and, if that is the matter you are referring to, then it is quite possible that around that time we were in the process of forming that statement; but as to the specific date, I cannot pin it down, sir.

Q. Merely for the purposes of refreshing your recollection, did you submit to Mr. Patt on November 26, 1954, another revision of a release to be made when and if the Commission confirmed the grant? A. Yes, I have here a letter of transmission dated November 26. Again, I have not checked whether this is a change from the previous release but I did so address a letter.

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[Tr. 1099]

Q. Discussions were had by management of WJR during July and August regarding the Commission forms which would have to be filed in the event a change of transmitter location were decided upon by WJR. Is that your recollection, Mr. Kramer? A. You are talking about the discussions with counsel?

Q. That is correct. A. Yes, that is my recollection.

Q. Now, is it true that management issued instructions in September to be prepared to file a modification application on a moment's notice? A. I do not remember the moment's notice phrase, Mr. Wilkinson.

Q. On short order. Would that be a fair summary of the instructions? A. I think the instructions could more properly be stated that we wanted the data ready for filing when and if the Commission reaffirmed the grant.

Q. And not knowing the exact date that that might be reaffirmed, the instructions were to the effect to be ready on very short notice to put the application into final form,

[Tr. 1100]

is that correct? A. Yes, to the extent it was possible to do so.

Q. Now, it was determined, as you intimated there, that the application would, however, not be filed until the Commission had announced its action on the petitions for reconsideration and the petition by the Flint Citizens Committee, is that correct? A. I think largely that is correct. I am not certain that the certain petition of the Flint Citizens Committee was within our instructions. Certainly the petitions for reconsideration were.

Q. Now, was it subsequently decided for a very brief period that you would likewise not file the m.p. for a period of 30 days after the Commission announced its action on those petitions for reconsideration? A. As I recall it, Mr. Wilkinson, there was a question as to whether we should wait the full 30 days or whether we would file it as quickly as we could following that action by the Commission reaffirming the grant.

* * * *

[Tr. 1118]

Q. Do you recall receiving a letter from your attorneys in Washington dated May 17, 1954? A. I do not know unless I have the letter.

(A document was handed to the witness.)

Yes, there is a letter dated May 17 1954, addressed to

[Tr. 1119]

me from counsel.

Mr. Wilkinson: Off the record.

The Presiding Officer: Off the record.

(Discussion off the record.)

The Presiding Officer: Back on the record.

By Mr. Wilkinson:

Q. Mr. Kramer, prior to May 17, 1954, did you make an inquiry of your Washington counsel regarding network affiliations of WJRT? A. I made a general inquiry of counsel prior to May 23, Mr. Wilkinson. I say prior to May 23 by telephone, a general inquiry on network problems, yes, sir.

Q. And was that inquiry in fact prior to May 17, 1954? A. Yes, sir. It may have been May 17 or prior to May 17, sir.

Q. Was it after the grant was made on May 14, to the best of your recollection? A. I cannot answer that question. I do not know whether it was, again, May 17 or May 14 or May 13. Certainly it was in that short period of time.

[Tr. 1120]

Q. And that inquiry was by telephone? A. Yes, sir.

Q. What was the general nature of the inquiry, Mr. Kramer? A. Of course, I can't remember verbatim --

Q. That is the reason for my question generally. A. -- the conversation. Again, what I have testified earlier, that the convention period was a time when our qualms started. It was general information that the DuMont Network was not making rapid progress during the latter part of 1953 and early 1954, and I can assume that I was somewhat apprehensive concerning DuMont and I probably asked counsel if there was any problem in getting other network programs, either on an individual basis or however they might be secured.

* * * *

[Tr. 1121]

Q. Do you have any notes on that telephone call to your counsel on May 17, 1954, Mr. Kramer? A. I do not.

Q. Did you discuss with him the weaknesses which you have mentioned about the DuMont Network? A. I think I undoubtedly did, which was probably the inspiration for my call in the first place.

Q. And did you indicate that you might like some supplemental programs of another network, such as CBS, ABC or NBC? A. I assume that I talked to him about the general

[Tr. 1122]

problems that we were facing there, with what appeared to be a network that was slowly disintegrating, and that I wanted to be informed as to what problems might exist in obtaining additional network programming which we felt would be necessary to a good operation.

Q. When you say "the problems," are you referring to legal problems or practical problems of getting the network, or legal problems that you might be confronted with at the Commission? A. I don't believe I defined it in either sense.

Q. In the answer you gave just a minute ago you said you discussed the "problems" with him. What kind of problems, legal problems or practical problems of how to get an affiliation? A. No, certainly not that.

Q. The legal problems that might arise if you took on the programs of another network? A. I am certain that that was the thrust of my call, yes, sir, because I would call counsel on that sort of thing.

Q. Did you have any discussions with Mr. Patt prior to the Chicago convention about the possibility of getting other programs? By "prior to the Chicago convention" I mean between the date of your grant on May 14 and your going to the convention on May 23. A. I should indicate that in normal practice Mr. Patt

[Tr. 1122-A]

and I are in communication almost everyday, either by phone or in person, and certainly I feel that in these conversations we no doubt covered most everything, every problem, that we felt we faced.

Q. Before calling your Washington counsel on May 17, did you confer with Mr. Patt on the questions you proposed to put to your Washington counsel on this matter of network programming? A. I don't recall whether I did, or not.

Q. Do you know whether a copy of your attorney's reply to you was also sent to Mr. Patt? A. The communication indicates that there was a copy of Mr. Eagan's letter of May 17 sent to Mr. Patt at his Cleveland office.

Q. For the record, who is Mr. Selden S. Dickinson? A. Mr. Dickinson is our general counsel in Detroit. He is also a director of WJR, the Goodwill Station, Incorporated.

Q. Just one question on this matter: Did you receive a copy of a letter which Mr. Patt addressed to Mr. Dickinson on May 21, 1954? A. Yes, I did. I remember the letter.

* * * *

[Tr. 1126]

Mr. Wilkinson: I have no further cross-examination of Mr. Kramer at this time.

By Mr. Fitzpatrick:

Q. Mr. Kramer, when was the decision made to have Mr. Rothman of Campbell-Ewald, the advertising agency, prepare brochures for NBC and CBS? A. Mr. Fitzpatrick, I will have to go backward in my pencil notes to answer your question. It was sometime in June of 1954, and if I may have just a moment I may be able to pinpoint it even better.

Q. It would be prior to the 22d or 23d, I believe. That is when you confered with them. A. Yes, that is when Mr. Patt and I confered with him. I am trying to pinpoint when I first called him. My best recollection, Mr. Fitzpatrick, would be around June 16, 17 or 18, somewhere in there, and the initial call to Mr. Rothman was made by myself, and it was by telephone.

Q. On the 16th you had a board of directors meeting where you discussed the situation, is that correct? A. Yes.

Q. Concerning the television situation. That is correct, is it not? A. Yes.

* * * * *

[Tr. 1128]

Q. Was this decision to have Mr. Rothman prepare the brochures a decision of Mr. Patt or yourself, or both of you, or someone else? A. Both of us. Both Mr. Patt and I joined in that decision.

* * * * *

[Tr. 1147]

Q. Were the sites to be chosen in an effort to minimize overlap with CBS affiliates or were they instructions to prepare it with relation to overlap with all of the network affiliates in Detroit? A. Our instructions were specifically to prepare a map showing a Davison site or a site east of Flint, a site

[Tr. 1148]

west of Flint, and a site northwest of Flint, and the considerations were two-fold. Obviously, it was the retention of the high quality signal in Flint and, secondly, the overlap problem, not only with CBS affiliates in Detroit and Kalamazoo but the overlap with WWJN in Detroit and the Grand Rapids station, WOOD-TV. Those were the considerations behind Mr. Patt's instructions to Mr. Jones.

* * * * *

Q. Am I correct in stating that it was not until the executive meeting of September 8, 1954, that WJR decided to file a modification application to change site?

[Tr. 1149]

A. That is a totally correct statement.

* * * * *

[Tr. 1152]

Wednesday, February 13, 1957

* * * * *

[Tr. 1154]

JULES COHEN

was called as a witness and, having been duly sworn, was examined and testified as follows:

* * * * *

[Tr. 1156]

Q. Well, now, when was the next contact after you received the aerial photographs? A. After that, the next contact was with you, Mr. Rollo, on December 1, where our records reflect the fact that on that date the final decision was made to specify a tower height of 999 feet above ground, and we were at that point authorized to proceed with preparation of the exhibit.

Q. Was that a personal call or a telephone call? A. It was a telephone call.

Q. Did you then proceed to prepare your engineering exhibit? A. We did.

Q. And when did you complete that exhibit? A. We completed the exhibit on December 14.

Q. And what year, I might ask?

[Tr. 1157]

A. 1954.

* * * * *

[Tr. 1165]

Q. Does the transmitter site of WJRT near Chesaning, as you have shown in Exhibit 91, comply with the technical standards of the FCC rules? A. It does.

Q. Which specific rules do you have in mind and what do they provide? A. Well, I have in mind the rule, Section 3.610, which applies to minimum mileage separations, and 3.685, which refers to the signal requirement over the primary city to be served.

Q. And the site complies with both of those rules?

[Tr. 1166]

A. Yes, sir, it does.

* * * * *

1171]

Q. Mr. Cohen, have you made any studies with respect to any differences in coverage of the city of Flint -- I am speaking now of the city of Flint, not the entire A or B areas -- that would be obtained either from the Clarkston or the Chesaning site. A. Yes, we have made such studies.

Q. And what were those studies, and what conclusions have you drawn from them? A. We studied a substantial number of paths from each of the sites to points scattered throughout the city of Flint. We determined from the topography on each of these paths that we would have not only line of sight from either antenna to practically all points in Flint, but also that we would have at least first fresnel zone clearance along the several paths. And as a result of these studies, we concluded that there would be no significant area within the city of Flint that would be likely to receive a signal of less than the 77 dbu specified

[Tr. 1172]

by the Commission's rules.

Q. And that applies to either site. A. Yes, sir.

Q. Perhaps you had better explain for the record what you mean by fresnel zone clearance. A. A signal received from any antenna is a combination of the direct ray and signals reflected from the earth and any man-made objects that happen to be in the path. When we say first fresnel zone, we mean that region around the direct ray from which the reflected ray path would differ in length from the direct path by one wave length.

Q. I think I understand you. Mr. Cohen, what is the approximate difference in the Clarkston and Chesaning antenna radiation center heights above mean sea level? A. Approximately 400 feet.

Q. Have you taken into account this 400-foot difference in expressing the conclusion you just stated concerning service? A. Yes, we have. That difference very definitely was taken into account in laying off the profile graphs from each of the locations as recognized by the methods prescribed by the rules. The height of the terrain in the vicinity of the antenna is significant as well as the absolute height of the antenna, and in a case where we have one antenna located on a large plateau, at somewhat greater height than another antenna which is located roughly on the same horizontal plane as the city

[Tr. 1173]

the fact that the one antenna is at a greater height above mean sea level would not necessarily mean that it would provide any stronger signal into the city considered than the lower antenna.

Q. Now, going back a moment, with respect to your testimony concerning the -- your conclusion that there is no significant difference between the coverage over Flint and from either Clarkston or Chesaning, that takes into account, does it not, or does it, the question of shadowing? A. Yes, it definitely does.

Q. Would you explain more fully how it does and what your conclusion with respect to shadowing is specifically. A. Well, the problem of shadowing was taken into account in these profile graph studies that I had previously explained, and it was our conclusion that there would not be any significant shadowing in Flint from either site.

Q. Referring back again to page 1 of Exhibit 91, line 2 of that page, will you state your opinion as to the significance between the -- I am referring, I should say, to line 3 instead of line 2 -- your opinion

[Tr. 1173]

concerning the significance of the difference between 84.5 dbu at the farthest Flint boundary from Chesaning, and the respective values of 99 dbu from Trebit and 88.5 dbu from Butterfield. A. Once we had, on the basis of our examination of paths to the various points in Flint, found that we had no substantial

[Tr. 1174]

shadowing, and that we would expect a rather strong signal throughout Flint, we concluded that there would not be any real difference as far as Flint service is concerned between or among the several proposals. The reason for that largely goes to the matter I discussed in response to Mr. Dempsey's question a short time ago, pointing out that the automatic gain control of the television receiver would serve to limit the amount of signal employed by the receiver. There is, in fact, a related problem of getting too much signal into a city, where the amount of voltage at the terminals of the television receiver is excessive and cannot be handled, it is beyond the range that the automatic gain control can handle, resulting in overloading of subsequent receiver stages and resulting in a rather unsatisfactory picture. In such instances, it is necessary to put special attenuators between the receiving antenna and the television receiver itself.

[Tr. 1186]

CROSS EXAMINATION

By Mr. Dempsey:

* * * * *

Q. If we could have them at your convenience in the next few days -- A. Certainly the next --

Q. -- I am sure any examination, if any at all, would be very short and could be done at a later time.

Taking the center of Flint as a reference point, Mr. Cohen, what is the difference in height of your radiating point on your new site, that is, the Chesaning site, and the old site, the Clarkston site? Is that 400 feet that you testified to? A. I don't understand the reference to the center of Flint.

Q. Mean sea level would be the same. A. Yes, there is approximately a 400 foot difference in the absolute height -- height above mean sea level.

Q. Which is further from the center of Flint? A. The Chesaning site is a little bit further from the center of Flint.

Q. How much? A. The figures I have before me are based on the broadest point, and there is also the problem of what is the center of Flint. There is to the farthest --

Q. Well, couldn't you take the difference between the near

[Tr. 1189]

and far boundaries and the mileage you have given? Wouldn't that be a fair way to approach it? A. If you want to so define the center of Flint, yes. There is a difference of approximately two miles.

Q. Your Chesaning site is two miles further than the Clarkston site? A. Yes, sir.

Q. From the center of Flint, and it is some 400 feet lower? A. Yes, sir.

Q. In your opinion, shadowing would be the same, notwithstanding the increase in distance and decrease in height? A. That is right. We found no significant shadowing effects.

Q. You mean you found no obstacles on your profiles that you ran, and therefore no shadowing in any event. Is that your statement? A. Yes, sir. We felt that we had a representative number of points.

Q. Did you run down the streets with those profiles or did you take into account the buildings in the city? A. We did not take into account the buildings in the city.

Q. Do they sometimes cause shadowing? A. Yes, they do.

[Tr. 1190]

Q. And if you are considering them as obstacles, would it make a difference if you increased the height and increased the distance? A. It is my opinion that consideration of buildings wouldn't produce any changes -- significant differences in our study, no.

Q. But is it your opinion that there is no significant shadowing in Flint because of the size of the buildings there? A. I don't know quite how to answer that, Mr. Dempsey, for the reason that in every community there are receiving locations which are bound to be shadowed because they are located directly behind tall buildings. Certainly the existence of buildings tends to produce shadowing. The residential areas which are most significant from the standpoint of television viewing, however, are not troubled particularly by shadowing effects due to building height because there are very few buildings of appreciable height in those areas.

Q. Are you suggesting, Mr. Cohen, that the Commission is expressing an undue concern about shadowing in the rules relating to site selection? A. The only reference I can think of in the rules is in that 3.685 which, as I recall, generally refers to selection of the site to avoid shadowing.

My impression is that that was largely included as a warning to avoid the location of transmitters in such fashion that there

[Tr. 1191]

would be principal features of topography of sufficient height between the antenna and the city to be served which would cause trouble.

The Presiding Officer: In the hills, or something like that?

The Witness: Yes, sir.

By Mr. Dempsey:

Q. Did you read the Commission's opinion in this case granting WJR's application, denying the Trebit and Butterfield applications? A. Long ago, yes.

Q. Do you remember any reference in that opinion to the problem of site and its selection under the rules with respect to shadows? A. No.

Q. I have in mind the Commission's equating of the Trebit and WJR sites by saying that the extra distance from Flint to the JR site was overcome by the extra height. A. I didn't remember that, Mr. Dempsey. I recall their conclusion, but I didn't remember the reasoning that they expressed.

Q. Is it your opinion that the extra height of the JR site originally did not have any bearing on its comparative value as against the Trebit site in overcoming the extra distance away from Flint?

[Tr. 1192]

A. From the standpoint of Flint coverage, I can't see that there is really any substantial difference between those two sites, either WJR, the Clarkston and the Trebit site.

* * * * *

[Tr. 1193]

Q. As I understood your previous testimony, you said there is no difference between 99 and 84.5. Is that correct? A. Yes, it is.

* * * * *

[Tr. 1201]

CROSS EXAMINATION (Continued)

By Mr. Wilkinson:

* * * * *

[Tr. 1205]

Q. Using the Commission's methods of computation, there is a stronger signal over Saginaw than there is over Flint in the Chesaning site? A. Yes, sir.

* * * * *

[Tr. 1206]

Q. Do you know whether the Grade B contour of WJRT from the

Chesaning site includes any of the Detroit metropolitan area as defined in the '50 Census? A. At the moment I am not even sure of what is included in the Detroit metropolitan area.

Q. In any event, it includes none of the Detroit urbanized area, is that correct? A. That is correct.

Q. And roughly speaking, the people embraced within the Grade A contour at Clarkston and the Grade A contour at Chesaning there is a difference of approximately three million -- is that correct -- and that same is true of the Grade B, approximately a three million difference? A. Roughly. 2,800,000.

* * * *

[Tr. 1208]

Q. Now on that assumption, if I may approach the witness, on that assumption, on the basis of that stipulation, that station WWTV at Cadillac, WJIM at Lansing and WKZO at Kalamazoo, WJBK at Detroit and KNX at Saginaw have CBS affiliations, is the only area shown in Figure 5 covered by the Chesaning site which is not also covered by one of those five stations the arc north of the WKNX-TV boundary contour and, of course, within the corresponding WJRT contour from Chesaning, as arced by WWTV's contour and as arced by WJBK-TV's contour? A. That is correct.

Q. And the population within that area, since it is an area that has only one other service, namely from WNEM, at Bay City, is as shown in table on page 4. There is a population of 21,624 persons within that area which is not presently served by a station that is presently affiliated with CBS. Is that correct? A. That is correct.

* * * *

[Tr. 1217]

Monday, February 18, 1957

* * * *

[Tr. 1219]

Mr. Rollo: At this time, if the Examiner please, I would like to obtain from the Reporter what has previously been marked Exhibit No. 104, being the written interrogatories of Mr. Patt that were rejected earlier in this proceeding.

At this time I would like to re-offer the exhibit in evidence as constituting Mr. Patt's direct examination.

The Presiding Officer: Is there any objection to the receipt of what has already been designated as WJR Exhibit No. 104?

Mr. Dempsey: If the Examiner please, there is no objection to the receipt of Mr. Patt's testimony so far as the form goes. I think there has been noted on the record some question about the relevancy of some of the testimony in so far as it deals with changes in stock ownership. That portion of it has been questioned. I must confess that I am not too certain who made the objection or who said what about it, but basically it went to the question of whether changes in stock ownership are relevant and material at this stage of the proceeding.

Mr. Cohen: Mr. Examiner, it might be helpful if I stated that I made the original objection or observation at that time, because they were not then being offered.

[Tr. 1220]

There is colloquy in the questions and answers, wherein Mr. Patt describes all of his stock ownership in the Goodwill Station, Inc., as well as all direct and beneficial ownership of stock by members of his family. To the extent that that testimony is at variance with the application with which we are in comparative hearing, we object to that testimony and to the extent thereof.

If counsel cares to have it spelled out we can make the comparison, but there is, and I think it can be stipulated, testimony about stock acquired subsequent to the original application. To that extent we do object to that type of testimony and testimony that is encompassed in that objection.

Mr. Rollo: To my recollection I do not recall whether it was on or off the record when you brought this subject up. I believe I conceded that that material was not relevant to the issues under which this proceeding is being conducted, and that my only purpose in having it included in Mr. Patt's testimony was because, as I recall, of a comment that had been made by Mr. Wilkinson to the effect that there had been a transfer of control to Mr. Patt.

That is my sole purpose in offering this exhibit.

Mr. Dempsey: We find ourselves in this position: It obviously is not anything right and does not purport to be a complete story of the changes since the closing of the other record.

[Tr. 1221]

Without comment it might appear to be so, which might give a very misleading picture. We are interested in knowing, by a ruling from the Examiner, whether this is relevant, or not. If it is, then it is just the beginning. If not, it is out and that is the end of it so far as we are concerned.

However, it is the nose under the tent and we either have to get the whole animal in or kick the nose out.

Mr. Wilkinson: Mr. Examiner, my position on this matter of stock ownership is briefly this: That in Issue No. 1 program changes are included: A corporation must act through its stockholders, officers and directors, Commission specifically called for any change in program plans, and so on.

The original program plans that went into this record were made in connection with the stock ownership of WJR as of that date in the original hearing. There have been subsequent changes. A new program proposal presumably is being submitted under the present ownership, and I do not believe that it would be stretching the issues to show the up-to-date ownership and who is making the decisions now with reference to program changes, and in connection with the second issue whether the delay in notifying the Commission of certain changes reflects adversely upon WJR's qualifications.

Perhaps it might become material to know when these changes occurred, who made the decisions and whether the persons who may have made the decisions are still stockholders

[Tr. 1222]

in the corporation.

For that reason I believe that evidence showing present ownership is material. I will agree with Mr. Dempsey that we do not want just the changes in Mr. Patt's ownership, that we should have a one-page exhibit showing the present ~~day~~ ownership and contrasting that with the former ownership we can draw our own conclusions from it. If they want to put it on two different pages, contrasting the former and present ownership, that will be all right.

For the reasons I have enumerated I think this evidence, as far as it goes, is material. I think it should go further, if Mr. Dempsey likewise suggests, in the event we go into this portion of it.

Mr. Fitzpatrick: Would you want the stock ownership as of September 1954 when, as far as I can see from the record now, the decision was made to file the modification application? That would be the pertinent period of time as far as ownership, management and decisions, rather than today.

Mr. Wilkinson: As far as Issue No. 2 is concerned, using a hypothetical situation, if it were now out of the case it might have some bearing.

Mr. Fitzpatrick: I would not object if you made both showings, but if you are making an ownership showing and you think it is relevant, it should be at the time the decision was made, rather than taking the ownership as of today.

[Tr. 1223]

Mr. Cohen: We have maintained since the outset of this proceeding that we are competing with an applicant who filed an application sometime back in 1952 and has not amended it subsequent to that date. Our objection obviously flows from that fact.

The Presiding Officer: Of course, showing a different stock ownership will reinforce your argument that the constituency of the applicant is different from the original applicant.

Mr. Cohen: It may leave a vacuum, Mr. Examiner. I presume, upon our theory, if there is a grant of the WJR application it will have to be a grant to that applicant with whom we were in competition back in 1952. He may not exist today.

The Presiding Officer: Are we going to fight a windmill or a ghost, or are we going to have a competition with an applicant who does not exist any longer?

Mr. Cohen: These are the questions we have been addressing to you, Mr. Examiner.

Mr. Fitzpatrick: I do not think that that decision or question has to be decided here today. I think we have gone over this whole question of necessity for amendment and abandonment before. I think the question now is whether or not we are going to have this showing of ownership, and we have not had WJR state whether or not they wish to make a showing. If they are now prepared to make a showing there would be no need for further argument on this point.

[Tr. 1224]

Mr. Rollo: Mr. Examiner, I tried to make myself clear that I do not consider the stock ownership of WJR, or any changes therein, as in issue under the issues under which this proceeding is being conducted.

The sole purpose this information was contained in Exhibit 104 was to show the extent of Mr. Patt's interests and his family's interests in response to an indication or reflection on the record to the effect that control of the corporation rested in Mr. Patt. That is my sole purpose.

I am not going to press the issue. I have made myself clear that I do not consider the matter within the issue.

Mr. Fitzpatrick: Are you then, Mr. Rollo, withdrawing that portion of the interrogatories that deals with stock ownership?

Mr. Rollo: Only if the Examiner overrules the limited purpose for which I am offering it.

Mr. Cohen: Mr. Rollo, will you stipulate in the record that subsequent to the date of the filing of the WJR application, with which we are in hearing, there has been a transfer of control, both approved and consumated?

Mr. Rollo: Again, I say that that is not within the issues of the hearing, but the Commission records certainly disclose the matter you are talking about.

[Tr. 1225]

Mr. Cohen: Less than a stipulation, will the Examiner take judicial notice of that fact?

The Presiding Officer: If it is a matter of record I suppose I cannot avoid taking official notice of it.

Mr. Dempsey: If the Examiner please, it is not quite as simple as that. If it is relevant and appropriate you may take notice as an alternative to accepting an exhibit, but I do not know that you can, for purposes of this case, take notice of everything and anything that might be cognizable officially in some other case.

The Presiding Officer: It may not be material.

Mr. Fitzpatrick: Not only that, but the Examiner would only take official notice of things requested here in hearing.

The Presiding Officer: Theoretically, under the APA I can take official notice of anything as long as I give notice of taking official notice. There need be no prior notification that I take official notice.

Mr. Dempsey: We would like notice as to what you are going to do about this and what other things you are going to take notice of in this connection. I think we are entitled to be informed as to your ruling on the point.

The Presiding Officer: I would think so, too. It seems to me Mr. Wilkinson has made a good suggestion as to the possible materiality of this type of evidence, although I do feel that it cannot be circumscribed, that if the stock

[Tr. 1226]

ownership of Mr. Patt and his family is going to go in at all the entire matter ought to be spread on the record so that we do not have a limited view of the matter.

Mr. Dempsey: We might be forced even to show that we do not have any diversity problems.

The Presiding Officer: It may be that this opens the door. I do not know.

I feel, gentlemen, that the matter can go in as part of Exhibit 104, but that Trebit, Butterfield, the Commission and Mr. Wilkinson, except for WKNX, are not precluded from examining further on these matters to develop the entire picture.

Mr. Dempsey: Basically, the question is: Do the issues now stated encompass the question of changes in stock holdings of WJR? If they do, then a much more complete showing, I think everyone will agree, is necessary. If they do not, no showing at all should be made lest it be misconstrued as a complete showing when, in fact, it is not.

This ought to be rulled out or admitted. If it is admitted, then a great deal more must go in.

The Presiding Officer: I have already said that it is to be admitted under the view that Mr. Wilkinson advanced and that you are not precluded from supplementing this information so that we have a complete picture here.

Mr. Wilkinson: Then I suggest, in view of the fact that these are matters peculiarly within the knowledge of

WJR, and the transfer of control relinguished upon acquisition of negative control, which reference has been made to by Mr. Patt, may not reflect changes that have occurred since that date. It seems to me, therefore, that the burden of making the complete showing that Mr. Dempsey is insisting upon should be made by counsel for WJR because the stock ownership and the dates these transfers were made are peculiarly within their knowledge.

Mr. Dempsey: If the Examiner please, in order to clarify a point, I am not insisting upon a complete showing. I am insisting on a showing that will not be misleading by appearing to be complete, whereas, in fact, it is not.

I do want to call your attention to this very question that a matter of this kind being put in this proceeding was raised before the Court of Appeals by the Commission and the apparent meaning of the decision was that it is not properly open. I have no desire to have this record, however, much there might be an apparent and immediate gain to my client, to contain material that is only going to be tossed out by the court if relied on by the Commission.

I think it is a very serious question and I think it ought to be ruled on very squarely. If we are now going to go into WJR as a new applicant, in so far as a change of ownership is concerned, we ought to be advised. Up to now we cannot assume that that is a part of the case.

[Tr. 1228]

Mr. Rollo: Let me state my position again, Mr. Examiner. I certainly do not want to concede in any way, shape or form that changes in ownership of WJR are in issue. That matter has been litigated, and the results of that litigation are that it is not an issue.

If the material cannot be admitted for the limited purpose that I have asked that it be admitted, then certainly I would not want to offer the material if it is going to be interpreted as conceding that the matter is in issue.

Mr. Wilkinson: Mr. Examiner, could I be heard in response to both Mr. Dempsey's last comment and Mr. Rollo's?

I hesitate, with due deference, to perhaps disagree with Mr. Dempsey on the court's decision because he was much more directly involved in the case than I had been. However, they emphasize certain fields in which there have been substantial changes as a result of the MP that was filed in December of 1954. They pointed out specifically the change of transmitter, the change in programming and the change of studio. Those were the three points on which they relied, and the court made specific mention of those three fields. They also made mention about any withholding of information about a decision to change.

I do not believe that the court mandate was intended to preclude changes, to spell out in detail everything that the Commission might order by its issues in this case. The

[Tr. 1229]

Commission came out on October 17 with issues pursuant to that court mandate.

As I explained to you before, and I understand you are tentatively agreeing, I think Issues No. 1 and 2 are broad enough to include stock ownership for two reasons: That a corporation cannot act in vacuum, it has to act through stockholders, and who the stockholders are, who is making these decisions for changes, could be material under that issue, the reliability of those program commitments, studio commitments, and so on, and it is also relevant under Issue No. 2 if there has been any substantial change of stockholders. I think the change in stock ownership is in issue under the issues the Commission has made.

Mr. Eagan: Could I make a short comment? Maybe we are spending a lot of time on this.

I would like to suggest that you should either rule that the question of stock ownership is not relevant under the issues, and in that case you can either reject or accept Mr. Rollo's offer for its limited purpose, or, on the other hand, if you do feel it is relevant rule that it is relevant and accept Mr. Rollo's offer made for the limited purpose and take judicial notice of what the Commission records show.

I point out that there are two alternatives.

The Presiding Officer: I hesitate, of course, to say something which expresses a fact that should not be in the

[Tr. 1230]

record, but the facts of the present stock ownership of WJR are as they are. I do not think that we can shut our eyes to that stock ownership.

I am going to rule, therefore, in line with Mr. Wilkinson's suggestion, that these matters of stock ownership are within the issues and that the material in Exhibit 104 relating to that may be received -- of course, I have not ruled upon the entire exhibit as yet -- and that in order to avoid any long delay in the matter perhaps, if that is possible, take official notice of whatever has occurred regarding the changes in stock ownership of the WJR corporation.

Mr. Wilkinson: I have no objection to that if I have assurance that since the time the last transfer application was filed with the Commission that there have been no subsequent changes in stock ownership. If I can be assured by counsel for WJR that that is the fact I have no objection.

Mr. Rollo: That is not the fact. This is a publicly owned corporation and there are minor changes occurring from time to time, and they are reported in accordance with the Commission.

Mr. Wilkinson: They have been reported?

Mr. Rollo: All changes today have been reported.

Mr. Wilkinson: If judicial notice could extend not only to the transfer applications by the 323 reports, I would have no objection.

[Tr. 1231]

The Presiding Officer: Is that agreeable then?

Mr. Cohen: Mr. Examiner, so long as these refined rulings on points of evidence on the points I have made have not been overlooked, you may find at the conclusion of your study that the applicant with whom we are in competition no longer, as a legal fact, exists.

The Presiding Officer: It may be. It seems to me that the facts are the facts, and cardinally the matter that attracts me here is that I cannot close my eyes to what has actually occurred.

Mr. Cohen: I do not dispute that. I am talking about the matter of what is before you.

Mr. Dempsey: Mr. Examiner, I, too, dispute it, not just for the sake of being controversial, but I thought you had to close your eyes to everything except what is in the issue. Whether it is a fact, or not, is not material. It is whether it is in the issues.

The Presiding Officer: I have already ruled it is within the issues.

Mr. Dempsey: If it is within the issues, then I think that ruling is something a little bit different than we have had heretofore in the case, and it does open a rather wide new area.

May I ask what the status is now with respect to the record on all of the matters filed by WJR, changes of ownership

[Tr. 1232]

in the 323's and in the application for transfer? Is that a part of this record.

The Presiding Officer: They will all be officially noted now.

Mr. Fitzpatrick: I was going to raise one point. Before stating that they are officially noted, I think unless the parties spell out in their proposed findings the extent of the use they want of this official notice we cannot put the burden on the Examiner to study and make a compilation himself on the basis of 323's filed with the Commission as to what the present stock ownership of the corporation is. That is a very difficult and time-consuming task.

The Presiding Officer: I am glad you mentioned that, Mr. Fitzpatrick. I trust that the parties will do that in their proposed findings, to the extent that these matters are material they will set them out as any matter from the record of the Commission.

Mr. Rollo: I feel quite certain that the record is perfectly clear on this, but to guarantee that WJR's position is clear I want to state that your ruling is over our objection.

The Presiding Officer: Very well.

Mr. Dempsey: I think the record should indicate the same thing with respect to Trebit's position.

The Presiding Officer: Very well. Are there any other comments on WJR Exhibit 104?

[Tr. 1233]

Mr. Wilkinson: Mr. Examiner, on page 13 -- I do not know whether Mr. Dempsey has concluded.

Mr. Dempsey: Excuse me. I wanted to ask one more question about this. I would like to ask, not necessarily at this minute but when counsel have had a chance to think it over, if there will be a statement on the record as to just what it is that is proved or not proved by all this material that you have agreed to take official notice of? If there is a fight going on we would like to be in on it, but we do not quite know what the fight is about. I do think if it is relevant to the issues it must prove something or other that would have a bearing on the decision.

If it convenient for Mr. Wilkinson to state what it is, we would know whether we are with him or against him or whatever other evidence if any we need.

The Presiding Officer: Mr. Wilkinson, you may get help or further opposition. Will you explain, sir?

Mr. Wilkinson: I think I have given my full explanation about the court decision, the three points they primarily took up for purposes of appeal. The court thought that those points at least were sufficiently important and that a further hearing should be held, but they did not spell out exactly the issues to the Commission. The Commission itself, in its October 17 order, spelled out certain issues.

[Tr. 1234]

It is my argument that this matter of change of ownership could bear on either issue and the Examiner's ultimate conclusions on those points and the alternate comparison of whether, as a result of these changes, the grant should go to WJR or whether the grant should go to Trebit or Butterfield.

I cannot be any more specific right now. I will try to talk to Mr. Dempsey some other time off the record. That is as far as I can explain on the record.

The Presiding Officer: I think that the thrust of the evidence in this matter that can be officially noted is understood then.

I agree with Mr. Wilkinson. At least to the extent that it may have some relation to the issue, I do not feel that it is so obviously outside the issues of this case that I should exclude them.

* * * * *

[Tr. 1244]

By Mr. Dempsey:

Q. There may very well be none. It frequently happens that when what appear to be discrepancies are pointed out a question is raised, "Oh, that is a different statement or difference of reading." Minor discrepancies are to be expected, and in fact, they are. I wanted to know that these were not those accidents. A. I have read Mr. Kramer's testimony and Mr. Faust's testimony and I believe them true and correct in full substance.

Q. Based on your reading of them and any further thought you may give before you leave, I want you to feel free to make any elaboration of that statement. I do not want to say it in a way of correction, as though you were changing testimony of anything, but I am sure with the benefit of your full recollection you may very well find something that you overlooked.

Are you familiar with the exhibit -- I know you are -- the exhibit by number WJR Exhibit 97? That is the memorandum that Worth Kramer wrote, I believe, at your suggestion, summarizing the discussions had in New York with various network officials, and recommendations as to further action to be taken.

Mr. Eagan: That is the memorandum of July 10?

Mr. Dempsey: That sounds like the right one.

[Tr. 1245]

The Witness: Yes, I am familiar with that.

By Mr. Dempsey:

Q. I assume you have already said, in effect, that it agrees with your recollection as to the facts of the discussions in New York, and what not, that it recites. A. Yes. I requested Mr. Kramer to write this memorandum because I was doing most of the talking in the presentation of our sales pitch to four networks. I thought maybe by sitting in and observing he might be able to give me, for my own benefit when we made you next visit to the networks, a memorandum of what was said by me and what was said by the people to whom we were addressing our presentation.

* * * * *

[Tr. 1251]

Q. With respect to the recommendations which appear on page 6 and are numbered 1 through 4, did you also join with them as of that date? A. I had not told him that these were my views but when I read his views I concurred with them.

Q. So when you got the memorandum from Mr. Kramer you agreed that he correctly summarized the facts about your discussions in New York with various people, you agreed with his conclusions about conduct for the future based on that, and you concurred in his recommendation, again based on that and as of that date? A. That is right.

Q. Although he did not write them at your direction you agreed with him? A. That is right.

Q. I suppose I should ask you if you also concurred in the addenda which occurs on the bottom of page 6. A. Certainly.

* * * * *

[Tr. 1256]

Tuesday, February 19, 1957

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[Tr. 1258]

JOHN F. PATT

was recalled as a witness and, having been previously sworn, was examined and testified further as follows:

CROSS-EXAMINATION (Resumed)

By Mr. Dempsey:

* * * * *

[Tr. 1259]

Q. You proposed in the application in which you went to hearing to provide a new and unique network television service by reason of

[Tr. 1259]

an affiliation with the DuMont Network? A. That is right.

[Tr. 1260]

Q. Some time prior, let's say, to September 1954, you decided not to provide that type of service; is that correct? A. Some time prior to--

Q. September 1954. A. I guess that is a fair statement.

* * * *

[Tr. 1263]

Q. When did you first decide to take a new look at any phase of the proposal which had been submitted to the Commission and on the basis of which you had received the grant? A. July 8.

Q. Between May 14 and July 8, you had no intention or thought or gave no consideration to varying any aspect of that proposal; is that correct? A. No, that is not correct. We hoped to get some additional network programming from one of the three other networks

[Tr. 1264]

when we saw how limited the DuMont schedule was, and we made a decision to approach CBS some time in mid-June. I think it was following our Directors' meeting of June 16.

Q. On or about June 16, you decided that your proposal for network service which was based on a DuMont affiliation was not satisfactory, and you would, if possible, like to change it by adding other network programs; is that correct? A. That is correct.

* * * *

[Tr. 1273]

Q. Following this Board meeting of June 16, you did, with Mr. Kramer, make some investigations and you decided--and this, I think, is one of the things you decided without going to the Board--not to proceed with construction and gave orders nothing in furtherance of construction be done; is that correct? A. We decided to halt construction activities; yes.

* * * *

[Tr. 1283]

Q. You are quite clear in your mind that on June 9, 1954, you had no thought of even a possibility of moving South? A. That is right.

Q. Your recollection is that you were thinking those days of going North and not South? A. Yes.

* * * *

[Tr. 1299]

Q. Mr. Patt, did you give any consideration to advising the Commission or the other parties to this proceeding that you were not going to build the studio building, the plans for which had been offered into evidence by WJR at the original hearing? A. I do not recall any consideration being given then.

Q. You never considered at any time the need or requirement for advising the Commission that one of the things for which you had given a preference was no longer in the picture? A. No, not until time for the 701 to be filed.

Q. When you filed that, you indicated that you had proceeded with your construction permit by acquiring these studios, not that you had changed your proposal; isn't that right?

[Tr. 1300]

A. I don't recall verbatim what it says, but I believe whatever it says is in evidence.

Q. Were you of the opinion that you were advising the Commission when you filed the 701 that you were not going to proceed with the original construction, that you were going to file at a new site; that you were going to have new and different studios and a new and different network? A. Can you break that up?

Q. I will try to break it up, Mr. Patt. Is it your view, Mr. Patt, that by filing the 701, you were giving notice to the Commission and the other parties and to the public that you were not going to proceed with the studio proposed in the original hearing? A. I did not hear the first part of that.

(The pending question was read by the reporter.)

The Witness: All we do here is say that we had acquired the WTAC-TV studio building. We did not go beyond what we might do in the future.

By Mr. Dempsey:

Q. Is your answer no to the question? A. I have given it a qualified no.

Mr. Dempsey: If the Examiner please, I would like the witness to give an unqualified no. I think the question is susceptible to that.

The Presiding Officer: I think it can be asked this way:

At the time you notified the Commission of the 701 form, had you abandoned--

Mr. Dempsey: That was not the question. The question is whether it is his testimony that by filing the 701 he was giving notice to the Commission, to the public and to the other parties.

The Presiding Officer: That is why I wanted to couch the question the way I was doing it, because I wanted to get away from Mr. Patt's putting a construction upon a written instrument which he filed with the Commission but if you want to get the intent of the drafter of the instrument, perhaps that can be done.

Mr. Fitzpatrick: I thought that was the intention.

Mr. Dempsey: That is exactly what the question attempted to elicit.

The Presiding Officer: The question, then, is what was your intent at the time you filed the 701?

Mr. Dempsey: The belief and intent. By that filing, did he in his opinion give that notice.

The Presiding Officer: That is a different question. What was--

Mr. Dempsey: Intention and belief.

The Presiding Officer: All right, let's have it that way.

The Witness: It was our intention and by this answer in Form 701 to give the Commission notice that we had acquired

[Tr. 1302]

this studio building as a part of our construction.

By Mr. Dempsey:

Q. Now will you answer the question? Was it a notice to the Commission in your opinion that you had abandoned the plan to construct the studio specified in the earlier hearing?

Mr. Rollo: If the Examiner please, I object to the question. It has been asked and answered two or three times. We know that the document is a public record. We also know from previous sessions in this hearing, Mr. Dempsey for some unexplainable reason was unable to see the 701 for some 20 or 21 days after it was filed.

Mr. Dempsey: I think I should be permitted, not because of any special latitude on cross-examination, but because of the overweaning emphasis you put upon this document as notice, to find out if that was the purpose and intention and just what people were being notified of in it.

The Presiding Officer: I think you can ask him what the intention was at the time it was filed. That is why I feel the question should be asked in such language, but not to ask Mr. Patt what was the effect of this document.

Do you feel that you gave notice to the world? I don't think Mr. Patt--

Mr. Dempsey: Do you feel it is a confession that exculpated WJR, and can I not ask if they so construed it?

The Presiding Officer: I feel you can ask Mr. Patt what

[Tr. 1303]

his intention was, if there were any matters in his mind at the time he filed the document.

Mr. Fitzpatrick: My understanding is that Mr. Dempsey has been trying to determine what they believe they were trying to do.

The Presiding Officer: All right, intention or belief or whatever you want to call it, but what the legal effect of this is is another story. Apparently the questions were tending toward that line.

Mr. Dempsey: I do not think they were. I think Mr. Fitzpatrick correctly evaluated them. I think, if the reporter will read them back, you will agree and Mr. Patt has not approached that.

The Presiding Officer: The objection of Mr. Rollo is overruled and you may proceed, Mr. Dempsey, to inquire further about the intention of Mr. Patt when he filed this 701 form, what did he have in mind, what did he believe.

The Witness: Maybe I can approach it this way: Our belief and our intent in giving this answer was to advise the Commission of what we had done pursuant to our construction permit. I do not regard it as going further than that and saying that for all time in the future we were abandoning our original studio plans, your characterization of the abandonment.

[Tr. 1304]

By Mr. Dempsey:

Q. This was not intended by you or believed by you to be advice to the Commission that you would not construct the studio building that you proposed in the original hearing; is that correct? A. I think that is correct.

Q. Was it intended by you and believed by you to be notice to the Commission--let me ask one other question--do you conceive this to be notice to the public as well as to the Commission, when you filed the 701? A. I would assume so. I think the public announcement was made on August 10.

Q. May I ask you, sir, whether you conceive by the filing of a 701 that you were giving public notice of what you had done or proposed to do and notice to the other parties to this proceeding? A. I assume so. I don't know whether that is the effect of an application or not. I assume it is.

Q. Let me ask you by the filing of this did you believe and intend to give notice to the Commission and the parties and the public generally that you had abandoned your Clarkston site? A. It is that last part--excuse me. I thought you were still on the studio. Would you repeat that?

[Tr. 1305]

(The pending question was read by the reporter.)

The Witness: We are talking about the 701?

By Mr. Dempsey:

Q. Yes, sir. A. Yes, sir. To the extent that the public is advised through the filing of an application with the Commission. I think the public announcement that we made was about two weeks later.

Q. Is it your opinion that you were making a public announcement or making a public record of your intention with respect to the Clarkson site by filing a 701? A. Yes, a public record.

Q. Would you mind telling me why, then, on December 1, the day you filed it, you wrote Mr. Thomas and asked him to keep it a secret until you made a public release of another kind? A. Mr. Thomas had written me a letter and we did not want him to make an announcement which we were obliged to make for ourselves at the proper time when our application for modification was finally prepared.

Q. If the cat was out of the bag, why did you want to impose secrecy on Mr. Thomas?

The Presiding Officer: Who is Mr. Thomas?

Mr. Dempsey: He was President of the Chamber of Commerce. We have an exhibit, 108, which contains that information.

[Tr. 1306]

* * * *

By Mr. Dempsey:

Q. In your opinion, on December 1 you were making a public statement by filing a 701 with the Commission. Why did you request that Mr. Thomas, in accordance with an understanding you state you have with him, not make a public statement about the matter on the same day? A. I simply wanted to ask him to wait until our plans were complete, which would be forthcoming very shortly and that we would make a full public statement in the newspapers at that time, which we did.

Q. What was this understanding that you had with Mr.

[Tr. 1307]

Thomas?

A. I had no understanding with Mr. Thomas. He was not at the September 15 meeting. Toward the end of the September 15 meeting, going back to that meeting with the representatives of the Flint Citizens Committee, someone asked me, "Well, we like your plans to move North of Flint. When are you going to be announcing this?"

I said, "We would await a couple of occurrences." One would be the petition of the Commission. One would be the obtaining of the land which we then did not have in our possession or under option and the completion of an application; and when those things were all accomplished, we would make a full public statement to the people of Flint concerning it.

Q. Did you ask them not to make a public statement about the matter? A. Yes. I said I had hoped there would be no premature announcement by them because the plans were incomplete.

Q. Did you conceive then that you had--and I am reading your records--"an understanding that no public statement with regard to the matter would be made by the Flint Citizens representatives with whom you had luncheon"? A. The word "understanding" is perhaps not exactly correct. We had no pledge or agreement from them. I simply made a request of them that they not make a public announcement in the newspapers.

[Tr. 1308]

Q. If you did not have such an understanding with the people at the meeting, why did you say you did to Mr. Thomas, who was not at the meeting? A. I just thought it was generally agreed that our plan to make the announcement when our plans were complete was entirely in accord with the members who were at that meeting.

Q. So you thought you did have an understanding? A. Broadly, yes. I would like to add this, Mr. Dempsey, that the members of that committee who were at the September 15 meeting were much closer to our opponents, your clients, than they were to us. I had no illusions that what I told them at that luncheon would not filter by word of mouth, by conversation, to Mr. Lindow and to other members of the Flint Citizens Association.

Q. Are you suggesting that you were giving us notice of change of plans by telling the Flint Citizens Association? A. No, I am simply saying that I was not endeavoring to keep it from you.

* * * * *

[Tr. 1309]

* * * * *

Q. So you were not trying to keep it from your opponents? A. No.

Q. Even now we are not permitted to use that as an admission that you abandoned your plans for the other studio? A. That is right.

Q. Did you feel that you ought to tell the Commission that you no longer would go forward with your Clarkston site construction when some time in August or thereabouts you decided not to do that? A. As soon as our plans matured and as soon as we, on advice of counsel, had received the information that action had been taken on the petitions for reconsideration.

Q. The action was taken on December 2nd. When did you receive advice that it had been taken? A. December 2nd.

Q. You filed this 701 on December 1st? A. That is right.

Q. Mr. Patt, you testified that your counsel had advised you

[Tr. 1310]

not to tell the Commission that the proposal on which you had one preference would no longer be carried out by you, that it had been decided by you not to build at Clarkston, not to build the new studios, not to go forward with DuMont programming, and that all of those things should be kept secret until such time as the Commission had decided petitions for rehearing which attacked your proposal to have a DuMont network to build at the Clarkston site and to go forward with the elaborate studios that you proposed in your original hearing and your counsel said the Commission should decide it on grounds that you were not going to use before you came forward with the true facts. A. That is a pretty long question, if it is a question.

Q. I think it is a pretty serious question, Mr. Patt.

Mr. Rollo: Can't we have it broken down? It was more of a speech than a question.

Mr. Dempsey: I stand convicted of making a speech and I will make it again.

By Mr. Dempsey:

Q. You propose three things; one, a Clarkston site; two, a DuMont network. A. Wait a minute. We did not receive a preference on our Clarkston site. There was no preference to any of the applicants on the matter of site.

Q. No, that is right, the Commission said there should

[Tr. 1311]

not be a preference because either a newspaper statement or a press release which we were given--you had the advantage of height and Trebit had the advantage of nearness, and they canceled out, or words to that effect; is that correct? A. As I remember it, the Commission decision of May 14, they finally decided that all of the applicants met equally well the matter of transmitter site, coverage, and so on.

Q. You recall that it was Trebit's contention that you did not meet equally well with Trebit. A. I remember your contention and remember our contention.

Q. And you won on the contention that ours was not better than yours, did you not? A. That is correct, but we did not win on the basis that our contention was that ours was better than yours.

Q. But then you decided yours was not good enough to build on, but you kept that from the Commission until a rehearing; is that correct? A. That is correct.

Q. Mr. Patt, is it your view that it was proper for the Commission to be called on to decide these petitions for rehearing to reaffirm if it adopted the views that were expressed by WJR and on its behalf and in the opposition to the rehearing affirming your original grant when you had no intention of going ahead with it on the basis that you had

[Tr. 1312]

won it? A. I am lost, frankly.

Mr. Rollo: If the Examiner please, Mr. Dempsey in his questioning is assuming a lot of things.

The Presiding Officer: Yes. I do not know that you can ask a question of that type of the witness, Mr. Dempsey. You are asking a matter that can be developed from facts which may be asked of him, may be developed of him, but to ask an ultimate is a matter I do not think the witness should be required to answer.

Mr. Dempsey: I did not think there was any quarrel of the facts.

Mr. Eagan: I quarrel with your wording. I say it is not the basis they want. Mr. Patt is very qualified, but he is not qualified to give a legal opinion.

Mr. Dempsey: Mr. Patt testified he was familiar with the pleadings in this matter. He is, therefore, familiar with the contentions made by Mr. Eagan and Mr. Rollo that the Commission was right originally in preferring WJR on the basis of its proposed unique network service, namely, DuMont.

Mr. Eagan: They never preferred us on that basis, Mr. Dempsey.

Mr. Dempsey: I think the decision speaks for itself.

The Presiding Officer: Mr. Dempsey, you cannot get a witness on cross-examination to say, "I confess," which is

[Tr. 1313]

the purport it seems to me of your questioning now. You may ask Mr. Patt questions which will develop certain facts.

Mr. Dempsey: I didn't know there was a rule against asking for a confession.

The Presiding Officer: There are other questions that I would like to ask Mr. Patt, perhaps, and I certainly don't want to interfere with your questioning. There are matters that I might say in connection with the filing of a 701 I stated in that decision in the protest case that revealed perhaps a certain, let me just say, skepticism on my mind, but it indicated that I was not completely unsophisiticated when I treated that, but those questions have not been asked and I do not want to interfere with the cross-examination here to ask them, but I do not think you can ask the witness to make certain admissions which are the tenor of your question.

Mr. Dempsey: I thought I could ask him to make the admission. I thought it was his privilege to refuse, but I did not know it was objectionable because I was asking. It might be futile, but I didn't know it was objectionable.

By Mr. Dempsey:

Q. You said you acted on advice of counsel. Did your counsel advise you not to disclose to the Commission that you were going to use the WTAC studio building and not build the studios that you said in the hearing you were going to build? A. No.

[Tr. 1314]

Q. So that was done on something other than advice of counsel; is that correct, sir? A. We didn't consider that it was necessary to notify the Commission concerning that.

Q. Do you recall the Commission adverting to your studio plans in this decision? A. I have a general recollection of it, yes, as part of our local program proposals. I think it was later changed to be a very minor part.

Q. When was the change made? A. 1955. No; December 6, 1954.

Q. You don't suggest that you really knew they were going to do that on petitions for rehearing, do you, and that you were waiting until it became a minor point before you disclosed it? A Would you repeat that?

(The pending question was read by the reporter.)

The Witness: No.

The Presiding Officer: Is this a good spot for recessing, Mr. Dempsey? Off the record.

* * * *

[Tr. 1315]

By Mr. Dempsey:

Q. Mr. Patt, I believe just before lunch you had fixed the date on which you first learned of the commission's decision on the petition for rehearing as December 21, 1954? A. I said December 6.

Q. I think you said December 2. Do you mean December 6th? A. December 6.

Q. I want to ask you to take a look at a letter dated December 2, addressed to Mr. Rollo by you, and see if maybe it does not confirm what I believe your earlier testimony was that December 2 was the date on which you knew of the decision.

[Tr. 1316]

* * * *

Q. Mr. Patt, I think that other correspondence indicates that you had decided not to file your application for modification of permit until thirty days had passed after the decision on the petitions for rehearing; isn't that correct? A. I think that is a fair statement.

* * * *

[Tr. 1317]

Q. That wasn't the discussion you had on December 2, was it? A. I think we had a discussion on that maybe a week or two before that.

Q. I think the correspondence indicates, Mr. Patt, that perhaps months before that you had been advised by counsel that the period for protest of any action or the period for rehearing petitions was thirty days after action. A. Yes, I think that is what my thirty-day notice here had reference to.

Q. That is right, thirty days from the date of the action would be the period in which the parties could protest, or file rehearing petitions, or oppose in some way what had been done. A. Or take it to court.

Q. That is right, and you were going to wait for that period to run

[Tr. 1317]

before you made your filing? A. That is right.

Q. That is why the letter written on December 2 indicated thirty days, I thought from the date of the letter, it indicated awareness of the action taken on that date. A. As I explained, the reference in paragraph 3 here is

[Tr. 1318]

to approximately thirty days which I intended to mean, and I think Mr. Rollo undoubtedly understood it that way, that we were considering thirty days from whatever time the action on the petitions became final.

Q. Is that your interpretation of the letter, looking at it now, or at the time you wrote it? A. Yes, sir; it is.

Q. Which? A. It is my interpretation of my recollection of the situation and then it is my interpretation of reading the letter now.

Q. Is it, one, your recollection? Is it your independent recollection that that is what you had in mind when you wrote that letter? A. Yes.

Q. It is also your interpretation? A. That is correct.

Mr. Dempsey: I think we should have this identified as Butterfield Exhibit E.

The Presiding Officer. All right. E.

Mr. Dempsey: It is a letter dated December 2, 1954, to Mr. Rollo from Mr. Patt.

(Butterfield Exhibit No. E was marked for identification)

[Tr. 1319]

By Mr. Dempsey:

Q. Mr. Patt, you referred this morning to advice of counsel in a context which I took to mean that you had been advised by counsel not to disclose to the commission or the public, or the parties in this proceeding, certain decisions which you had made.

Will you please state exactly what it was that you were advised not to disclose, and why?

Mr. Rollo: If the Examiner please, I object to the question again. There is is based upon assumptions that have not been proven.

Mr. Dempsey has a manner of phrasing his questions that I don't quite know how to meet. He is leading the witness into assumptions that are not proven.

The Presiding Officer: Well, let us ask the basis for that, the underlying basis for the question. Ask whether something was told Mr. Patt perhaps and that might overcome the objection here.

But Mr. Rollo's objection here is that you are assuming something which has not as yet been shown.

You may perhaps feel that if the facts are not that way the witness can refute them.

Mr. Dempsey: If the Examiner please, I understood Mr. Patt to say this morning that on advise of counsel he had not taken certain action with respect to informing the

[Tr. 1320]

commission.

Mr. Rollo. That is entirely all right.

* * * *

By Mr. Dempsey:

Q. Then you had been advised by counsel not to file your application for MP until thirty days had passed after the commission decided the pending petitions for rehearing which had been filed by Butterfield and Trebit? A. The first advice was not to file until after we had received notice of the decision by the commission. Sometime thereafter, in October or November, as I

[Tr. 1321]

recall, and I could not pinpoint the date--

Q. What decision of the commission do you mean? A. A decision by the commission deciding the petitions for reconsideration.

Q. When was that advice given you? A. The advice was given to me on July 33. That was under the assumption that we later made a decision to move our transmitter site.

Q. If you were not going to file an MP, then the timing of the filing was unimportant; is that correct? If you are not going to file an application, obviously the advice was meaningless. It was contingent on your filing? A. I am not clear on that question. I am sorry.

Q. I thought you were saying that the advice not to file until a certain date was only to be followed if you decided to file? A. Yes, if we decided--we were still at that point, when Mr. Rollo gave me that advice, we were still at the point of deciding whether to go ahead at Clarkston with an affiliation with Dumont, or becoming an independent station.

Q. Is it fair to say, sir, that in considering the question of whether to go ahead at Clarkston or to move the site to some other place, that you discussed with Mr. Rollo the timing that would be involved? A. That is right.

[Tr. 1322]

Q. And he advised you that if you should decide to change site it would be necessary to file an application for modification of construction permit? A. That is right.

Q. And if you decided to do that, you should not file such application until after the commission decided the then pending petitions for rehearing? A. That is correct.

Q. And that that advice was later made more specific to say that it should be thirty days or more after the decision? A. I am not sure of that, but we discussed that and I think that was the tentative conclusion to which we came.

Q. Didn't you a minute ago, in talking about this letter of December 2, indicate that you had meant to wait thirty days until after that decision?

A. Yes, and we had intended to wait to see what further legal recourse Trebit and Butterfield might undertake in that thirty-day period.

Q. Well, sir, sometime prior to December 2, had you been advised by counsel that you should not file a modification application for thirty days at least until after the commission decided the pending petitions for rehearing. A. I believe we must have been.

Q. Do you remember whether you were or weren't?

[Tr. 1323]

A. I don't recall clearly whether that was finally advised or not. It was something that we certainly discussed and were considering.

Q. When did you definitely decide to file an application for modification of construction permit? A. We made that decision on September 8, subject to our being able to find suitable property.

Q. Do you have any doubt-- A. And subject to receiving a favorable final decision by the commission on the petition.

Q. Mr. Patt, I don't know how to ask this question without doing it in some what the same way that has been objected to before, but I would like you to explain why it was that you thought it essential or appropriate, or proper, or any other word you want to use, to have the commission decide you should win at Clarkston before you told them you were not going to go there? A. Well, I think in my direct testimony I explained that we were concerned, counsel was concerned, and I shared that concern, that the commission might regard an application to move before they had acted on the first application finally, as an attempt to influence their decision in the petitions for reconsideration, and that that would be improper.

You will remember that you made quite a point of the site situation and Butterfield did not, of course; later the

[Tr. 1324]

Flint Citizens Committee organized and petitions were circulated.

As I remember, the commission was bombarded with letters and resolutions supplementing that petition and some having no reference to it. I know the commission files were pretty full of letters from citizens who had been galvanized into saying that we were a great big Detroit interest that had no interest in Flint.

Q. I said the same thing in the course of the case. A. Of course, you did, we said you were entirely wrong. I said on the witness stand that we would be a Flint station with Flint studios and Flint staff and Flint manager and Flint local programming, and that we had no purpose or intention of being a Detroit station in any way; that we would pick up an occasional program from Detroit when the occasion warranted it, just as we would pick up a program from Saginaw, Bay City, Lansing, Ann Arbor.

* * * * *

[Tr. 1329]

The Witness: I assumed that after discussion with counsel and receiving their views that we acted properly, sir. I may say further that even had we had a different view than counsel's views, or had counsel had a different view, we would not have been able to inform the commission fully about our site until we had one located. And we did not finally have one cleared of air hazards until late November or early December.

* * * * *

[Tr. 1331]

Q. Mr. Patt, do I understand your testimony to be now that you felt you should not advise the commission of your decision that your original proposal was not a good one until you found an alternative which you would proffer as a substitute? A. We decided on advice of counsel not to advise the commission of our alternative proposal as a transmitter site until such time as we had found a site, and, further, until such time as the commission had acted on the petition for reconsideration.

* * * * *

[Tr. 1335]

Q. Are you suggesting that it was the desire not to confuse the commission? A. Yes, sir.

Q. That inhibited your telling them that you no longer were going ahead with your proposal? A. Yes, sir; that and the statement that Mr. Rollo gave me that it might be construed as an improper attempt to influence the commission in its consideration of, first, the Trebit petition, and, secondly, the Citizens Committee petition, that we were simply endeavoring to put our Detroit interests ahead of Flint which we had said was not the case and which was not the case.

Q. Mr. Patt, did Mr. Rollo say that you were not free under the rules to file an application to amend your application at this stage? A. I don't recall that he did.

Q. Did he say that you were free under the rules to request a modification either by way of amending your original application or through any other means? A. I don't remember exactly. I think our discussion was to the effect that we were free to do it, but that we decided not to for the reasons given.

Q. Your recollection is that you were told that there was no rule, regulation, or policy, which would prevent your

[Tr. 1336]

filing this application for modification just as soon as you were ready to submit it in complete form; is that correct? A. I don't recall specifically whether I was told that, or not.

Q. Did you ask that? A. No, I don't recall asking it.

Q. Mr. Patt, if there was nothing wrong with it, it was proper, and I think it is important to get this on the record, did Mr. Rollo advise you that a proper application might be misconstrued and that you should not avail yourself of your rights under the rules, regulations, the statute and commission policy, to file this because someone might charge you you with influence? A. Essentially, yes.

Q. He advised you not to avail yourself of your legal rights because someone might make a false charge if you did it? A. Again, you are going farther than anything he told me.

Q. What did he tell you? A. Just exactly what I have said, that in his opinion we should not file an application for modification if we did decide to file such application, until after the petitions

[Tr. 1337]

for reconsideration were decided.

Q. Did he advise you that if you filed it the parties might object on the ground that you were not entitled to change the basis on which you had won after the hearing was over. A. I don't recall that. In our discussion I remember that we discussed the commission's decision relating to transmitter sites. That decision, if I remember it correctly, said that all the transmitter sites met the requirements of the commission equally and no one was to be preferred.

For that reason I know I was influenced to think that we could go ahead and move to another site that also equally met the commission's minimum standards for principal city coverage.

That is as far as it went.

* * * * *

[Tr. 1340]

Q. Mr. Patt, would you have had any difficulty in bringing DuMont as a new service to Flint from a site north of Flint at any time during this proceeding? A. I don't think so.

* * * * *

[Tr. 1363]

Q. What was it based on? A. Based on what I have repeated now three or four times, that he felt to do so prior to the issuance of the decision might be construed as an attempt to influence the commission on its answer or determination of the issue raised by the Flint Citizens Committee and by Trebit with respect to the propriety of our transmitter site.

Q. Construed by whom as an attempt to influence? A. By the

Federal Communications Commission.

Q. Mr. Rollo suggested that the commission might construe your filing as improper; is that what you are saying, Mr. Patt? A. I don't know whether it is quite that way. That it might be an improper attempt by us to influence the commission to decide the case in our behalf because it would eliminate one of the arguments that had been used by Trebit and by the Flint Citizens Committee as to reasons why the commission should change its decision.

Q. Let me be very frank with you. I probably missed the boat on this.

Up to now I have always assumed that the phrase "attempt to improperly influence" was addressed to some charge that others would make. Now, do I understand that Mr. Rollo told you that the commission would construe it as an

[Tr. 1364]

improper attempt to influence itself? A. I think that was included in his summation of his reasons.

The Presiding Officer. Let us find out what did Mr. Rollo say. Let us complete the conversation if you remember it, Mr. Patt. What did Mr. Rollo tell you?

The Witness. I can't tell you in exact words.

The Presiding Officer. To the best of your recollection, sir.

The Witness: The gist of it was that he felt to file an application for modification during the pendency of those petitions, which carried with them the argument in behalf of Trebit and of the Flint Citizens Committee, that we were going to be a Detroit station instead of a Flint station -- I have lost myself -- that to file that before those petitions were decided on their merits might be construed as an attempt on our part to take the wind out of your sales, your argument.

By Mr. Dempsey:

Q. Let us assume it would have been a successful attempt to take the wind out of our sales. If no legal impropriety had been involved hadn't you been trying to take all the wind out of all sales throughout that case up to that day?

Was there objection that you would some how take the wind out of our sales prior to filing anything with the

[Tr. 1365]

commission? A. Mr. Rollo's advice again was that we should not do it during the pendency of those petitions. Undoubtedly the commission had them under consideration, had perhaps made a decision on them. We were hopeful that the decision would be forthcoming in August or October. Even if we had gone ahead and filed, we couldn't have gone ahead because we didn't have the site ready.

Q. Now, you could have been ready before December 6, could you not? A. No, sir.

Q. You could not? A. No, sir.

Q. What was the earliest date you could have been ready? A. December 16.

Q. What makes you say that, Mr. Patt? A. Because we were determined that we were not going to have any issue with respect to Air Space approval this time. We thought we had met all of the requirements of Air Space, but we very carefully engaged Mr. Lappas to pursue that matter and we gave instructions to follow that through just as fast as he could.

I kept calling Clarence Jones and asking, "Have you heard from Mr. Lappas"?

[Tr. 1366]

He would in turn call Mr. Lappas and try to get word from him as to how the matter was proceeding with the Kansas City district Air Space office.

Q. Mr. Patt, when did you get Air Space approval for this site?

A. We did not get formal Air Space approval until after December 16, but we had informal assurance from Mr. Lappas that the matter had been favorably considered and would be acted upon very shortly.

Q. You had that long before December 16, did you not, Mr. Patt?

A. No, sir.

Q. You never heard from Mr. Lappas before December 16, that you had no substantial -- A. As of late November I called Mr. Lappas, myself, which was the first time I had ever talked with him.

I literally chewed him out to get some action on the thing. I learned through Mr. Rollo that the matter of fifty feet on our antenna was holding up this matter because some air authorities were taking the position of not approving antennas of a thousand feet or more.

I said if that is all we have to do, let us cut fifty feet off our antenna and get it in the works.

Q. Mr. Patt, when you amended your application from

[Tr. 1367]

Waterford Hill to Clarkston, did you have Air Space approval? A. No, we ran into considerable difficulty -- Oh, on Clarkston?

Q. Yes. A. We had informal assurance that it would meet approval of the -- I think Pontiac Airport and the Michigan Authority.

The Presiding Officer. Before you chose Clarkston you had that assurance; is that it?

The Witness. Yes. I don't know that it was a formal assurance or not.

The reason for moving from Waterford to Clarkston of course, was to get a site that would conform to their approach. We thought Waterford met all the known criteria, all the published criteria, and it did.

But, nevertheless, and I sweat blood appearing before the --

By Mr. Dempsey:

Q. If they had only published the location of the Pontiac Airport--

The Presiding Officer. Let us not have these interjections.

Mr. Dempsey. If the Examiner please, we have just heard some rather interesting testimony that the reason for not filing was that there had not yet been Air Space approval.

Today is the first time I ever heard that one. I think it should be explored a little.

The Presiding Officer. I am not saying anything about exploring that matter, but I am concerned with some of the interjections about the Pontiac Airport.

Mr. Dempsey. Mr. Patt gratuitously offered the statement that the Waterford Hill site met all of the published criteria. There was some disagreement about that with Air Space because they turned it down. He brought that into the case. Mr. Rollo apparently objects to something I have done.

The Presiding Officer. Let us continue.

By Mr. Dempsey:

Q. When did you make arrangements to acquire the Chesaning site? A. We obtained an option to it I believe on September the 22nd.

Q. When did you buy it? A. We obtained an option on two parcels in that area at that time. The purchase of it occurred in April, I believe, of 1955.

The Presiding Officer. Which one did you buy, Mr. Patt?

The Witness: The Eisenhauer farm.

The Presiding Officer. Was that the parcel that eventually became the site which is now in issue?

The Witness. That is right.

The Presiding Officer. It is not the one that was eight hundred feet away, but which had not been approved by Air Space?

The Witness. I believe, and counsel can correct me if I am wrong, that that farm was large enough to move the tower eight hundred feet in order to finally meet that little difference.

The Presiding Officer. I see.

Mr. Dempsey. I think that is correct.

* * * * *

[Tr. 1372]

By Mr. Dempsey:

Q. Does that in any way refresh your recollection about when you had reasonable assurance of CAA approval or Air Space approval for the Chesaning site on an informal basis? A. This is dated November 1, 1954. We still do not have that assurance until sometime in December, as I recall.

* * * * *

[Tr. 1377]

Q. Pending from yesterday is a request of Mr. Patt to state on the record any points at which he might have disagreement with the testimony of Mr. Kramer or Mr. Faust. I think that description is enough to identify it. But have you had any chance to go over yesterday's testimony and do you have any comment? A. I have read a portion of Mr. Kramer's cross-examination. The only minor difference that I would have relates to testimony on page 1115 where one of the counsel asked how do you propose to get any programs that you might originate in the Detroit studio to Chesaning?

Mr. Kramer said by line.

In answering that question, myself, I would simply say that any programs originating in the Detroit studio would go, first of all, through the control room at Flint, which would be the control point for all originations by the station and that there would undoubtedly be no direct link between the Detroit studio and the Chesaning transmitter.

On page 1116 Mr. Kramer mentioned that he subsequently learned from me that I had discussed his idea of suggesting to ABC that they move their transmitter to Trenton with Mr. Kintner and Mr. Jahncke.

I met with Mr. Kintner on only one occasion, which was either the seventh or eighth of July, and subsequently my

[Tr. 1378]

discussions with ABC were with Mr. Jahncke, except for one visit I paid to Jimmy Ridell who was in charge of the Detroit station, to let him know that we were calling on his home office and to tell him the purpose of that call.

I have not reread any of Mr. Kramer's or Mr. Faust's direct examination. Sometime in the middle of the night I did remember that in reading Mr. Kramer's direct testimony with respect to a meeting with Mr. Leyford on July 8 he said that he thought we informed Mr. Leyford that we had decided, or we were thinking of deciding on abandoning construction activities at Clarkston.

I didn't recall our conversation that way and I would have testified that we did not inform Mr. Leyford of that decision because we did not make the decision until late in the day and I think we had seen him either earlier that day or on the preceeding day, I don't know which, and all that I remember of that particular discussion is that we told him of the progress we had made, that we had ordered equipment, that we were moving forward as rapidly as possible, that we still had hopes of meeting at least the October 1 target date which he was very much concerned about.

I think we told him about the petitions for reconsideration that had been filed that were giving us some cause for concern as to what the ultimate outcome of those might be.

[Tr. 1379]

By Mr. Dempsey:

Q. You mentioned those petitions. Did you ever take the position that the petition for stay -- Butterfield, you will recall, filed such a petition; Trebit did not? A. Yes.

Q. --had the effect of deterring you or preventing you from constructing or going ahead with your permit? A. Of course, if the commission should issue such a stay pursuant to such application, we would automatically be halted.

Q. That is right, sir, but unless and until the commission did issue it did you construe any of these documents as preventing you from going ahead? A. No, and I did not -- as I recall it, I think Mr. Kramer's memory is faulty there, but I won't swear that mine is not equally faulty-- I believe that we gave Mr. Leyford no reason to believe on July 8 that we weren't going ahead.

I think that was told to him the following week when it was an accomplished fact, that we had discontinued.

I believe that Mr. -- as I remember it -- Mr. Leyford pressed us very hard about that October 1 starting date and said that he was being pressed by CKLW-TV for a decision one way or the other as to whether they were going to accept their bid for the DuMont affiliation in that area.

I think I told him that he could expect to hear from us

[Tr. 1380]

very shortly, perhaps the following week.

That from my memory of the case to date is the only substantial matter in which my testimony would have differed. Otherwise, I have adopted Mr. Kramer's testimony as you requested yesterday.

Q. That is correct. My memory is that you had gone over the original direct testimony in writing of Messrs. Kramer and Faust. You read their testimony on the stand and you have read part of Mr. Kramer's cross-examination; is that right? A. I read all -- well, I read substantially all of Mr. Kramer's cross-examination.

Q. As of now are you willing to say with respect to all of it, or do you still want to finish it before you commit yourself on the rest of it?

A. I don't think I am going to have time to read it, but I am willing to stand as it is and adopt the rest of Mr. Kramer's testimony.

Q. I would rather, really, Mr. Patt, that you make a decision not upon your willingness to read, and I don't want to put any time pressure on you, I do want your careful decision, not a calculated risk sort of decision. A. I am hopeful of finishing up early tomorrow and I will not have the time and I realize that you are not pressing me to read it tonight, but I don't think I am going

[Tr. 1381]

to take the opportunity to read it because that is the only important variance in which my testimony would differ from his.

Q. You base that statement now on your having actually read it once and reread such portions of it as you had any possible doubt about? A. No, I have not reread anything, but a portion of the cross-examination last night.

Q. Did you pick that at random, or is that something you went to because of your prior reading? A. My impression when I answered your question yesterday, was that the variance came in the cross-examination. I remembered later that it was in the direct and that I had talked with Mr. Kramer by telephone following his direct testimony and I complimented him on telling the full story of the case and said there was only one place that I could think of where I would have had a recollection different from his. That is what caused me to remember that sometime last night.

Q. Mr. Patt, are you now saying on the record that having read all of Mr. Kramer's testimony, direct and cross, and all of Mr. Faust's testimony, direct and cross, you do not feel it necessary to reread it to be able to state without reservation that you adopt it as your own? A. As far as I can recall, yes.

[1382]

Q. With the exception of what you have just said? A. Yes--

Q. I don't think you should say as far as you can recall. If you want to read it again, I am willing to give you the opportunity. If you didn't want to read it again, I would rather you put it on the basis of you are satisfied. A. Could we leave the matter open until the end. I may have an opportunity to -- when you ask me are you willing to accept it without reservation, I just want to have a chance to do it if I can. I may not have a chance. If I don't have a chance, I will accept his testimony.

* * * * *

[Tr. 1407]

Wednesday, February 20, 1957

* * * * *

[Tr. 1408]

CROSS EXAMINATION (Resumed)

By Mr. Wilkinson:

* * * * *

[Tr. 1413]

Q. In other words, you have conferences with Mr. Kramer other than those reflected in written memoranda, is that correct?

[Tr. 1414]

A. Oh, I have conferences with Mr. Kramer on all subjects connected with the business almost everyday, whether I am in Detroit or Cleveland or New York or Washington, or where I am.

Q. Does Mr. Kramer keep you advised of matters that arise at the Detroit end? A. Yes, sir.

Q. Is that done rather promptly as a general pattern and practice? A. As a general rule, yes.

Q. Do you recall when you were advised by Mr. Kramer of a telephone call that he had had from Alan Campbell with reference to WTAC - TV? A. I could not pin-point the date but it was sometime following his receipt of the call and May 19, probably sometime early in May.

Q. Since he has testified it was on or before April 30 when WTAC ceased operation, would you have been advised in the next day or two after A pril 30 in the ordinary course of business? A. Depending on where I was at the time and what his commitments were, I would have been advised very shortly, within a matter of a week I would say.

Q. In other words, prior to the release of the final decision on May 14, 1954?

[Tr. 1415]

A. I am sure that I was.

* * * *

[Tr. 1425]

Q. Mr. Kramer was with you at that meeting? A. I drove from North Hampton to Bronxville on June 7 and into New York City on the morning of June 8. Mr. Kramer was already there and we met and had lunch and went over to Mr. Lyford's office about 2:00 o'clock in the afternoon.

* * * *

Q. Mr. Patt, Mr. Kramer has testified that he was of the view, after talking with Mr. Lyford, that you could have had a DuMont contract on that date had you so elected. Is that your view, too?

[Tr. 1426]

A. I will adopt that view. I think the only question at that time was whether we were actually going to make our early fall date. I believe I told Mr. Lyford that we would be able to give him that date with a little more certainty in another 30 days if he could wait that long. He said that while he was being pressed by Mr. Campeau he preferred to deal with an American station and would wait for us.

* * * *

[Tr. 1428]

Q. As early as June 18, 1954, you were working, were you not, on a brochure for CBS presentation? A. From the memorandum you have just handed me, we were. This memorandum--

* * * *

[Tr. 1436]

Q. Now, if you could have assured Mr. Lyford that you would be on the air by fall, you are of the view that you could have obtained a Dumont affiliation at that time, are you not, Mr. Patt? A. Yes. There was always a possibility of some hitch developing when you came down to the short strokes of signing the contract and agreeing to terms. But I am quite sure that they preferred WJR's television station to the Canadian station that was also available.

* * * *

[Tr. 1455]

CROSS-EXAMINATION

By Mr. Fitzpatrick:

* * * * *

[Tr. 1463]

Q. Didn't you have it later in August? Wasn't it around August 24th that you learned that CBS would affiliate with you if you moved to the northern area? A. My last meeting with Mr. Akerberg, at that meeting he left me with a rather strong presumption that if we could minimize the over-lap with the Detroit and Kalamazoo affiliates, he thought there was a very good chance we could be an affiliate. He didn't come right out and say it was an accomplished fact. He simply said "Let me see what you have and we will take a look at it again."

Q. You believed that you could have it at that point, didn't you? A. I believed so; yes.

* * * * *

[Tr. 1473]

Q. Wasn't the change in the transmitter site the reason construction was not completed?

Mr. Dempsey: Of what date?

Mr. Patrick: As of December 1 or November 30.

Mr. Dempsey: 1954?

Mr. Fitzpatrick: Yes.

The Witness: If I understand the question, it is a large part of the reason but I do not think it is the full reason we discontinued construction.

[Tr. 1474]

By Mr. Fitzpatrick:

Q. Had you decided to go ahead and operate from the Clarkston site would you have been on the air in September or October? A. That is something no one knows. I would guess, from what I have been able to see from other station construction, we might not have been able to make it until November or December.

Mr. Dempsey: I move to strike that answer.

The Presiding Officer: Why?

Mr. Dempsey: I think Mr. Patt might not have seen other construction. If he looked to Grand Rapids, 90 days was all that was necessary to put that in order.

The Presiding Officer: Well, it is his statement.

Mr. Dempsey: A ridiculous one.

The Presiding Officer: That may be.

Mr. Dempsey: If Mr. Fitzpatrick's question was designed to ask if he is now to become an expert engineer, and ask if he could meet the deadline, that would be an objectionable question, because Mr. Patt is not qualified as an expert engineer. I do not think Mr. Fitzpatrick asked that question and I do not think Mr. Patt thought that when he answered the question. I think the answer is evasive.

The Presiding Officer: Mr. Fitzpatrick, do you have any

[Tr. 1475]

objection to the answer?

Mr. Fitzpatrick: No, sir.

The Presiding Officer: I think the objection must be overruled.

The Witness: Can I amplify that?

Mr. Fitzpatrick: You can, as far as I am concerned.

The Witness: I would say in late May we hoped and intended to be on the air by September 1st, or more reluctantly, October 1st. By the early part of July I doubted very much whether we would make that date.

* * * * *

[Tr. 1479]

* * * * *

The Presiding Officer: * * *

Mr. Wilkinson, I believe you want to continue with your cross-examination?

Mr. Wilkinson: Yes.

By Mr. Wilkinson:

Q. Mr. Patt, when I asked my questions, I think we were in New York at the August 22 to 24, or 24 to 26 meeting. What were the dates of those meetings again? A. 24th to the 26th.

Q. And in response to Mr. Fitzpatrick's question you went away from that meeting with CBS pretty much assured of that when the moves were made you would get some kind of an affiliation with CBS? A. It was not quite as strong as that, but I felt very hopeful.

* * * *

[Tr. 1481]

Q. In other words, you left the meeting with the impression

[Tr. 1482]

that if you got up there northwest of Flint, whether it be Owosso, Chesaning of any other town you have or have not heard of, that you would be in all probability able to work out a program with CBS. Is that correct? A. Yes. It would look very interesting to them as an alternative to or as a substitute to them for the Lansing outlet.

* * * *

[Tr. 1489]

Thursday, February 28, 1957

* * * *

[Tr. 1490]

JOHN F. PATT

resumed the stand and testified further as follows:

CROSS EXAMINATION (Resumed)

By Mr. Wilkinson:

* * * *

[Tr. 1492]

Q. Now, apparently in that discussion you considered the pros and cons, the economic necessities, and then the legal problems, is that correct? A. In the telephone conversation?

Q. Yes. A. My recollection is that I simply called him and told him that we were getting nearer to a possible decision to make some kind of a move, that we had suggested one or two new transmitter sites to the networks, and that I would like to now see a copy of the MP form which I had been told in my July meeting was the proper form for us to file.

And I think I asked Mr. Rollo on the phone to send the financial portion to Mr. Siebert, the technical portion to Mr. Jones, and the rest of it to me.

Q. I see. And from the letter, that would indicate that that conversation was held apparently on Tuesday, August 17, '54, August 19 being a Thursday? A. That is correct.

Q. Now, was your counsel reluctant to see you file? A. Yes, very.

[Tr. 1493]

Q. Now, what was his--what was the reason for his reluctance as he explained it to you? A. Because he felt that it would involve possible further litigation. I think he eventually conceded when I talked to him about it that we had some serious economic problems which perhaps outweighed the considerations of the advice not to file for a change which he had given to me.

Q. So you compromised; a compromise became necessary between the economics and the legal advantages, is that correct? A. Yes, sir.

Q. Now, was there any discussion by your attorney and by yourself that this application, if it ran into difficulty, you might dismiss it? A. I believe in that letter you just showed me that the counsel suggested that as a possibility.

* * * *

[Tr. 1495]

Q. Now, did you give instructions to the pertinent personnel of WJR organization to be prepared to file such an application, be in a position to file such an application shortly after the petitions for reconsideration was acted upon? I'm not thinking of the 30-day business right now, whether you wait 30 days or not, but were they to be prepared to file an application as soon as action was taken by the Commission; were such instructions given? A. I believe so. I don't recall the exact date of those instructions, whether they were in September or August; but it was in that general period.

Q. Well, because of the indefiniteness of your answer that you merely believe, I show you again your letter from Mr. Rollo to Mr. Jones, of August 19, 1954; and was your attorney correct in his statement that, "In talking with John Patt on Tuesday of this week he advised me that he desired to have an application ready for filing immediately after the Commission acts on the pending petition for reconsideration," and so forth? A. Since he wrote that, I'm sure that that was the fact.

[Tr. 1498]

* * * *

Q. Why did you want a meeting at that time with the Flint Citizens Committee? A. I was very much concerned with out over-all public relations problem with the Flint community and in particular the members of the Citizens Committee who had been active in spearheading a drive for petitions, for resolutions, for letters to be sent to the Federal Communications Commission in June and July. I was very cognizant of some weekly broadcasts on WFDF which were not favorable to WJR's application. I was concerned about the publication of certain articles that appeared in the weekly newspaper--the Flint New Advertiser; all leading to the impression that WJR was proposing not to be a Flint station but

[Tr. 1499]

to be a Detroit station. And I wanted to meet with that committee to give them further assurances of our plans and to tell them now that we had made a decision to move our transmitter site northward. In other words, they had approached us on May 19th, and we had told them at that time that we had no plan or intention of moving our transmitter site. As I have previously testified, I wanted them to be the first to know that we were according our plans for a transmitter to the request they made in May.

Q. What did you hope would be accomplished by this meeting? A. Simply to try to build up a little friendship or good will. We were somewhat amazed that a group of leading businessmen would take it upon itself or upon themselves to try to fight the efforts of our company, which has always been interested in the good will of the community, in the communities that it served, to try to prevent that company from coming in and investing new capital and being a part of the community. We wanted, in other words, to try to get a welcome from them.

Q. Did you hope they might withdraw their opposition at the Commission? A. Well, if that could have been accomplished without it being suspected that WJR had anything to do with it, certainly we would have had no objection. In other words, had

[Tr. 1500]

they done it voluntarily.

But since they offered to do it at that meeting, after our representation that we were moving our transmitter site northward, and we then requested that they do nothing about it; at that time I felt that the petitions for reconsideration would be decided in a matter of comparatively short time, perhaps a few weeks at the most, and I didn't want any meeting or discussion or effort on our part to be a part in influencing them to make that belated decision to do that. As I think I have testified, they would have done so; they offered to do so.

Q. But you asked that nothing be filed by them at that time? A. Yes.

* * * *

[Tr. 1503]

Q. You stated in that letter: "We are trying to keep as many things identical as possible, and to that end we will

[Tr. 1504]

work toward identical local programming, although CBS Network programs will be substituted for Dumont."

Now, Mr. Patt, my question on that statement--

Mr. Rollo: That is the same letter, is it not?

Mr. Wilkinson: Yes, sir.

By Mr. Wilkinson:

Q. When was that decision made to keep as many things identical as possible? A. I presume sometime prior to this, but not very much prior.

Q. Probably by a telephone conversation with your attorneys? A. Very likely.

Q. You are unable to pinpoint the date? A. Not at the moment, I have no recollection.

Q. And in that same letter had you made a decision--and I quote: "For the present we are including only those network shows that are on WJIN-TV, not WKNX-TV"? A. Yes.

Q. Now, what was the reason for that decision, Mr. Patt? A. Well, in our discussions with Mr. Ackerburg, and I think specifically when he called me in answer to my letter of August 31st, I asked him, was it our understanding that we might consider, that we might contemplate being a substitute for the VHF station that they had in Lansing -- WJIM-TV, which was not

[Tr. 1505]

carrying very many of their programs "live", and he said yes. I asked him if his contemplated commitment to us involved dropping WKNX-TV at Saginaw, which we could completely surround, and he said no, we will continue our affiliation with WKNX-TV.

* * * * *

[Tr. 1518]

Q. Mr. Patt, did you on September 23, 1954, and I show you a copy of your letter to Mr. Rollo of that date, submit to him a draft of a press release that you proposed to issue when the MP modification was filed? (Document handed to witness) A. Yes, sir.

Q. Did that draft that you submitted go through a number of modifications in the ensuing months? A. I don't recall that it went through any number of modifications. I think it was abandoned as a press release and subsequently another one was drafted in December when the statement was published as an advertisement. I don't recall that anything there was used.

Again, this was simply an attempt on my part to cover a loss

[Tr. 1519]

of bases at the same time and be prepared for what I hoped was an early announcement of the decision on the petitions for reconsideration.

Q. In your original draft accompanying your letter of September 23 to Mr. Rollo, did you discuss service to Saginaw and Bay City as well as Flint? A. My "clumsy draft," as I referred to it in my letter of September 23rd, included Saginaw, Bay City, Midland and Lanson. That, however, service to those areas, was our purpose from both transmitter sites.

Q. However, from the original site at Clarkston, you would not have put it in a Grade A, or city-grade service into either Saginaw or Bay City? A. No, I think they would be on the order of Grade B or better.

Q. And, of course, from the Chesaning site, you put city grade into both Bay City and Saginaw, is that correct? Your understanding? A. I believe into Saginaw. I am not sure about Bay City.

* * * *

[Tr. 1526]

Q. So on October 25th, 1954, you were planning to wait thirty days between the announcement of the grant and the filing of the MP? A. I believe so.

* * * *

[Tr. 1617]

Monday, March 25, 1957

* * * *

[Tr. 1618]

Mr. Wilkinson: Mr. Examiner, I have a statement to make. My engineer is not here yet. I expect him almost momentarily. And rather than take up an engineering matter--I have a problem about the testimony of Mr. Edwards. I have submitted to other counsel in this proceeding a copy of a proposed stipulation. I have sent a copy to the Examiner. Has he received it?

The Presiding Officer: I have not, Mr. Wilkinson.

Mr. Wilkinson: In the stipulation I proposed, in order to expedite this hearing, that the parties hereby stipulate that the testimony of William J. Edwards, president and general manager of Lake Huron Broadcasting Company, licensee of WKNX-TV, Saginaw, Michigan, and the testimony of Mr. Paul Maury, economic consultant for WKNX-TV, in so far as such testimony is reflected in the Examiner's findings in Paragraphs 118 to 126 of his initial decision, in Docket No. 11412, 13 RR 763, 807-A-10, shall constitute a part of the record in the instant proceeding, Dockets No. 10268 and 10270.

Now, I have been in touch with Mr. Rollo and other counsel in this proceeding. Mr. Rollo does not believe that this testimony of the effect of the Chesaning site and the acquisition of a

[Tr. 1619]

CBS affiliation by WJR on WKNX-TV is relevant under the issues in this proceeding. However, if the Examiner rules that such evidence is relevant and material, it is my understanding that Mr. Rollo would agree that if Mr. Edwards were called, and Mr. Maurey, that they would testify as they did in the protest hearing, and would not insist on recross-examination, and would consent to the stipulation. That is on the assumption that the Examiner first ruled that this evidence is material to the present issues.

Now, counsel for Trebit and Butterfield did not have an opportunity of cross-examination of these witnesses, as did other counsel in this proceeding. They have taken the position, of course, that WKNX-TV should not be in here as an intervenor, should not offer any evidence of any kind. But is my understanding that they, too, do not insist on any right of cross-examining Mr. Edwards or Mr. Maurey in the event that the Examiner would rule that this evidence is relevant and material, and would be willing to enter into a stipulation along this line.

Therefore I would like, with the Examiner's permission, to address myself for about five minutes to the question of whether the economic effect and the public service effect of this change of site from Clarkston to Chesaning on WKNX-TV and the acquisition by WJR of the CBS affiliation -- whether those effects would be relevant and material to the issues in this proceeding.

[Tr. 1620]

Mr. Fitzpatrick: Mr. Examiner, I don't know what the purpose is of Mr. Wilkinson addressing himself to this question. But I will state on the record now that he has not gotten in touch with me on this point, and I have not the slightest idea what is contained, at this moment, in Paragraphs 118 and 126, and certainly if the purpose is to discuss the merits of this, I think that this is the wrong time to do it.

The Presiding Officer: Well, I certainly feel, Mr. Fitzpatrick, that you should be advised in advance of the matters that are going to be considered in this argument. I don't suppose Mr. Wilkinson has any intention, except that you are advised that way. Mr. Wilkinson, what about that? Can we defer any further discussion until Mr. Fitzpatrick at least has had a chance to--

Mr. Hancock: Mr. Examiner, as Mr. Wilkinson said, he and I did talk about this this morning on the phone. I had just then received his letter with respect to this matter. I told him at that time that I had not read these paragraphs since his letter was written, and I would try to read them before the hearing, but I did not have time to read them. So I, too, do not know exactly what is in those paragraphs.

We had agreed, as Mr. Wilkinson stated, that we would try to work out some sort of a stipulation, and that if we could, it would not be our disposition to require cross-examination of these witnesses. But frankly, I am in somewhat the position of

[Tr. 1621]

Mr. Fitzpatrick. While I know generally what is in these paragraphs, I have not had a chance to restudy them and decide in my own mind their impact, if any, on this proceeding.

Mr. Wilkinson: Could I state, Mr. Examiner, that these paragraphs of the Examiner's decision in the protest hearing, of course, relate to the testimony given by Mr. Edwards; that in the event that JRT is permitted to move to Chesaning and evidences a distinct intent to go ahead at Chesaning, that it is his intention and plan to sign WKNX-TV off the air, because when they get the CBS affiliation, even though we might retain a paper affiliation at Saginaw, that we would lose, of course, the network programs, because the record shows in this proceeding, as it did in that proceeding, that our coverage circle is entirely embraced in WJRT's coverage circle from the Chesaning site; and that therefore we would be thrown off the air, and Saginaw would be without a station.

Now, all that I am trying to get this morning is whether such evidence along that line would be material. And I did not want to be in the position to have to go to the expense of bringing Mr. Edwards here and Mr. Maurey if the Examiner is going to rule that such evidence is not material; and conversely, I did not want to be in the position, as I understood, as soon as this engineering is in this morning, from our last stipulation, that it is up to us then to go forward--and I don't want to be in the position of not having my witnesses here and running

[Tr. 1622]

into that technicality.

So I thought if we could dispose of the preliminary question, whether the Examiner is going to rule such evidence to be relevant, then we would get together and finish up the stipulation, because Mr. Rollo indicates if the Examiner rules this is material, he is willing to go along, and it is my understanding the other persons would, too, except I had not conversed with Mr. Fitzpatrick. I knew Mr. Fitzpatrick's position, however, from various objections and comments made along the way in this proceeding, that he would probably object, as I understood it, to such evidence coming in. But I did not assume that he would want to further cross-examine these same persons in the event that the Examiner ruled that such evidence was material, because the Broadcast Bureau cross-examined those persons the last time in the last hearing.

Therefore, that is the reason, while I was waiting for my engineer, who I see just arrived, I thought we might get that out of the way. If the Examiner rules it is material, we will get together and finish up the stipulation and not delay the hearing. On the other hand, if he rules that it is not relevant, I would make an offer of proof. But I would know where I stand, whether it is going to be necessary to call Mr. Edwards and Mr. Maurey and have them here when they conclude in the next hour or two their testimony on the direct part of the case.

As I understood from the last session, Trebit and Butterfield

do not propose to put any evidence in. So that is the reason I would like to address myself to the question, is this kind of evidence material and relevant, and then we can go ahead with the question, knowing what your ruling is, whether to adopt verbatim these paragraphs that I have mentioned, 118 through 126 of your initial decision.

If there are particular words in there Mr. Fitzpatrick would object to, we can confer on those and so on at that time, if you rule.

Mr. Dempsey: May I say a word, if the Examiner please. We have agreed in principle, I suppose, is the way to put it, that if Mr. Wilkinson wants to offer testimony in the form of a stipulation stating that a certain witness if called would testify in substance as follows, and the matter is not one where we had any concern for cross-examination, although we might have objection to relevancy and materiality, we would not object to entering into such a stipulation. The form of this one seems to be somewhat different and to be objectionable. One of the grounds that it is objectionable as a stipulation, one of the grounds we discussed, was our concern about bringing the protest proceeding, by record, by finding, by anything else, into this and made a part of this one. But if the purpose is just to get a ruling on relevancy and materiality of this line of material, I have no objection to Mr. Wilkinson proceeding. I just wanted to assure him and you that we were not committed

[Tr. 1624]

on this stipulation. And we also do have evidence that we are going to present on engineering.

Mr. Wilkinson: On engineering--yes. I might say to Mr. Dempsey on this that rather than copy Paragraphs 118 through 126, and say Mr. So-and-so would testify as follows if called in this proceeding, I thought that the simplest way of getting this before the Examiner was to put it in this form for the purposes today. If Mr. Dempsey prefers I spell it out in the terms of copying almost verbatim exactly your findings on the scope of Mr. Edwards' testimony, then of course I am perfectly willing to make it six pages rather than a one-paragraph stipulation.

Mr. Dempsey: I don't care if you clip it out of the old decisions or have it copies in the record, just so long as we are not stipulating that that decision in any of its aspects is binding here.

Mr. Wilkinson: Well, this is not intended along that line. It is merely intended to state that if called, in so far as his testimony is reflected in these paragraphs of the decision dealing with economic matters, that he would so testify again, and that such testimony could be considered as part of the evidence in this record.

Now, I am willing to go ahead and argue this, as long as we have started it, or I am willing to defer it, whichever way the parties wish.

Mr. Fitzpatrick: I was not even on notice that we

[Tr. 1625]

were going to discuss the question of relevancy, but I think Mr. Wilkinson has taken a reasonable approach as to what my position would be, and he has searched my mind, and he has come up with the correct conclusion. So if we want to argue it, I have no objection to arguing the question of relevancy now. Everyone knows what my position is.

The Presiding Officer: The point is we are going to delay the taking of engineering evidence, which was on the agenda this morning. Do you have any objection, Mr. Wilkinson, to deferring this argument for some time, then, so we can get finished?

Mr. Wilkinson: Not at all, Mr. Examiner. My engineer is here now.

The Presiding Officer: Let's defer argument on that point, then, sir, and we will go on with the engineering testimony this morning.

*   *   *   *

[Tr. 1663]

(Discussion off the record.)

The Presiding Officer: * * *

[Tr. 1664]

* * * Have we deferred the matter Mr. Wilkinson brought up long enough so that you are ready, gentlemen, to consider Mr. Wilkinson's argument?

Mr. Fitzpatrick: We are no more ready now than earlier this morning. We have all been busy here. I thought the only thing we were going to discuss now was the question of relevancy. My understanding is that these two witnesses testified about economic injury, is that correct? If I am wrong, I am not prepared to talk about anything. I would have to read those paragraphs.

Mr. Cohen: We have not read them.

The Presiding Officer: What Mr. Wilkinson said, of course, is an accurate paraphrase of the finding.

Mr. Fitzpatrick: The Examiner is familiar with what the paragraphs would be.

Mr. Eagan: I thought it had been agreed he was going to argue the question whether alleged economic injury is relevant under these issues. And I would just as soon dispose of that now.

The Presiding Officer: If you gentlemen are ready to discuss it, certainly we can take the time to do it now, while we are here.

[Tr. 1665]

Mr. Fitzpatrick: I have not seen the stipulation, through no fault of Mr. Wilkinson's. It has not come through our office yet.

The Presiding Officer: Can we consider the relevance of economic injury to KNX under the issues of this case. Now, apart from the contents of the stipulation, if any were to be entered into, assuming that this evidence is relevant--can we consider whether the evidence is relevant under the issues. That is is economic injury to KNX, the fact that KNX will go off the air if WJR is granted, relevant matter for consideration. Are you ready to discuss that, or would you rather--

Mr. Fitzpatrick: Maybe if we come back at two o'clock, that would be better.

The Presiding Officer: Is that convenient to other counsel?

Mr. Cohen: If we are going to argue it, let's do it now. Our position is clear. We have made it before, and we will make it again. We don't believe he is legally in the room.

The Presiding Officer: Mr. Fitzpatrick, are you prepared to argue the question of relevancy now?

Mr. Fitzpatrick: In my own opinion, it is not going to require any extensive argument on my part.

Mr. Wilkinson: I don't think it will take over five or ten minutes on my part.

[Tr. 1665]

Mr. Examiner, I prefer, however, not to label this economic injury to WKNX-TV. I think it should be in the posture of the

[Tr. 1666)

effect of the change of site from Clarkston to Chesaning, and the acquisition of the CBS affiliation upon an existing operation in Saginaw, whether that station would be required to fold, leaving the city of Saginaw without a station of its own. In other words, I am not offering this evidence for the purpose of showing that we are going to lose $500,000 or anything, but the public interest aspect, should Saginaw be left without a station.

Now, this is a comparative hearing, further evidence in a comparative hearing. In the first hearing, the sites were discussed here this morning. WJR's site was some 20 miles or so southeast of Flint. And they did not get a Grade A signal into the Saginaw-Bay City area. The present site, north of Flint, within ten to twelve miles of the boundary of Saginaw, they put a city grade signal into Bay City, Saginaw, and Flint. In fact, they put a stronger signal, their own witness testified in response to a question of mind, over Saginaw, than they do over the city of Flint.

I think the record is clear that from the Clarkston site they do not get a CBS affiliation. However, by moving it away from Detroit, northwest, to Flint, they have been able to get a CBS affiliation, which is a network with which WKNX-TV is affiliated.

My witness, of course, would testify, while we might retain a paper affiliation with CBS, nevertheless, as shown by the engineering exhibits, with our UHF contour completely embraced

[Tr. 1667]

within WJRT's contour, from the Chesaning site, we would not, of course, get any national programs, any national spots, and that in turn would affect our audience and our local programs.

Now, it seems to me that under Section 309 of the Communications Act, the first thing the Commission has to do is determine whether a grant is in the public interest. If they cannot find it is in the public interest, they have to order a hearing. And the ultimate issue in every hearing ordered is whether the grant will serve the public interest, convenience and necessity. And that is presumably what this hearing has involved.

Now, the Court of Appeals has held in the case of Great Western Broadcasting Association against the FCC, 68 FCC, and I am quoting, "In any case where it is shown that the effect of granting a new license will be to defeat the ability of the old licensee to carry on in the public interest, the application should be denied, unless there are overwhelming reasons of a public nature for granting it."

The Presiding Officer: What is the date of that case?

Mr. Wilkinson: The date of that decision is 1941. It is a pre-Saunder's decision. But I do not construe that the case is overruled by any dictum in the Saunders case. In fact, in Democrat Printing Case, which is a post-Saunders decision, the court used much similar language. And the Democrat Printing is '48, '49, '50, somewhere along in there. The court said, "The mere loss of profit to an existing station would not, of

[Tr. 1668]

course, be an adequate basis for denying a license to a proposed station. If, however, the result of the grant to the proposed station is to make it financially impossible for an existing station to continue its operation, or maintain a high level of service, the resultant loss of service might be adverse to the public interest, and therefore warant denying the new license."

Now, it is our contention that under the former hearing, this question of whether a station in Saginaw would have a station of its own did not enter into the picture, because at the old transmitter site, there was no CBS problem, we would have retained our CBS affiliation, there would have been no problem. But by moving it northwest to Flint, into an area where they have a stronger signal in Saginaw than they practically have in Flint, they are getting a CBS affiliation, taking away the CBS programs from us, and therefore I think it is material to know in the public interest whether Saginaw is going to be left without a station; whether the public in Saginaw, which presently has a station of its own--Bay City has a VHF of its own, Flint will have a VHF, if it goes to Butterfield, or Trebit would have a VHF. And in this way, if the old Clarkston site were granted and found to be preferable in the public interest, there would still be grants to each of these cities. But by going up to where they are going now, it will mean that there will be stations in Detroit, Flint and Bay City, but no station in Saginaw.

The Presiding Officer: What about the section of the

Communications Act which was intended to take care of the Pottsville situation?

Mr. Wilkinson: 402(h)?

The Presiding Officer: Yes.

Mr. Wilkinson: It seems to me that the court has sent this back for further proceedings not inconsistent with this opinion. In other words, they have directed that a further hearing be held in this case to determine the public interest. Now, the Commission, in that ordering of further hearing, has asked you to take into consideration the matter, this additional evidence, and then to determine in the light of the evidence adduced under the issues specified, whether the grant should be reconsidered on a comparative basis and should be granted.

Now, one of the factors to be taken into consideration is this change of transmitter site. And I think that consequences of this transmitter site change is what I am asking to bring into the picture here through Mr. Edwards and Mr. Maurey, the consequences of that change of transmitter site as far as the people of Saginaw having a station of their own.

I think that is relevant under the issues, and certainly relevant under a public interest determination to be made in this proceeding.

The Presiding Officer: What did the Commission say when they permitted you to intervene, Mr. Wilkinson ? Is there anything there that lends any strength to your argument?

[Tr. 1670]

Mr. Wilkinson: Well, they allowed us to intervene notwithstanding 402(h) and the Pottsville. However, in fairness to the other side, when they came along later, on our request for clarification of issues, and also for expansion of issues, they do make reference to 402(h) in very cryptic language in which they say, for reasons already stated, which I have never found out just where they were previously stated--

Mr. Eagan: Paragraph 6 in the order they released September 17.

Mr. Wilkinson: Yes. But whether they are talking about our request for enlargement--I am not asking here for enlargement of issues. I feel under the issues that effect the transmitter site change, these are in here.

Let me give you an AM illustration. Supposing we had three applicants here--Trebit, Butterfield and WJRT, applying originally for an AM facility on a regional frequency, with the same sites that they specified in the original hearing. No interference to other stations on the facility. So that problem does not arise in the first hearing. The applicants are considered on a comparative basis and various other factors, and the Commission grants it to JRT. It goes to court, like it did here, and is reversed. And they come in the second time with a new site, changed from some 20 miles south of the city to 20 miles northwest of the city, and at this time they start causing interference--not prohibitive or mutually-exclusive

[Tr. 1671]

interference with an existing station, but substantial interference. So there is an issue here on transmitter site and the consequences of it.

The Presiding Officer: Of course, there is a specific rule of the

[Tr. 1671]

Commission, 3.24(b), which takes into account situations like that.

Mr. Wilkinson: Well, I think that 307 (b) of the Act and 309(a) of the Act, on public interest, likewise require us to take into account the legal consequences of this change of site on the multitude of services and local public stations. Now, as the Examiner has held in the protest point, when the applicants are there, from the protest angle, if the site meets the Commission's standards, and so on, then the fact that the channels have been allocated to these various cities, the Examiner has perhaps no choice, he ruled in that case, in the protest case, about even the consequences of knocking Saginaw off the air. And that may be true in a transfer case, where a person meets minimum qualifications. It may be true in a non-competing case, where there is no interference. But if there is only a minor amount of interference, where there are two applicants with one proposing one site and another proposing another site in AM, only one of which causes interference, then we get into a different problem of where comparative factors come into play, where one of the applicants will not have this adverse public interest consequence, but where another applicant will have that

[Tr. 1672]

adverse public interest consequence, such as interference or loss of service. Then that becomes a comparative factor which could be weighed, just like newspaper ownership--the fact that somebody has previously violated the antitrust laws or factors of that kind could be weighed comparatively, where they would not be absolutely disqualifying factors in a protest hearing.

And therefore it is my argument that because of this tremendous change in site location, that you have new public interest factors coming in here, under this transmitter change, that can be considered in a comparative hearing, where it would appear that those consequences would not flow from a grant of either of the other applicants which will flow from a grant to a group that proposes CBS, has an agreement here with CBS that they will have an affiliation when they get there, and the natural consequences of that--whereas the other applicants are NBC proposals, the location is further south and further away, they do not put a stronger signal into Saginaw. And I think this evidence is material to the comparative weighing which the court has directed that this case go back for a reweighing in the light of the evidence that flows from the change of location.

Now, just one final point. I think that recent developments on deintermixture, where the Commission is now on record on the economic consequence of intermixture and so on and so forth, that the Commission could almost take official notice of what the consequences would be if JRT gets a grant at Chesaning with

[Tr. 1673]

a stronger signal in Saginaw, if they get our CBS affiliation, the economic consequences--not the economic consequences, but the consequences to the city of Saginaw in their own local outlet. They could almost take judicial notice of that, certainly under Davis's concept of the scope of judicial notice. But that wouldn't give them an opportunity to reply to it. So therefore, I propose to have no question about the scope of judicial notice, because I don't want to be turned down here that I did not offer it, or turned down that it is not in in an adjudicatory record subject to cross-examination by the parties--that I be allowed to produce the evidence that Mr. Edwards and Mr. Maurey gave in the protest hearing. And as I understand Mr. Rollo's point, if you order, if you decide this is relevant and material on the public interest issue, and the consequences that flow from the change of transmitter location, then he would stipulate, without recalling these witnesses, that Mr. Edwards would testify so and so, as he did in the first hearing, subject to cross-examination. Now, as I understand the other two parties, they say I should not be here at all--I should not have been allowed in.

The Presiding Officer: I cannot understand why they don't welcome your aid at this point, but that is a matter for them, of course.

Mr. Dempsey: I would hate to win on the merits and get fouled up in court.

Mr. Wilkinson: I think under the ruling that you gave, that we

[Tr. 1674]

would have to look at the present ownership, we cannot close our eyes to this on WJR, the logical, almost judicial notice consequence of the change of transmitter location, and the change of this transmitter location is one of the specific issues here--that the consequences that flow from that become a comparative factor that should be considered.

The Presiding Officer: Should I now call upon Trebit and Butterfield, or should I--

Mr. Dempsey: If the Examiner please, we can state our position very briefly. One--we think that the Commission was wrong under 402(h) to permit the intervention; and two, in permitting any issue to be put into this record, other than those clearly encompassed within the court's opinion, and this is not one of them.

Mr. Cohen: We concur.

The Presiding Officer: All right.

Mr. Eagan: I concur with what Mr. Dempsey said, and I go just a little further. Whatever it is wished to be characterized as, it is an alleged economic injury from which certain alleged results flow. And as Mr. Dempsey stated, it is clearly not within the issues set forth in the Commission's hearing order released herein, in October 19, 1956. This has never been an issue in this proceeding prior to the appeal. No such issue was raised in the December 28, 1954 joint petition for rehearing. No such issue was raised in any of the appeals for the denial of

[Tr. 1675]

that petition. No such issue was raised or referred to in the court's decision which ordered this rehearing.

As the Commission has clearly said in previous orders in this case, Section 402(h) prohibits an argument of the issues beyond what the court ordered.

As I have already said, Mr. Dempsey has said, this was not one of the issues ordered by the court.

Now, in addition to that, I would like to point out that Mr. Wilkinson's petition to enlarge the issues specifically requests such an issue, and the Commission's order released herein on January 24, 1957, specifically denies enlarging the issues to include this so-called economic-injury-plus issue.

I would also point out that recently the Commission has issued a final decision in the Cleveland-Tennessee case.

The Presiding Officer: I was going to ask about that.

Mr. Eagan: In which they held that they had no authority to consider the effects of legal competition.

The Presiding Officer: Of course, Mr. Wilkinson's request is not limited to the economic effect upon KNX, but to the fact that--

Mr. Eagan: That is the first premise. You get nowhere unless you have that, and that is the very thing the Commission ruled in the Cleveland-Tennessee case they had no authority to consider.

The Presiding Officer: I have not read that decision yet.

[Tr. 1676]

I have just heard about it. But--

Mr. Eagan: It has always been clear that economic-injury-period cannot be considered, and this Cleveland-Tennessee case says that economic-injury-plus cannot be considered, either. It is a square ruling on the so-called dicta in the Sanders case.

The Presiding Officer: Of course, in that January 24 memorandum, opinion and order, the Commission, at Paragraph 11, said, "We regard Section 402(h) as limiting our authority to add or delete issues in the remand proceeding." Now, what did Lake Huron ask in that decision which was denied? Does it cover the same matter you are now covering,

Mr. Wilkinson?

Mr. Wilkinson: We asked for a clarification of the issues, and enlargement. And we felt that we were not giving up our contention, that it was not within the present issues, but we wanted to remove any doubt on the point.

Mr. Eagan: The Commission rule removed any doubt. It asked for a specific issue, No. 8, in their petition, on page 5--it asked for the so-called economic-injury-plus issue, and the Commission denied it.

The Presiding Officer: In view of that, am I precluded from, in effect, overruling the Commission, or would I be overruling the Commission if I held that this evidence were relevant, if it were pertinent, Mr. Wilkinson?

Mr. Wilkinson: I would certainly not construe it that way, because I think the mere fact that the Commission considers a

[Tr. 1677]

petition for enlargment or clarification a person files out of an abundance of caution--otherwise he takes a terrific risk of arguing, not coming in, that it is turned down on general principles, as it is here in one cursory paragraph, without any explanation, that this is not precluding the Examiner from allowing in matters which are clearly as he construes appropriate under the existing issues.

Mr. Eagan: But the question is what did the court order in the rehearing. They ordered nothing like this, and it is not included in that.

I would like to just complete the argument. One, you would be overruling the Commission if you were to consider such evidence relevant. I don't think there is any question about that. And also I would like to just touch briefly on another aspect of what Mr. Dempsey said, that Lake Huron's petition to intervene should never have been granted. In my opinion, it was much too late. And Mr. Wilkinson understandably made no reference to the fact that in the 1952 hearing, it was quite clear from the record, quite clear from the application of Trebit, that they would cover the city of Saginaw with the 77 dbu as city grade signal, which is what our application filed December 16, 1954 proposed. So this element of so-called economic-injury-plus was in the case, if it is relevant, at the start, and it should have been raised at that time, not four years late.

And I would also like to point out you can make the same

[Tr. 1678]

argument--that because of Trebit's coverage of Saginaw, they specify NBC--if they got NBC, WMEN, Bay City, could not keep NBC. So they would switch to CBS, and you would be back in the same boat they are allegedly in now. So in addition there is no showing there would be any comparative difference between the applicants in so far as economic injury goes. It is all in the realm of speculation, in addition to being not relevant.

If you go into this subject, you cannot stop there. You have got to go into all the other speculations, too.

The Presiding Officer: Are you finished, Mr. Eagan?

Mr. Eagan: Yes.

The Presiding Officer: Mr. Fitzpatrick.

Mr. Fitzpatrick: The parties, namely, Mr. Eagan and Mr. Dempsey, have pretty well exhausted the argument, and I agree with them. I don't think that the question is relevant to the issues as framed in the order that you have before you. Nor was it raised in the petitions to reopen the record for full rehearing which went before the court, which they ordered a remand on.

I, of course, will not comment on the question of intervention. I commented on it originally and said that Mr. Wilkinson shouldn't be in here, but I believe the Commission is now saying the court differs with my position. So I won't take any position on his intervention at this point. It has been ruled upon.

[Tr. 1679]

But I do think the issue is irrelevant, that the matter raised is not relevant to the issues as framed.

And I think also--I had also noted, as did Mr. Eagan, that this same type of issue was requested in the petition which was denied by the Commission.

The Presiding Officer: That is the point that bothers me, of course, Mr. Wilkinson, the one that Mr. Fitzpatrick just mentioned, and it has been mentioned by Mr. Eagan also. I feel, of course, that if I were free to consider this matter without any restriction, I perhaps would rule that, unlike the protest case, in a comparative case, what you have raised is a matter for consideration. But unfortunately it seems to me I am limited by previous rulings, cryptic though they may be, that the Commission has made.

The Commission said at Paragraph 11 of its January 24, 1957 order that, "We regard Section 402(h) as limiting our authority to add or delete issues in the remand proceeding." And it seems to me that an issue regarding the consideration of the effect of a grant to WJR upon the possible continuation of service in Saginaw would be a matter beyond the issues as they are now specified and beyond what the court considered in the appeal on which the present remand is being pursued, to which the present remanded hearing is being held.

Mr. Fitzpatrick: I don't think that they would even be relevant under the original issues in this proceeding, or any

[Tr. 1680]

comparative television case.

The Presiding Officer: Yes. In view of what Mr. Eagan has mentioned, I feel that is so, too. I believe, Mr. Wilkinson, that you have a point, that it should be a matter that should be considered, perhaps, but that is before the Cleveland case was decided. But I do not feel under the present issues and the present posture of the case I can consider that type of evidence. And for that reason, I will have to rule, then, that this evidence regarding possible loss to Saginaw of a UHF television service as now provided by KNX is not pertinent under the issues, and therefore it would be unnecessary to consider further the question of a stipulation regarding that matter.

Now, does that take care of that point, then, gentlemen? Do you want to have that as an offer of proof?

Mr. Wilkinson: Yes. I would like to express exception on the record to the ruling, and state that if I were permitted--and I assume nobody is going to put me to the expense of calling my witnesses in order to make the offer of proof--

The Presiding Officer: Oh, no. I am answering for that point.

Mr. Wilkinson: Therefore, I make an offer of proof that, if permitted, I would produce Mr. William J. Edwards, president and general manager of Lake Huron Broadcasting Company, licensee of Station WKNX, and Mr. Paul Maurey, economic consultant for WKNX-TV, and they would have given testimony similar to that

[Tr. 1681]

in the protest hearing, where they were subject to cross-examination by the Broadcast Bureau and by WJR, and that their testimony would have supported the findings which the Examiner made in Paragraphs 118 through 126 of his initial decision in Docket No. 11412, and I ask that the Examiner's findings in that case be made a part of the record in these proceedings, so reflecting such testimony.

The Presiding Officer: The ruling has already been made, then, and that will be the offer of proof, of course.

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[Tr. 1683]

Wednesday, April 17, 1957

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[Tr. 1684]

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ROBERT E. L. KENNEDY

was called as a witness and, after having been first duly sworn, was examined and testified as follows:

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[Tr. 1698]

CROSS EXAMINATION

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[Tr. 1699]

Mr. Eagen: * * * Now with respect to your Exhibit B, Mr. Kennedy, am I correct in stating that it demonstrates that each applicant--and I am including both of the WJR sites, Chesaning and Clarkston--would provide city grade or better service to the entire Flint metropolitan area?

The Witness: Are you referring to Clarkston and Chesaning only, sir?

By Mr. Eagen:

Q. No, I said each applicant. What I am saying is that all three applicants--and included in that is WJR either at Clarkston or at Chesaning--would

[Tr. 1700]

provide city grade or better service to the entire Flint metropolitan area. Isn't that shown by your Exhibit B? A. It is shown that WJR from Clarkston and WJR from Chesaning, Butterfield from their site, and WFDF from their site do provide 77 dbu or better to the entire metropolitan district of Flint, yes, sir.

Q. So the answer to my question is yes? A. Yes, sir.

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[Tr. 1708]

Q. Does this exhibit that you have rendered--Exhibits A and B--does it have any relation whatsoever to service? A. I don't see the word "service" used anywhere in the exhibit, Mr. Eagen.

Q. I don't see it either, but I ask whether any of the statistics in there can be related in any way to the question of who will and who will not receive service. A. I think that the exhibit shows that these various signal intensities are computed in accordance with the Third Notice and they show that those iso-service contours exist at the locations which are shown on the map, that the percentages of the areas between those contours are tabulated in Exhibit B and that by use of the Third Notice the number of receiving locations within those annuli receiving a given signal a given percentage of time is determined.

Q. Yes, sir. My question is: Does that have any relation at all to the question of who will and who will not receive service? I don't think that answers the question, Mr. Kennedy.

Mr. Dempsey: I object to the question unless Mr. Eagen describes what he means by "service." I would like to state in connection with the objection--and I am not being captious--we spent hours and hours at the earlier proceeding because a witness used the word "service," and the objection was that that

[Tr. 1709]

was a distortion and a misrepresentation of the Third Notice, that the notice and the Sixth Report alike carefully avoided the use of the word "service."

For that reason, the exhibits were reduced to statistical computations and, as I have said, I have no objection to the witness giving his opinion that it does or does not constitute service, but this wrangle turns on whether the Third Notice of the Sixth Report has construed it a service. If he says yes, they will argue it is a misconstruction of the Sixth Report, and that is entirely outside the scope of the direct and the purpose of the exhibit.

The Presiding Officer: Yes, Mr. Eagen. I don't think you should ask Mr. Kennedy to construe the Third Notice or the Sixth Report here.

Mr. Eagen: Well, who is there to ask? He is an expert engineering witness. He has based it on the Third Notice.

The Presiding Officer: The computations are based--

Mr. Eagen: I want to know what the computations mean, if anything. That is what I have just asked him.

Mr. Dempsey: He has just answered that question, Mr. Eagen.

Mr. Eagen: He has told me it is where certain signal strengths fall. I understand that. I want to know if from that you can conclude anything with respect to who will and who will not receive service.

The Witness: Mr. Eagen, the purpose of the exhibit was to

[Tr. 1710]

show comparatively the percentages of the area which received a given signal strength, the percentages of the locations within those annuli which would be computed by the Sixth Report to receive that signal strength or better. Whether that signal strength constitutes service or not I am not prepared to state.

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[Tr. 1726]

By Mr. Wilkinson:

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[Tr. 1729]

Q. Now the Chesaning site is closer to the City of Saginaw than to the corporate limits of Flint, is it not? A. Yes, sir.

* * * *

[Tr. 1738]

Mr. Ockershausen: Mr. Examiner, the next document, which is marked WFDF Exhibit D is a matter again presented in this form for convenience.

We could have asked that you take notice of a previous hearing record to bring these matters forward. The exhibit consists of excerpts from hearing record of WJR, Detroit, television hearing which took place in 1947 and '48, and it breaks down into two parts. One is a description of one of the WJR exhibits which is a WJR exhibit, as a matter of fact, describing the television programs which were proposed for Detroit. The next part of that exhibit consists of excerpts from Mr. Lydorf's testimony concerning WJR Fisher Building studios that were also proposed to be used in this proceeding.

Item Number 1, the proposed television programs which were in that record as having been proposed for the use of Detroit, are in a number of instances identical in title or verbatim described, the same in this proceeding as they were in the Detroit proceeding.

The Presiding Officer: And what inference do you ask to be drawn from that fact, Mr. Ockershausen?

[Tr. 1739]

Mr. Ockershausen: Mr. Examiner, one of the preferences, at least, one of the items of preference, given to WJR, at least that acquainted them with Trebit was the preparation of their program plans for Flint, and when you look back into that proceeding, we find that many of them were lifted out of Detroit, put in the Flint record, in the Flint application.

The Presiding Officer: Is this the sort of rehearing, a reconsideration of the matter then?

Mr. Fitzpatrick: I was going to raise that question, Mr. Examiner. I am having some difficulty with this exhibit because if it is to show that the programming, particularly the local live, I believe it is, programming, proposed by WJR is similar to and was similar to the original proposal in the Detroit application, that would possibly have been relevant at the first hearing in this case.

The Presiding Officer: That is right.

Mr. Fitzpatrick: But the issues that we are proceeding under here now are the changes between the proposal as granted by the Commission and the proposal as encompassed in the modification application.

The Presiding Officer: Yes.

Mr. Fitzpatrick: Certainly it doesn't come within that issue. Now the only other issue is the question of misrepresentation and concealment. Unless it is argued it comes in some place under that issue, I fail to see its relevancy to this proceeding

[Tr. 1740]

we have before us now.

Mr. Dempsey: Mr. Examiner, we have extensive testimony in this proceeding by WJR as to how the programs were prepared for modification application.

The Presiding Officer: If it has some relevancy there, I would like to know what it is.

Mr. Cohen: Mr. Examiner, these program descriptions that Mr. Ockershausen has offered are program descriptions which are now currently advanced by this applicant under its changed proposal.

The Presiding Officer: Well, suppose they are?

Mr. Cohen: The fortuity that it also happens to be the one they had previously in this very hearing and many years back in Detroit is quite relevant.

The Presiding Officer: That may be, but what difference does it make? That is their good luck. I think that they don't have to think too hard.

Mr. Cohen: It has something to do with their great ingenuity.

Mr. Dempsey: And how they would tailor it to suit Flint.

The Presiding Officer: Mr. Fitzpatrick has reminded us of the question of the changes as a result of these various modifications. Now that here there is a similarity to the proposals of Docket Number 8648 or that something was said about the studio in 8648, I would still like to know where that is relevant to

[Tr. 1741]

the issues in this proceeding.

Mr. Eagen, have you any comment?

Mr. Eagen: Yes, sir. I agree wholeheartedly with what Mr. Fitzpatrick said, that this perhaps--I wouldn't agree to it, but perhaps could have been received at the first hearing.

Now there is no reason why they couldn't have presented it at the first hearing. There is nothing that has happened since then that brought this to their attention for the first time. But the important thing, as Mr. Fitzpatrick has already pointed out, is it has no relation to the issues which we are trying in this further hearing.

The Presiding Officer: I feel that is so. I feel--yes, Mr. Wilkinson.

Mr. Wilkinson: I would like to be heard on this, too.

The Presiding Officer: Certainly, sir.

Mr. Wilkinson: In support of the programming, as distinguished from the studio pages of this exhibit.

I questioned Mr. Faust at some length about his meeting here in Washington, sitting down at a hotel one meeting and preparing up a list of exhibits, but there was some question about some interviews and talking that had been done to tailor the program to the needs of the area.

Now we have been contending that they are coming up here with substantially the same programs for a location 20 miles south of Flint where they would cover Detroit with a Grade A signal, where

[Tr. 1742]

they had two or three million people in that area, that they are losing those people now and moving 20 miles northwest of Flint, getting into Saginaw and Bay City; and in order to make a comparative decisions here, are these new programs in the M. P. that were devised here in Washington by Mr. Faust, and so on, are they tailored to the needs of this area north, and so on, of Flint, or are we competing for practically the same programs that they once proposed when they were in Detroit proper, or when they were at the first stage of the proceeding in the first hearing down at the Clarkston site?

And I think that since these are the same program titles, the same program descriptions that are included in the new program exhibits that have been received here on the M. P. or to the extent that we can compare them and read and show that it becomes very material whether these new programs now are tailored to include Flint and Saginaw or whether they are just still the same old programs they had in Detroit when they never would have covered Flint and Saginaw at all--

The Presiding Officer: Well, what does it prove if we know that they are the same programs?

The question is: Are they adapted to the new area? not whether they were also adapted to the old area. That may be a fortuitous circumstance, and WJR is not to be deprived of the benefit, if there is any, of these programs merely because they were adapted to Detroit. They may be of universal application;

I don't know. But merely to show that they were proposed when they wanted a Detroit facility doesn't mean they are not also adapted to the Flint area and perhaps even the Flint-Saginaw area.

Mr. Dempsey: If the Examiner please, we offered the exhibit in the hope you would pass on that very question--I think it requires study of the exhibit to know whether they are universally applicable or whether they are not--and if there isn't an objection to receiving it that you might in considering it find they are universally applicable.

The Presiding Officer: I don't know, Mr. Dempsey, that I will learn anything by reading the descriptions of the programs in 8648 here. The problem is the description of the programs in 10268, not in 8648.

Mr. Dempsey: If the Examiner please, we have had a great deal of testimony from Mr. Faust and how he prepared them. He was told to prepare them to cover this area. We think this has an important bearing on the actual preparation, and for that reason it is relevant.

The Presiding Officer: I see. You feel it goes to the question of whether Mr. Faust actually determined the needs of the Flint area and whether he sat down to fulfill those needs or whether he merely copied something that was in 8648.

Mr. Eagen, have you any comment on that, sir?

Mr. Eagen: I don't think it is responsive at all to the

[Tr. 1744]

issues we are trying here. The local live program proposes were not prepared originally by Mr. Faust. They were prepared and described in an initial hearing at which time this might have been relevant, but it is not relevant now.

The testimony shows that Mr. Faust took the local live proposal that had been set forth in this hearing.

The Presiding Officer: I see. Yes.

Mr. Fitzpatrick.

Mr. Fitzpatrick: I still feel somewhat similar to Mr. Eagen on this point. I think Mr. Faust did take the original proposal and did make some changes.

The Presiding Officer: Surely; that is true.

Mr. Fitzpatrick: There has been no statement here--unless I haven't been paying proper attention--to the effect that the changes from the original proposal to the proposal of the modification are changes that show that he had been in on the modification adopted in the Detroit proposal.

What happened is that you had the Detroit proposal, then you had original, then you had this.

He worked from the original proposal by the Commission and changed it to the modification. It can be argued, as Mr. Wilkinson obviously is prepared to do and possibly--I don't know; I can't say whether the Broadcast Bureau would when you get to writing conclusions--that in changing and making the changes he did he didn't consider or WJR did not consider the question that

[Tr. 1745]

they were serving almost a completely new area in population in the Saginaw area, rather than down in Detroit. But it can be argued from the record as it stands now--

Mr. Dempsey: The point is precisely it can't be argued from the record as it stands now. When we were in the original hearing, WJR made quite a point it would cover Detroit. Obviously program points were a part of it.

Mr. Eagen: Mr. Dempsey, if we are going to characterize the record--

Mr. Dempsey: I am not characterizing the record. Actually Mr. Rollo made the statement he thought he should enjoy a preference because of the coverage.

Mr. Eagen: There was distinctly stated on the record time and time again that there would be no--

Mr. Dempsey: May I finish?

Mr. Eagen: The record is very clear on it.

Mr. Dempsey: The record is quite unclear. Mr. Faust declared in Detroit an audience outweighed many times over--

The Presiding Officer: That is in 10268, Mr. Dempsey, is it not?

Mr. Dempsey: If the Examiner please, in this proceeding on the original applications, programs because they had a Detroit flavor were not necessarily bad for a station that proposed to cover Detroit. Now we are considering a move so that there is no longer any possibility of Detroit coverage. We had extensive

[Tr. 1746]

testimony on the reformation of the program structure. The fact that one of the things that wasn't reformed were programs peculiarly designed and conceived from Detroit seems to have relevance, and for that purpose we offered the exhibit.

Mr. Wilkinson: I had asked Mr. Faust and other people about these older applications: "Didn't they first file for Detroit and then you filed for Flint? And it seems to me this is all part of the overall picture here.

Mr. Eagen: If there were any pertinency--and there isn't--it should have been asked of Mr. Faust when he was on the stand.

Mr. Dempsey: He was asked these questions.

Mr. Fitzpatrick: Mr. Faust wasn't familiar with--

The Presiding Officer: This compilation wasn't shown Mr. Faust. Now to try to introduce this, to me, it seems rather doubtful whether it is really pertinent at all. To introduce it at this time also seems to me to be unfair to WJR. Mr. Faust isn't here now.

Mr. Dempsey: We would be glad to have him come back. He said then he didn't know anything about it. I suppose he would repeat the same statement.

Mr. Eagen: So how does this relate to how he prepared any changes?

Mr. Fitzpatrick: Is the limited purpose of this offer to show that the original proposal here was tailored to Detroit and you will show it by offering this and then that shows that when

[Tr. 1747]

they made their modification which was tailored, should have been tailored to another area they didn't take that into consideration?

Mr. Dempsey: Mr. Fitzpatrick, we were not complaining in the original proceeding that WJR had tailored its network for Detroit. We contended that it was slanted heavily towards Detroit. We were not objecting to the fact that except that on a comparative basis we thought we should be preferred because ours was not. But the finding of Detroit programming in the WJR schedule in the original proceeding was to be expected.

To show that in moving up to Saginaw they have carried them forward is the purpose of offering them now.

Mr. Fitzpatrick: I will withdraw my objection, Mr. Examiner.

Mr. Eagen: If he has this question, he could have asked the witness on cross examination.

The Presiding Officer: Yes.

Mr. Dempsey: If the Examiner please, here it is: Preparations formally made to the Commission by WJR. If that isn't an appropriate offer of admission, why should we drag it out of the witnesses on cross examination? It is appropriate.

The Presiding Officer: One at a time, gentlemen. The reporter cannot get you when you talk in tandum.

Mr. Dempsey: I have never heard it said that admissions of opponents aren't proper to offer when it comes time to offer your case. Are they repudiating these as admissions? If they

[Tr. 1748]

are not, I think it is the appropriate time to offer it.

Mr. Eagen: That isn't the only question. The question is related to relevancy, and timing.

The Presiding Officer: The question in my mind is whether it has any real relation to the issues in this case. There is no question but a certain recommendation or proposal was made in 10268. This was the one, as I understood. It was based upon what had already been proposed in 8648. Why do we have to go back to 8648? And if we do go back to 8648, would I not be in a position then of reviewing what the Commission has found in 10268? That is not my function here.

As I gather it, my function is to determine what the effect of these various modifications is, not to review what the Commission has already found in 10268 in its final decision in that case, and here we are retrying, it seems--

Mr. Eagen: That is exactly correct. I suggest that we have a ruling.

Mr. Cohen: Why did we have this testimony from Mr. Faust?

Mr. Dempsey: Then all of it was irrelevant. None of it was your business.

The Presiding Officer: What Mr. Faust testified to, as I remember it, was the procedure that he adopted to prepare the program schedule in the modification application.

Mr. Cohen: And then proceeded to offer testimony and exhibits as to the content, the purpose, the reason, the type

[Tr. 1749]

programming, and this certainly relates to that very issue.

The Presiding Officer: It relates to programming, and under the general category it talks of programming, but I am afraid, gentlemen, that if we admit this description of proposed television programs I would be confusing the issues in this case.

I realize that you gentlemen are entitled to examine and to question the adequacy of WJR's preparations here, but I don't think we ought to go back to 8648 because that is already incorporated in 10268.

Mr. Cohen: Mr. Examiner, it is an admission wherever you find it. It is an admission if we find it in a newspaper in Flint. It happens to be in this document.

The Presiding Officer: You mean that they are looking to a Detroit--they prepared their programming with a view to serving Detroit?

Mr. Cohen: Exactly.

Mr. Hancock: This did not become important as far as we were concerned until the change was made.

Mr. Eagen: That isn't quite accurate because they were screaming like mad all the time at the last hearing that the big thing against us was that we were going to serve Detroit.

Mr. Hancock: And we argued that--

Mr. Eagen: This is not relevant to these issues.

Mr. Dempsey: Wait just a minute, if the Examiner please. The fact that we didn't prove all the things that we might have

[Tr. 1750]

proved to show WJR was going to cover Detroit and was geared only for Detroit doesn't seem to me to have any bearing on the question now of whether we should prove their new proposal was as much a Detroit proposal as their old one.

They are now attempting from a site where they don't even cover Detroit to get credit for programs designed only for Detroit, to use studios located in Detroit, to originate programs for a station that won't cover Detroit. That, I think, we are entitled to prove.

Mr. Hancock: Because this is still a comparative hearing.

The Presiding Officer: Yes, I see.

Mr. Eagen: But it is confined to the changes that occurred and what effect, if any, those changes have on comparison.

Mr. Hancock: We still have basic issues of comparison between the merits of our proposal in this case, though.

Mr. Eagen: I don't know that that is open for reconsideration.

The Presiding Officer: That is the thing that is bothering me, of course. It is a difficult question here.

Mr. Dempsey: Didn't Mr. Faust testify he was ordered to change the local live programs to conform them to the new area? Doesn't this indicate to what extent he made his confirmation?

The Presiding Officer: I see.

Mr. Eagen: I don't think it has anything to do with it. He already answered the question that he has no knowledge of what

[Tr. 1751]

was in this program.

Mr. Dempsey: I think it indicates he had no knowledge of a lot of things he should have known in preparing the program schedule.

The Presiding Officer: He testified he went to the programs in 10268 in this program itself and then tried to fit them into the new schedule. Now, basically, it seems to me that this proposed exhibit would show that in the original portion of this hearing, the first part of this hearing, WJR merely took programs that had already been proposed in an effort to serve Detroit in 8648.

Now I realize that there is a continuation of the chain of reason here that is if they used the same programming in the early part of 10268 as they used in 8648 and they now propose that, obviously they are proposing the same program they used in 8648.

But what I wonder now is am I confusing the issues in this case and in effect attempting to review what the Commission has already ruled upon in the original final decision in this matter?

Mr. Dempsey: If the Examiner please, there was an issue in the original hearing specified by the Commission to determine the extent to which the programs proposed would serve the needs of the communities and areas to be served. There is no question WJR served Detroit under its original proposal. Programs designed to serve the needs of Detroit were appropriately included

[Tr. 1752]

in the schedule.

Now it is a question of whether in the new proposal and considering the changes that were made, whether they have failed to accommodate themselves to the needs of the new areas in the communities and certainly an answer that ought to be answered under the present issue.

The Presiding Officer: Yes. But we have it in 10268. The programs are already shown. What they were designed to cover or to serve is apparent from the record in this case.

Mr. Dempsey: We are talking about an entirely different area.

Mr. Eagen: He can make this argument if he wants, but he is going to have to base it on the existing record.

The Presiding Officer: Yes. I don't see where we have to go back to 8648. I don't say that it doesn't have some relevance here, Mr. Dempsey, but I am saying only that it has so little relevance in comparison with the confusion that it would create in view of the issues of this case that I don't think it should be admitted. I think I would be put in the position of reviewing what the Commission or reconsidering what the Commission has done in 10268, that is, in its original consideration.

Mr. Dempsey: Sir, if you are not in position of reconsidering what the Commission has done in light of the changes and you are not permitted to understand the nature and extent and purpose of the changes, the extent to which they were real, the

extent to which they were fictitious, I don't see what your function is in this proceeding.

Mr. Eagen: I don't think that is responsive to what the Examiner has stated. I think he has ruled.

Mr. Dempsey: I don't think there has been a ruling.

The Presiding Officer: There has been no ruling yet. I have merely stated my views.

Mr. Fitzpatrick: I was going to say when the parties get to writing their findings and certainly when the Examiner gets to writing his decision in the case, he is going to have to look to see what the changes were in the local live programming.

I am picking that because I think this is addressed to the fundamental thing. He will have to see what changes were made in the local live programming in the modification. Then he will have to address himself, I should think, to whether or not the changes as they now exist, as now proposed, meet the needs of the community, the community and areas within the Grade A and Grade B intensity contours.

The Presiding Officer: All right. Now the Commission has already passed upon the programming, the description or various program descriptions, I suppose.

Mr. Fitzpatrick: Yes. The Commission found it met the needs of the communities and areas within the Grade A and Grade B contours.

How are you going to find out whether the proposals meet the needs within the now Grade A and B?

[Tr. 1754]

The Presiding Officer: I understand.

Mr. Fitzpatrick: I am not arguing the question of relevancy. I think it is a rather tenuous type of question here. That was the reason I withdrew my objection. I wasn't making my observation for the purpose of argument but just so we would have it all before us in one place.

The Presiding Officer: I see. Yes.

Mr. Dempsey: Do I understand the view expressed that had there been an entirely new area of coverage, not a single change in the program schedule, that the ruling would be no change, or is the program schedule to be considered as related to the area covered?

The Presiding Officer: Well, of course.

Mr. Dempsey: And if there is a change in the area and same program, it is as important as the change in the program for the same area?

The Presiding Officer: But the Commission has already made a certain finding. Now based upon the record in this case, you ought to be able to argue then whether the changes, if any, made by Faust have been adapted to the needs of the new area to be served.

Mr. Dempsey: I think it is important to show Detroit is the thing it was designed for and it is no longer in the picture. It wasn't important when it was still in the picture.

Mr. Eagen: The extent to which you can show it or not show

[Tr. 1755]

it is dependent upon the record that now exists.

The Presiding Officer: I would think so, yes. The fact that they were once proposed for Detroit doesn't mean they were adopted for Flint or maybe Flint-Saginaw. The Commission has made a finding in the original decision here. I feel if I should admit this proposed description of television programs in 8648 I would be confusing the issues in this case, despite the fact there is some relevance here to the question at hand here.

For that reason, I believe the description of proposed television programs included in WFDF Exhibit D may be excluded. It may remain in the document, however, as an offer of proof.

Now we haven't yet considered the testimony of Lydorf in 8648 regarding the Detroit studio proposal. How is that relevant then?

Mr. Dempsey: I understand there is still a proposal to use Detroit studios with the new proposal for remotes. I think Mr. Lydorf's testimony is an admission they can't be used.

The Presiding Officer: That, of course, is a different story.

Mr. Eagen: Again that is something that if it is to be brought out should have been brought out in the initial stage of this hearing.

This hearing is confined to the changes. On this question of the Detroit studio proposal, there is no change.

Mr. Fitzpatrick: On this point I am in complete agreement

with Mr. Eagen.

The Presiding Officer: Yes. This is a matter that certainly seems could have been brought up.

Mr. Dempsey: If the Examiner please, if the ruling is that defects which carry over from the old proposal are insulated from attack in the new, then I would like to have an exception shown on the record.

The Presiding Officer: All right.

Mr. Dempsey: And to say we conceive we are deprived of a fair hearing because they are able to bring a brand new proposal with any weakness whatsoever and avoid it by saying that was covered up in the original one.

The Presiding Officer: No. I think you can show it is impossible, perhaps, Mr. Dempsey, but I don't think you can show it be reference to 8648.

Mr. Dempsey: Is there a better way of showing it than an admission of the party, no matter what record it is from?

Mr. Fitzpatrick: Do we know the fact with relation to the Fisher Building in '48 as to the height of some of its suites is still applicable today? I don't know what alterations have taken place in the building.

Mr. Dempsey: Is that the ground of your objection, Mr. Fitzpatrick?

Mr. Fitzpatrick: No, it isn't an objection. It is an observation.

[Tr. 1757]

Mr. Dempsey: I didn't think it was. If it is, we will meet it.

The Presiding Officer: I think I will have to sustain the objection to the Lydorf testimony also then. It may remain in the record as an offer of proof.

* * * *

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 19 1959

Joseph W. Stewart
CLERK

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,717

649

LAKE HURON BROADCASTING CORPORATION,
Appellant,

v. ~~648~~

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEAL FROM DECISIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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May 19, 1959

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission, in treating WJR as a "permittee" rather than as an "applicant," in according WJR comparative consideration on a changed proposal which (in appellant's view) was tantamount to a "new application," in dismissing a "new application" for Channel 12 tendered by appellant, and in disregarding proffered evidence in the comparative proceeding regarding the impact on Saginaw's only television facility of a grant of WJR's modified application vis-a-vis a grant of the Trebit or Butterfield applications or a reaffirmance of WJR's original grant, misconstrued this Court's prior mandate, the requirements of Sections 307(b), 308, 309, 402(h) and 409(c) of the Communications Act, applicable Commission Rules, and pertinent administrative and judicial precedents.

2. Whether data adduced and proffered in the protest and comparative proceedings tending to show that a grant to WJR at Chesaning (in the immediate vicinity of Saginaw) needlessly jeopardized Saginaw's only television facility, whereas a grant to WJR at Clarkston or a grant to Trebit or Butterfield would assure to both Flint and Saginaw stations of their own, was pertinent to a proper "public interest" determination under Sections 307(b), 308, and 309 of the Communications Act, and if so whether the Commission gave appropriate consideration to such data and to other significant points of difference in the actions here appealed from.[1]

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[1] Appellee and intervenor, in signing the stipulation thus setting forth the questions presented, did not concede the correctness of any legal or factual premises implicit in the questions as thus phrased and reserved the right to argue that some of the questions are not properly before this Court.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,717

LAKE HURON BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Lake Huron Broadcasting Corporation ("Lake Huron"), licensee of television station WKNX-TV, operating on UHF Channel 57, Saginaw, Michigan: (1) From a Decision of the Federal Communications Commission, adopted July 9 and released July 11, 1958 (25 FCC 159, R. 6367-6411), wherein the Commission (by a 3-1 vote) affirmed, after further proceedings ordered by this Court (99 U.S. App.

D.C. 71), its prior action of May 12, 1954 (J.A. 400-490) granting to WJR, The Goodwill Station, Inc. ("WJR") a construction permit for television Channel 12, Flint, Michigan; (2) from a Decision of the Commission adopted July 15 and released July 16, 1958 (25 FCC 196, R. 12843-12889), wherein the Commission after a "protest hearing" affirmed its prior action of April 14, 1955 (see J.A. 600) granting a modification of the aforesaid construction permit; (3) from Memorandum Opinions and Orders of the Commission, adopted September 8 and released September 10, 1958 (25 FCC 1065, 1071; R. 6443-6448, 12918-12919), wherein the Commission (by a 3-1 vote) dismissed and denied interrelated petitions for reconsideration of the aforesaid decisions; and (4) from an action of the Commission, taken September 2 and publicly announced September 8, 1958 dismissing without a prior hearing an application for Channel 12 which Lake Huron filed October 29, 1956 (Public Notice 63190).[1]

In making the aforesaid grants to WJR and returning Lake Huron's application for Channel 12, the Commission "denied" Lake Huron's application, within the meaning of 47 U.S.C. Sec. 402(b)(1). Likewise, because of the impact of those grants on Lake Huron's UHF operation in Saginaw, Lake Huron is a "person . . . aggrieved" and "whose interests are adversely affected" by the actions here complained of, within the meaning of 47 U.S.C. Sec. 402(b)(6) and 5 U.S.C. Sec. 1009.

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[1] The Commission's letter of September 2 and its Public Notice thereof released September 8, 1958, returning Lake Huron's application for Channel 12, are not included in the certified record. These documents are printed as Appendix A to the instant brief.

STATEMENT OF THE CASE[1]

On May 12, 1954, after a comparative hearing, a majority of the Commission rejected the Initial Decision of its trial examiner, granted WJR a construction permit for Channel 12, Flint, Michigan, and denied the mutually exclusive applications of Trebit Corporation ("Trebit") and W. S. Butterfield Theatres, Inc. ("Butterfield") (9 RR 227; J.A. 400-491). The construction permit thus granted was predicated on coverage which WJR would provide from a site at Clarkston, Mich. (approximately midway between Detroit and Flint), on an affiliation by WJR with the DuMont Television Network, and on the expenditure by WJR of $776,000 for elaborate studio facilities in Flint (J.A. 400-491).

On December 16, 1954, two weeks after the Commission had denied separate petitions for reconsideration filed by the losing applicants (J.A. 491-503), WJR filed an application for modification of construction permit (BMPCT-2689) -- in which it specified a transmitter site at Chesaning, Michigan (some 11 miles south of Saginaw and some 45 miles northwest of its original site at Clarkston), the substitution of an affiliation with CBS for that with DuMont, and the utilization of an abandoned UHF studio building in Flint in lieu of the $776,000 structure originally proposed (see J.A. 585-592). Following a grant on April 14, 1955 of that application without hearing (see 12 RR 440, 441; J.A. 600, 601), Lake Huron, as the licensee of UHF station WKNX-TV and as a CBS affiliate for the Saginaw area, protested the Commission's action granting BMPCT-2689, contending that WJR's operation at Chesaning, as a CBS affiliate, would deprive Saginaw of its only television station, whereas operation by WJR at Clarkston as a DuMont affiliate or as an independent would not (R. 8385-8421). The Commission ordered a hearing on Lake Huron's protest and postponed the effective date of the MP grant (Docket No. 11412, 12 RR 440, R. 8545-8553).

---

[1] The background facts are here stated in summary fashion, (1) because other facets of this litigation have been before this Court twice previously; (2) because more detailed Statements of the Case are being submitted by other appellants whose appeals (with lower case numbers) are consolidated herewith; and (3) because certain factual data can be better discussed in connection with legal points hereinafter raised, thus avoiding needless repetition.

In the meantime, a joint petition by Trebit and Butterfield filed December 28, 1954 (J.A. 503-535) requesting the Commission to reconsider its original grant to WJR because of matters disclosed by BMPCT-2689, and a joint petition by them for reconsideration of the April 14, 1955 modification grant, were denied by the Commission on the grounds that the proceeding had lost its comparative character and that Trebit and Butterfield, as defeated applicants, lacked standing to object to the modification (J.A. 540-548, 608-621).

On appeal to this Court by Trebit and Butterfield, the Commission's denial of their joint petition of December 28, 1954 was reversed and remanded. W. S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71 (May 24, 1956). After remand the Commission by Order released October 19, 1956, reopened the comparative record and ordered a further hearing to determine the site, studio, and program differences between WJR's original and modified proposals and to determine whether the timing by WJR of its MP application reflected adversely on its character and fitness to be a television licensee (21 F.R. 8152; R. 4736-4737).

On the premise that WJR's MP was tantamount to a new application, on which the Commission was proposing to accord WJR comparative consideration, Lake Huron filed an application of its own for Channel 12, within the 10-day cut-off period then specified by the Commission's rules, contending that if WJR could be heard on a "new application" for Channel 12, so should Lake Huron (see Appendix A). The relief thus sought was at that point ignored. However, Lake Huron was permitted to become a party intervenor in the "further hearing" (14 RR 905, R. 4955-4957).

Despite evidence thereafter adduced in the further comparative hearing indicating that WJR's MP differed from its original proposal in substantial respects, and despite evidence tending to show that WJR had deliberately withheld information from the Commission regarding its changed plans until Trebit's and Butterfield's original petitions for reconsideration were denied, the Commission on July 11, 1958 by a 3-1 vote affirmed its grant of Channel 12 to WJR as modified by BMPCT-2689 (25 FCC 159, R. 6367-6411). In doing so, it affirmed the Examiner's action excluding evidence proffered by Lake Huron showing that the utilization of Channel 12 by WJR at Chesaning (on the outskirts of Saginaw and as a CBS affiliate) would jeopardize Saginaw's only television station, whereas operation on Channel 12 by WJR at its Clarkston site or by Trebit or Butterfield as NBC affiliates would not.[1]

Despite a finding by the Examiner in the protest hearing (Docket No. 11412) that operation by WJR as a CBS affiliate at Chesaning (as proposed in BMPCT-2689) might well deprive Saginaw of its only station, the Commission on July 15, 1958 reaffirmed its prior action granting WJR a modification of its construction permit (25 FCC 196; R. 12843-12889).

Subsequent interrelated petitions for reconsideration of the aforesaid actions, filed by Trebit, Butterfield, and Lake Huron, were dismissed and/or denied, notwithstanding still another belated shift by WJR in its program plans -- to affiliate with ABC rather than CBS (25 FCC 1065, 1071; R. 6443-6448, 12918-12919). At that point the Commission, without according appellant any hearing thereon, also returned Lake Huron's application for Channel 12 (Appendix A). From these several adverse actions Lake Huron has prosecuted the instant appeal (Case No. 14,717), which this Court by subsequent order consolidated with related appeals taken by Trebit and Butterfield.

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[1] The Examiner excluded the data thus proffered as not embraced within the issues set forth in the further hearing ordered October 19, 1956 (Tr. 1618-1625, 1664-1674, 1680-1681). In affirming that action the Commission did so on the ground that such evidence was "irrelevant" (R. 6407, para. 24).

STATUTES AND RULES INVOLVED

Pertinent provisions of the Communications Act and of the Commission's Rules are set forth in Appendix B to the instant brief.

STATEMENT OF POINTS

1. The Commission, in treating WJR as a "permittee" rather than as an "applicant," in according WJR comparative consideration on a changed proposal which (in appellant's view) was tantamount to a "new application," in dismissing a "new application" for Channel 12 tendered by appellant, and in disregarding proffered evidence in the comparative proceeding regarding the impact on Saginaw's only television facility of a grant of WJR's modified application vis-a-vis a grant of the Trebit or Butterfield applications or a reaffirmance of WJR's original grant, misconstrued this Court's prior mandate, the requirements of Sections 307(b), 308, 309, and 402(h) of the Communications Act, applicable Commission Rules, and pertinent administrative and judicial precedents.

2. The Commission failed to give appropriate consideration to evidence adduced in the protest proceeding and proffered in the comparative proceeding dealing with the impact of WJR's modified proposal on Saginaw's only television station.

3. The Commission, in the comparative proceeding, failed to consider all significant points of difference disclosed by the record and urged by the parties.[1]

---

[1] The foregoing Statement of Points is presented as a summary of (and is not intended to supplant) the more detailed Assignment of Error specified in the Notice of Appeal.

SUMMARY OF ARGUMENT

Even in so-called comparative proceedings an applicant is not entitled to have his application considered comparatively unless that application "considered alone, might be granted." *Simmons* v. *Federal Communications Commission,* 79 U.S. App. D.C. 264, 265, 145 F. 2d 578 (1944). WJR's modified proposal to operate from Chesaning as a CBS affiliate should have been denied on three noncomparative grounds:

(1) Except for the corporate name, WJR's modified proposal bore almost no resemblance to the original proposal on which WJR was preferred by a majority of the Commission. The modified proposal differed from the original in the following vital particulars: as to majority stock ownership, corporate officers, integration, staffing, transmitter site, areas and populations served, programing, studios, and impact on other television operations. Because of these differences WJR's modified proposal was tantamount to a new application. *Radio Reading*, 6 RR 182 (1950; *Don Lee B/casting System*, 7 RR 1093, 1095-1096 (1952); cf. Rule 1.373(h) (Appendix B). Under the Commission's cut-off rules, then in force and effect, Trebit and Butterfield acquired "umbrella protection" against new applications with the commencement of the original hearing on November 17, 1952. Rule 1.724(b) (Appendix B). If WJR was to be accorded comparative consideration on its new proposal, designated for hearing by the Commission on October 19, 1956, *Ashbacker* principles dictated that Lake Huron be accorded similar rights on its application for Channel 12 tendered October 29, 1956. Rule 1.724(b) (Appendix B).

(2) From the time WJR obtained its original grant on May 12, 1954 until after the denial of the Trebit and Butterfield petitions for rehearing on December 2, 1954, WJR calculatedly, deliberately, and successfully kept from the Commission information regarding changes in its television plans, changes highly pertinent to pleadings then under consideration by the Commission. Such abuse by WJR of the Commission's

processes, not to mention Rule 3.613(b), reflects so adversely upon WJR's character qualifications, that its modified proposal, with such a genesis, should be denied outright on non-comparative grounds.

(3) In the further comparative hearing Lake Huron sought to introduce evidence showing that the utilization of Channel 12 by WJR at Chesaning (on the outskirts of Saginaw and as a CBS affiliate) would deprive UHF Station WKNX-TV of the benefits of its CBS affiliation agreement in Saginaw and thus deprive that community of its only television station, whereas operation on Channel 12 by WJR at its Clarkston site, or by Trebit or Butterfield as an NBC affiliate, would not. The Examiner excluded such evidence as not embraced within the issues set forth in the further hearing ordered October 19, 1956. In affirming that action in the comparative proceeding, the Commission did so on the ground that such evidence was "irrelevant" (R. 6407, para. 24). Evidence thus offered by Lake Huron was highly pertinent to a proper public interest determination under Sections 307(b), 308, and 309 of the Communications Act. Great Western B. Ass'n v. Federal Communications Commission, 68 U.S. App. D.C. 119, 123, 94 F. 2d 244 (1938); Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 71, 77, 202 F. 2d 298 (1952); Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958). The holding by the Commission in the comparative hearing that such evidence was "irrelevant" was thus egregious error.

The Commission's treatment of somewhat similar evidence, actually received in the protest hearing, was no less erroneous. There the Commission, on the erroneous premise that it was confronted with the single alternative whether Flint or Saginaw should have a station, failed to recognize that by denying WJR's requested shift to Chesaning as a CBS affiliate, both Flint and Saginaw would be assured television stations of their own. Under such circumstances it was not in the public interest to approve a site and affiliation change which needlessly endangered the continued existence of Saginaw's only available television facility on UHF.

(4) Whether or not the foregoing matters required the outright rejection of WJR's new proposal on the noncomparative grounds thus urged, these considerations should have weighed so heavily against WJR in any comparative consideration of the three applicants that WJR should not have been preferred. In treating WJR as a "permittee" rather than as an "applicant," in holding that WJR's efforts at concealment did not disqualify WJR, and in concluding that evidence of the impact of the Chesaning proposal on Saginaw was "irrelevant," the Commission failed to weigh these matters comparatively against WJR. Such action was error. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

ARGUMENT

Following this Court's holding (99 U.S. App. D.C. 71) that the Commission had abused its discretion in refusing to accord Trebit and Butterfield a hearing on their joint pleading of December 28, 1954, asking that the original grant to WJR be vacated because of matters disclosed in BMP-2689 filed December 16, 1954,[1] the Commission by order of October 19, 1956 expressly reopened the comparative hearing record to take additional evidence (1) on certain differences between WJR's original and modified proposals, and (2) on WJR's character processes, not to mention Rule 3.613(b), reflects so adversely upon WJR's character qualifications, that its modified proposal, with such a genesis, should be denied outright on non-comparative grounds.

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[1] Trebit's and Butterfield's joint petition of December 28, 1956 was tantamount to a second petition for reconsideration of the May 12, 1954 grant of Channel 12 to WJR, the first such petitions having been denied in a Memorandum Opinion and Order adopted December 2, released December 6, 1956 (J.A. 491-503). Since the second petition, predicated on new matters divulged by WJR as a result of the filing of its MP on December 16, 1954, was timely, and since that second petition (as this Court subsequently held) was in no sense frivolous, the filing of that joint pleading prevented the May 12, 1954 grant from becoming "final." See Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950).

(3) In the further comparative hearing Lake Huron sought to introduce evidence showing that the utilization of Channel 12 by WJR at Chesaning (on the outskirts of Saginaw and as a CBS affiliate) would deprive UHF Station WKNX-TV of the benefits of its CBS affiliation agreement in Saginaw and thus deprive that community of its only television station, whereas operation on Channel 12 by WJR at its Clarkston site, or by Trebit or Butterfield as an NBC affiliate, would not. The Examiner excluded such evidence as not embraced within the issues set forth in the further hearing ordered October 19, 1956. In affirming that action in the comparative proceeding, the Commission did so on the ground that such evidence was "irrelevant" (R. 6407, para. 24). Evidence thus offered by Lake Huron was highly pertinent to a proper public interest determination under Sections 307(b), 308, and 309 of the Communications Act. Great Western B. Ass'n v. Federal Communications Commission, 68 U.S. App. D.C. 119, 123, 94 F. 2d 244 (1938); Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 71, 77, 202 F. 2d 298 (1952); Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958). The holding by the Commission in the comparative hearing that such evidence was "irrelevant" was thus egregious error.

The Commission's treatment of somewhat similar evidence, actually received in the protest hearing, was no less erroneous. There the Commission, on the erroneous premise that it was confronted with the single alternative whether Flint or Saginaw should have a station, failed to recognize that by denying WJR's requested shift to Chesaning as a CBS affiliate, both Flint and Saginaw would be assured television stations of their own. Under such circumstances it was not in the public interest to approve a site and affiliation change which needlessly endangered the continued existence of Saginaw's only available television facility on UHF.

(4) Whether or not the foregoing matters required the outright rejection of WJR's new proposal on the noncomparative grounds thus urged, these considerations should have weighed so heavily against WJR in any comparative consideration of the three applicants that WJR should not have been preferred. In treating WJR as a "permittee" rather than as an "applicant," in holding that WJR's efforts at concealment did not disqualify WJR, and in concluding that evidence of the impact of the Chesaning proposal on Saginaw was "irrelevant," the Commission failed to weigh these matters comparatively against WJR. Such action was error. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

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[1] Trebit's and Butterfield's joint petition of December 28, 1956 was tantamount to a second petition for reconsideration of the May 12, 1954 grant of Channel 12 to WJR, the first such petitions having been denied in a Memorandum Opinion and Order adopted December 2, released December 6, 1956 (J.A. 491-503). Since the second petition, predicated on new matters divulged by WJR as a result of the filing of its MP on December 16, 1954, was timely, and since that second petition (as this Court subsequently held) was in no sense frivolous, the filing of that joint pleading prevented the May 12, 1954 grant from becoming "final." See Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950).

Thus, with express issues in both the original[1] and the further hearing dealing with WJR's qualifications, the first matter which the Examiner and the Commission should have considered, as in any so-called comparative proceeding, was whether WJR's application, "considered alone, might be granted." Simmons v. Federal Communications Commission, 79 U.S. App. D.C. 264, 265, 145 F. 2d 578 (1944). If not, WJR was not entitled to be considered comparatively, and its application should have been denied. Simmons v. Federal Communications Commission, supra.

It is appellant's position, in the light of the evidence adduced at the further hearing, in conjunction with that produced in the original hearing, that WJR's application should have been denied, as a matter of law, on three noncomparative grounds: (1) Because WJR's application, as modified December 16, 1954, was tantamount to a "new application" and hence not entitled to comparative consideration with those of Trebit and Butterfield which had enjoyed "umbrella protection" since November 17, 1952; (2) because WJR's deliberate concealment from the Commission of changes which it contemplated in its original proposal, until after the first petitions for rehearing were denied, reflects so adversely on WJR's qualifications as to affect its fitness as a licensee; and (3) because a grant of WJR's modified proposal (to operate from Chesaning rather than

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[1] In its Orders of July 11 and November 5, 1952, designating for comparative hearing in a consolidated proceeding the mutually exclusive applications of WJR, Trebit, and Butterfield, the Commission included two issues generally dispensed with under later practice (9 RR 227, 231-232): "(1) To determine the legal . . . and other qualifications of the applicants to construct and operate the proposed stations; (2) To determine the type and character of the program service proposed to be rendered and whether they would meet the needs of the communities and areas within the Grade A and Grade B field intensity contours . . . ." (J.A. 400-401).

Clarkston and to utilize CBS rather than DuMont programing) was not in the public interest inasmuch as it needlessly jeopardized Saginaw's only television operation.

It is appellant's further position that even if the foregoing matters did not require an outright denial of WJR's application "considered alone," they must count so heavily against WJR in any comparative consideration of the three applicants that WJR could not be preferred over either of its competitors.

I

WJR'S MODIFIED APPLICATION WAS TANTAMOUNT TO A NEW APPLICATION

WJR's modified proposal bears almost no resemblance (except for the corporate name) to the original proposal on which WJR was preferred by a majority of the Commission but not by its hearing examiner. The modified proposal differs as to majority stock ownership, as to corporate officers, as to integration, as to staffing, as to transmitter site, as to areas and populations served, as to programing, as to studios, and as to impact on other television stations:

Ownership and Management. -- At the time of the original hearing, Mrs. Parker (individually and as trustee and executrix) controlled WJR, The Goodwill Station, Inc. (9 RR 227, par. 25; J.A. 411-412). At that point her personal holdings alone totalled 115,950 shares (22.448%). After the original grant and prior to the further hearing she had relinquished affirmative control of the corporation pursuant to prior consent sought and obtained from the Commission under 47 U.S.C. Sec. 310(b) (BTC-2296; Tr. 1229-1234), and in doing so reduced her personal holdings to 20,900 shares (3.855%) (Form 323 Reports; Tr. 1229-1234).

During the original hearing, to provide greater incentive to management and to provide greater integration, WJR proposed to make 40,000 shares of its stock available under restrictive options to certain key officers, directors, and employees (J.A. 412-413). As made clear by WJR's Proposed Findings in the further hearing (pp. 5, 6), the majority of those persons allowed their options to lapse, a fact which gave rise to an effort by WJR, after the record in the further hearing was closed on April 17, 1957, to revitalize those options and to include among the recipients new "key employees" who were not associated with WJR at the time of the first hearing (R. 5625-5626). During the original hearing WJR relied heavily on the integrated participation of Patt as president and of Leydorf as chief engineer (J.A. 412-413). Prior to the further hearing Patt's proposed participation was curtailed for health reasons (cf. Tr. 1553), and Leydorf resigned as chief engineer (Tr. 997, 1002-1004). Although continuing as a director (Tr. 996) Leydorf disposed of his stock interest in WJR and ceased to participate in the day-to-day activities of the corporation (Tr. 997, 1002-1004). George Cushing resigned as a vice president of WJR on August 16, 1955 and was replaced by Elmer O. Wayne on November 21, 1956 (Tr. 1229-1234). Hornung, also a proposed television employee, left WJR on March 4, 1954 (Tr. 1028, 1034-1035; R. 6013, para. 116).[1]

Engineering. -- In the original hearing, WJR proposed a site at Clarkston, 23 miles southeast of Flint and approximately midway between Flint and Detroit (J.A. 408). From Clarkston WJR's Grade A signal covered 100% of the Detroit urbanized area and a population of 3,620,660 persons; its Grade B contour embraced 4,302,500 persons (J.A. 407-408). In the further hearing, WJR proposed a site at Chesaning, 21 miles northwest of Flint, 11 miles south of Saginaw, and approximately 45 miles northwest of its Clarkston site (WJR Ex. 91, R. 5154-5169, 6402). From Chesaning WJR would provide no portion of Detroit with either a Grade A or a Grade B signal (Tr. 1175, 1206; WJR Ex. 91, Figs. 2, 3, R. 5154-5169). From Chesaning WJR would for the first time place a city-grade signal over Saginaw and Bay City, and a Grade A signal over Lansing (WJR Ex. 91, Figs. 1-3, R. 5154-5169). With a site only a few miles from that of WKNX-TV, it would place a stronger signal over Saginaw than over Flint (Tr. 1205, 1729). From Chesaning WJR would serve almost 3,000,000 fewer people within both its Grade A and its Grade B contours than it did from Clarkston (WJR Ex. 91, p. 1, R. 5154). Of the 3,620,660 persons who would have received a Grade A signal from WJR at Chesaning, only 11% (404,608 persons) would continue to receive a Grade A signal from WJR at Chesaning (WJR Ex. 91, p. 6, R. 5159). Less than 50% of the population which would receive a Grade A signal from WJR at Chesaning was within the Grade A contour of WJR at Clarkston (WJR Ex. 91, p. 6, R. 5159).

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[1] As shown by the foregoing "Tr." references, the Examiner at the further hearing received evidence on intervening changes in "ownership and management." However, he ultimately concluded, on the premise that WJR was "more than a mere applicant," that such changes no matter how substantial could not eliminate "WJR as a party" (R. 6021). Lake Huron duly excepted thereto (Exceptions 49 and 50, R. 6133). The Commission in its final decision purported to restrict itself to "differences" in three areas (site, studios, and programing) (R. 6399, para. 1). However, the Commission continued to accord WJR a plus for "the excellent past broadcast record of WJR," notwithstanding the aforementioned intervening changes in ownership and management (R. 6407, para. 22).

Programing. -- In the original hearing WJR proposed to affiliate with DuMont (as its Detroit-Flint outlet) and to bring a new and unique program service to 4,302,550 persons. At the further hearing WJR proposed an affiliation with CBS rather than DuMont. Of the 1,325,545 persons who would receive a service from WJR at Chesaning, all but 21,624 already received a CBS service from existing stations affiliated with CBS (Tr. 1208, WJR Ex. 91, p. 4, R. 5157). The local programs which WJR proposed for Flint-Lansing-Saginaw-Bay City were substantially the same as WJR proposed for Detroit in 1948 and for Detroit-Flint in 1952 (rejected WFDF Ex. D, R. 5517-5532).

Studio. -- In the original hearing WJR proposed to construct an elaborate new studio building, especially designed for television, at a cost of $776,000 (J.A. 409). In the further hearing it proposed to utilize a warehouse-type structure, built originally at a cost of $67,500

(Butterfield Ex. G, p. 39), and utilized at one time by a now defunct UHF operation in Flint (WTAC-TV).

Impact on Saginaw. -- Operating from Clarkston, WJR was unable to obtain a CBS affiliation. Operating as a DuMont affiliate, or as an independent, and placing only a Grade B signal in Saginaw, WJR's operation would have had no adverse impact on WKNX-TV, Saginaw's only television station. But from Chesaning, WJR would place a stronger city-grade signal over Saginaw than Flint, and its service area would encompass in its entirety the service area of WKNX-TV (WJR Ex. 91). With WJR operating from Chesaning as a CBS affiliate, WKNX-TV would lose the benefit of its CBS network affiliation, and Saginaw would be left without a station of its own. Thus one of the primary differences flowing from WJR's proposed change of transmitter site was the impact which WJR would have on other television operations in northern Michigan -- it would jeopardize the continued operation of Saginaw's only television station.[1]

It is apparent, therefore, that except for the corporate name of the applicant, WJR's original and modified proposals were totally different. The modified proposal, because of the differences in the areas and population served, programing, staffing, integration, corporate ownership, corporate officers, studio, and impact, was tantmount to a new application and should have been assigned a new file number under established Commission practice. When a "major amendment" occurs, resulting in a "different application," the Commission has held (by virtue of an express rule in the AM field and by decision in the TV field) that the application (as thus modified) should receive a new file number and be treated as a new application, to be processed accordingly. Radio

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[1] The impact of WJR's operation from Chesaning on Saginaw is discussed at greater length (with appropriate record references) under a subsequent heading, Point III, *infra*, pp. 32-44. It is mentioned here for the sole purpose of highlighting one of the principal "differences" between WJR's original and its modified proposals.

Reading, 6 RR 182 (1950); J. Granville Clark, 7 RR 92 (1951); Palo Alto Radio Station, Inc., 7 RR 963 (1952); cf. Don Lee B/casting System, 7 RR 1093, 1095-1096 (1952); Rainbow, Inc., (BP-9910 amended to change officers, directors, and stockholders, and "File No. 10,381 assigned" -- Public Notice 29290, February 28, 1956).

The AM rule (1 RR 51:373(h)), as then worded,[1] listed as illustrative of a "major amendment" a "change in station location so that substantially a new service area is involved; substitution of new parties in the application so that the original applicant no longer holds a majority control." Under either of those illustrations, if this were an AM application, a new file number would have been in order -- substantially a new service area resulted from the 45-mile shift from Clarkston to Chesaning, and Mrs. Parker no longer had majority control of the applicant corporation.[2]

The Commission has had occasion to apply the same principle in television proceedings. Don Lee B/casting System, 7 RR 1093, 1095-1096 (1952). In that case the corporate name of the applicant (after a 100% change of ownership) remained the same. In commenting thereon, the Commission stated (7 RR 1093, 1095):

> We are of the opinion that the application of Don Lee, if and when amended to show . . . [the new ownership], must be treated as a new application. As such, it will not be entitled to the priority status conferred upon Don Lee by the Memorandum Opinion and Order of May 13, 1948 . . . .[3]

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[1] See Appendix B.

[2] See Huntington Broadcasting Co., 13 FCC 1032 (1949). In that case a 44% stockholder of one of the competing applicants died after the record was closed but before an Initial Decision was released. In refusing to allow the applicant to substitute other persons for the deceased, the Commission said (p. 1036): "The amendment in question is major in character and constitutes, in effect, a new application."

[3] Two years previously this Court had held that an appeal from the Commission's action of May 13, 1948 according Don Lee "priority status" was premature. Pauley v. Federal Communications Commission, 86 U.S. App. D.C. 294, 181 F. 2d 294 (1950).

In short, WJR's modified proposal under the foregoing precedents was, in effect, a new application and should have been treated as such.

Under the Commission's "cut-off" rules, then in force and effect, Trebit and Butterfield acquired "umbrella protection" against new applications with the commencement of the original hearing on November 17, 1952.[1] WJR's new proposal was not tendered to the Commission until some two years later. Hence, in the light of the substantial differences disclosed by the further hearing, differences so substantial as to be tantamount to a "new application," WJR was no longer entitled to comparative consideration vis-a-vis Trebit and Butterfield.

The Commission's decision of July 11, 1958 (25 FCC 159, R. 6367-6411) seeks to evade the consequences of its cut-off rules precluding substantial amendments during the course of a hearing by treating WJR as a "permittee" rather than as an "applicant" (see R. 6405-6406). Such an approach is a deliberate attempt to avoid legal principles enunciated by this Court and only reluctantly and half-heartedly accepted by the Commission. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F. 2d 552 (1956); Enterprise Company v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F. 2d 708 (1955); ibid, Case No. 14474 decided January 29, 1959.

In the second Enterprise case, where the Commission argued that the rule against substantial amendments was "inapplicable to Beaumont because it was a permittee rather than an applicant," this Court carefully noted that "We express no view" thereon. Since the change in the Beaumont application concerned a mere option to one of the losing parties to acquire an interest therein at a subsequent date, a change which weakened rather than strengthened Beaumont's case, this Court concluded that the Commission's construction of its rules "as not requiring Beaumont's disqualification" was reasonable under the circumstances (slip op. p. 3).

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[1] See Rule 1. 724 (b), as quoted in Appendix B, infra.

That is not this case. WJR's abandonment of its original Clarkston proposal (including a unique program service to 4,302,550 persons) was not a possible occurrence at some time in futuro; it was a fait accompli. And, as spelled out in more detail in briefs being filed by Trebit and Butterfield, the changes in WJR's proposal were the difference between an infeasible and a feasible proposal, and hence changes which strengthened rather than weakened WJR's application. Accordingly, the question on which this Court expressed no view in the second Enterprise case, namely, that the rule against substantial amendments is inapplicable to permittees whose grants are still under attack, is squarely presented in the instant appeal. An administrative agency no less than the persons who appear before it are bound by its own rules. Sangamon Valley Television Corp. v. United States, Case No. 13,992, decided May 8, 1959; Service v. Dulles, 354 U.S. 363, 372-373 (1957). Persons appearing before such an agency cannot be required to rely on unpublished procedures. 5 U.S.C. Sec. 1002(a).

At the time of the further hearing the original grant of May 12, 1954 (J.A. 400-491) had not become final; it was still under attack. It is true that separate petitions by Trebit and Butterfield for reconsideration of that grant had been turned down by the Commission in a Memorandum Opinion and Order adopted December 2, released December 6, 1954 (J.A. 491-503). However, long prior to that date, as disclosed by the further hearing, WJR had abandoned the proposal on which the Commission's actions of May 12 and December 2, 1954 were predicated, without WJR advising the Commission of that fact until it filed its MP on December 16, 1954. It was because of matters which thus came to light that Trebit and Butterfield filed their joint petition of December 28, 1954 for reconsideration of the May 12 grant -- in effect a timely second petition for rehearing predicated on newly discovered matters. In short, as this Court subsequently held, the Commission was required to take a new look at its May 12 grant in the light of facts and developments not disclosed until WJR filed its MP December 16, 1958.

That such was this Court's intention seems apparent from its action reversing the Commission's failure to accord Trebit and Butterfield a hearing on their joint petition for reconsideration. Pursuant to that remand the Commission expressly reopened the comparative hearing record to take evidence on additional issues (21 F.R. 8152, R. 4736-4737).[1] The Examiner was further directed, in the light of the additional evidence thus adduced to reconsider on a comparative basis the WJR, Trebit, and Butterfield applications. And, as heretobefore noted, the original comparative hearing contained an express issue going to the "legal and other qualifications" of each of the applicants. Therefore, if the "differences" in the three fields specified by the Commission (site, programming, and studio) were shown to be such as to be tantamount to a "new application," not filed until December 16, 1954, with WJR's legal and other qualifications still under consideration, the Commission should have concluded that WJR's modified proposals (because of substantial "differences") were submitted too late and not entitled to be considered comparatively with those of Trebit and Butterfield which acquired "umbrella protection" in November 1952. With the propriety of the original grant still under consideration, the Commission should have determined whether the changes in WJR's proposal in the interval between the original and further hearings were so substantial as not to be permissible vis-a-vis two applicants with cut-off protection accruing to them as of November 1952.

Furthermore, if WJR was to be accorded comparative consideration on its new proposal, similar treatment should have been accorded Lake Huron's application submitted within 10 days after public announcement of the Commission's action of October 19, 1956 ordering a hearing on WJR's new proposal (Rule 1.724(b), Appendix B, infra). If WJR could be heard comparatively on a substantially new application, Ashbacker principles dictate that Lake Huron be accorded similar rights. To reject Lake Huron's application for Channel 12, without according it a hearing thereon (see Appendix A), is totally inconsistent with its action allowing WJR to be heard on a new Channel 12 proposal long after Trebit and Butterfield obtained cut-off protection under then prevailing rules of the Commission.

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[1] Contrary to a contention elsewhere made by the Commission (R. 4955-4957, 6407), nothing in this Court's remand or in 47 U.S.C. Sec. 402(h) precluded the Commission from giving full effect to its own rules. It was not obliged to decide the case on the basis of the record theretofore made, because this Court in remanding for a further hearing expressly "otherwise ordered."

II

WJR'S FAILURE TO APPRISE THE COMMISSION OF ITS MODIFIED PROPOSALS PRIOR TO THE DENIAL OF THE ORIGINAL PETITIONS FOR REHEARING DISQUALIFIED WJR AS A TELEVISION LICENSEE

As shown by the record in the further hearing, from the time WJR obtained its original grant on May 12, 1954 until after the denial of the Trebit and Butterfield petitions for rehearing on December 2, 1954, WJR calculatedly, deliberately and successfully kept from the Commission information regarding changes in its television plans, changes highly pertinent to pleadings then under consideration by the Commission.

Such concealment was not inadvertent. Within three days after the original grant was announced, in response to an inquiry by Kramer about carrying network programs other than DuMont, WJR was warned by Washington counsel to be "scrupulously careful to adhere to representations made during the hearing," especially "until the 30-day appeal period has run" (Butterfield Ex. G, pp. 5-6, R. 5335-5336). As early as June 9 counsel for WJR was expressing "concern" over a proposal by WJR to change its transmitter site (Butterfield Ex. C, p. 1, R. 5321; Tr. 1277, 1281). WJR was again told on July 9 that shift of the transmitter site would present "several serious questions"; it would necessitate a 301 Form; it would necessitate a "new program schedule" -- a serious matter since WJR had been accorded a major preference for its programing; it would buttress Trebit's and Butterfield's claim that the record should be reopened; it would warrant a similar claim to a comparative hearing; and it might be construed as an effort by WJR to strengthen its original case (Butterfield Ex. G, pp. 41-42, R. 5371-5372). Similar advice was rendered by counsel on August 17 and September 23, 1954 (Tr. 1492-1493; Butterfield Ex. G, p. 75A, R. 5406).

Notwithstanding the legal advice it received and fully aware of the risks it was running, WJR concluded that economic advantages which would result from a change of site (CBS affiliation and assurances of operating in the black from the outset) outweighed the legal dangers (Tr. 1493). WJR thus decided in September 1954 to abandon its Clarkston proposal by shifting to Chesaning and affiliating with CBS (Butterfield Ex. G, pp. 53, 54, R. 5395-5396; Tr. 1492, 1495). But in order to have the economic advantages of a CBS affiliation and at the same time to minimize the risk of a comparative or further hearing, WJR decided not to divulge these substantial changes to the Commission until the petitions for rehearing had been denied (Tr. 1320-1321, 1331).[1] Having taken a calculated course of action (and being fully apprised of the dangers it was running) WJR embarked upon a plan of deliberate concealment:

Concealment of Changed Studio Plans. -- Shortly before UHF station WTAC-TV, Flint, signed off the air on April 30, 1954, and prior to the Commission's public announcement of May 14 granting Channel 12 to WJR, WTAC-TV telephoned Kramer to ascertain if WJR was interested in acquiring and utilizing WTAC-TV's studios (Tr. 393-394, 987-989, 990, 1061-1062, 1414-1415). Kramer immediately advised his associates

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[1] In forwarding a "completed draft" of the MP (except Section V) on September 23, counsel again reminded WJR of the risks it was running (Butterfield Ex. G, p. 75A, R. 5406). The net effect of this letter was a decision by WJR not only to delay the filing of the MP until the petitions for rehearing were denied but also for an additional 30-day period -- so as to minimize still further the legal risks (Tr. 1316-1317, 1321, 1322, 1524, 1526; cf. Butterfield Ex. E, R. 5323; see also Butterfield Ex. G, pp. 128, 139, R. 5459, 5470). Other events subsequently intervened, requiring WJR to forego the additional 30-day safety period (Butterfield Ex. G, pp. 156-159, 163, R. 5487-5490, 5494; WKNX Ex. 1, R. 5533-5534; Tr. 1534, 1535).

(including Patt) of this development (Tr. 988-989, 990, 1414-1415). Accordingly, in its May 14 press release commenting on the Commission's grant, although stating that WJR planned "to start construction of a new transmitter within 60 days," WJR made no mention of any plans to start construction of an elaborate $776,000 studio building in Flint (Butterfield Ex. G, p. 4, R. 5334), a fact warranting the inference that WJR was considering utilizing other studio facilities at the very moment that the original grant was announced. By June 16, 1954 negotiations with WTAC-TV had proceeded to the point that the Board of Directors of WJR "directed" its officers to conclude an agreement to acquire those facilities on terms theretofore discussed (WJR Ex. 95, p.3, R. 5219). Nevertheless, in a pleading filed by WJR June 21, opposing the Trebit and Butterfield petitions challenging the preference awarded WJR for its elaborate studio proposal, WJR made no mention of the action taken by WJR's Board of Directors on June 16 (R. 6959-6973). The WTAC-TV studios were acquired by a letter exchange on July 8 and 9; a formal ten-year lease agreement with option to purchase was executed on July 30, 1954 (Butterfield Ex. G, pp. 39-40, 43, R. 5369-5370, 5373).

Although the Commission's Rules require a television permittee as well as a television licensee to report changes in main studio location within 30 days (Rule 3.613(b)), no effort was made by WJR to apprise the Commission of this change in its studio plans and studio address until December 1, 1954 (Tr. 1313-1314; WJR Ex. 100, R. 5238-5240). Even then the new studio arrangement was mentioned in the 701 Form requesting an extension of its construction permit, not for the purpose of apprising the Commission of a change of plans, but as proof that WJR had "commenced construction within 60 days," a sine qua non if it were to retain its construction permit (WJR Ex. 100, p. 3, R. 5240).[1]

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[1] To that end WJR represented that it had been expending $8700 per month "since July 1 for maintaining a nucleus staff at the Flint studio" (WJR Ex. 100, p. 3, R. 5240). As shown by the instant record, the WTAC-TV studios were not acquired until after July 1 and a nucleus staff did not take possession of the building until September 1 (Tr. 419, cf. Tr. 1240, 1244; Butterfield Ex. G, p. 147, R. 5478).

Although Faust had suggested in his draft of information for the 701 Form that the Commission be told that the leased studios were to supplant the $776,000 structure originally proposed (Butterfield Ex. G, p. 144, R. 5475), the 701 Form as ultimately filed December 1, 1954 (WJR Ex. 100, R. 5238-5240), was much less candid. Under the information there supplied, WJR was left free, if circumstances subsequently required, to contend that the WTAC-TV studios were a temporary makeshift affair and that the $776,000 structure would still be built. The door was not slammed on that "out" until the MP was filed on December 16, 1954 (BMPCT-2689, R. 8258-8334).[1]

Concealment of Changed Program Plans. -- Although much had been made in the original hearing of the fact that WJR proposed to bring a "new network service" to the Flint-Detroit area by affiliating with DuMont (Tr. 1340), WJR's press release of May 14, 1954 is entirely silent about its network plans; DuMont went unmentioned (Butterfield Ex. G, pp. 3-4, R. 5333-5334). Since the press release did brag on the fact that WJR (AM) had served Flint for many years "with quality [CBS] network and regional radio programming" and expressed an intention to originate from Flint "local and regional [television] programs of highest quality," the failure to make any mention of their TV network program plans is indeed significant (Butterfield Ex. G, pp. 3-4, R. 5333-5334).

The studied failure to mention network plans in the May 14 press release takes on added significance in view of a telephone call which

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[1] Apparently aware of this "ace in the hole," the change in studio plans was not given a "classified" rating. In fact, a "press release" was issued August 10, 1954 by WJR stating that it had leased the WTAC-TV studio building; however, this release left the impression that this acquisition was a temporary measure, it being WJR's plan, when the pending litigation was resolved, "to construct additional facilities at the Lapeer Street plant to make it the most modern and complete television operation in Michigan" (WJR Ex. 99, p. 1, R. 5231). But (as we shall see) WJR's proposed 45-mile shift of transmitter from Clarkston to Chesaning and its substitution of CBS for DuMont was made a "top secret" affair. Because of the dangerous legal consequences which might flow therefrom, those matters were to be kept highly confidential.

Kramer made to his Washington counsel on the morning of May 17 propounding certain "legal questions" which might arise if WJR took programs from networks other than DuMont (Tr. 1118-1120, 1121, 1122; Butterfield Ex. G, p. 5, R. 5335). In a letter of the same date answering questions which Kramer had thus propounded, Washington counsel stated (Butterfield Ex. G, pp. 5-6, R. 5335-5336):

> I think your question about network affiliation is part of the over-all problem of being scrupulously careful to adhere to the representations made during the hearing. Reed and I will submit a detailed recommendation on this whole area in the near future. With respect to network affiliation, it is my preliminary feeling that you should not affiliate with anyone other than DuMont, unless (1) the other network is without a Detroit affiliate, or (2) the other network's signal is not receivable in Flint. This is based particularly on findings 81 and 82 on page 23 and conclusion 31 on pages 49 and 50.
>
> In any event, as a general proposition, I think it would be wise to move slowly with respect to decisions of this nature until the 30-day appeal period has run. At that time, we will have knowledge of what grounds (if any) Trebit and Butterfield will advance to the Commission or to the Court as part of their argument that the decision is incorrect . . . .[1]

That Patt was likewise giving consideration, as early as May 21, 1954, to network programs in addition to or other than DuMont is apparent from his letter of that date to Seldon Dickinson (a director of WJR and house counsel) where he stated (WJR Ex. 104, Ex. A, p. 2, R. 5285; Tr. 1283-1284):

> Whatever network, or networks, we succeed in negotiating agreements with will better be able to provide commercial network programs to us if we are able to commence our operations in September or early October at the start of the fall-winter-spring radio-TV season.

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[1] Patt and Kramer were in daily communication with each other; Patt received a copy of the May 17 letter to Kramer, and Kramer received a copy of the May 21 letter to Dickinson (Tr. 1122 A, 1419).

It is thus evident that within a week after the May 14 grant (if not earlier), top management of WJR were giving consideration to a program schedule different from their commitments in the comparative hearing on which they had been preferred.

In mid-June WJR began a determined effort to obtain a major network in lieu of DuMont (Tr. 240, 1126, 1128, 1263-1264, 1428, Butterfield Ex. G, pp. 11-33, R. 5341-5363). After his August 24 meeting with CBS in New York, Patt was confident that he could obtain CBS if WJR shifted its transmitter site from Clarkston to a point northwest of Flint (Tr. 1463, 1479, 1482; cf. Tr. 365). A decision to make such a shift was approved by the officials of WJR at a meeting on September 8, 1954 (Tr. 365, 1082-1083, 1093, 1099, 1148, 1323).[1] As Patt subsequently admitted, despite WJR's original commitment to provide a "new and unique" DuMont network service (Tr. 1259), WJR decided sometime prior to September 1954 "not to provide that type of service" (Tr. 1260).

But the foregoing decision by WJR to abandon DuMont and to take on CBS was not divulged at that point to the Commission. The first "inkling" on that score was in the 701 Form filed December 1, 1954 (WJR Ex. 100, R. 5238-5240). Even then WJR made no mention of CBS and in fact sought to leave the impression that no decision had been reached on the matter -- it stated that the delay in completing construction was "partially because of changes in television station facilities and network affiliations occurring during the past two years, which have required a review of applicant's network affiliation plans" (WJR Ex. 100, p. 3, R. 5240).

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[1] On or about the middle of September 1954, Patt instructed Faust to prepare a revised program schedule, substituting CBS shows for those of DuMont (Tr. 719-727). In keeping Kramer (who was on a speaking trip) advised of developments, Patt stated: "We are trying to keep as many things identical as possible, and to that end we will look toward identical local programming, although CBS network programs will be substituted for DuMont" (Tr. 1503-1504; cf. Tr. 1515; Butterfield Ex. G, p. 62, R. 5377), an instruction based on recommendations by Washington counsel (Tr. 1504). Faust came up with a roughed-in schedule on September 22 (Tr. 747). It was typed up and included with the rest of the application which Washington counsel mailed to Cleveland and Detroit on September 23 (Butterfield Ex. G, pp. 75-121, R. 5405-5452). This September draft was basically the revised schedule ultimately included in the December 16, 1954 MP application (Tr. 750).

It was not until December 16, in connection with their 301 Form, that WJR disclosed its plans to substitute CBS for DuMont (although retaining a few DuMont programs). In explaining its reasons in that application for shifting from DuMont to CBS, WJR made representations contrary to facts adduced in the further proceeding. In Exhibit P-3 attached to BMPCT-2689, WJR stated (R. 8306):

> . . . Since the hearing and the grant of applicant's construction permit by the Commission on May 14, 1954, DuMont has affiliated with station CKLW-TV in Windsor, Ontario, Canada. As a result of this affiliation, applicant's officers have had numerous discussions with the other networks to determine which, if any, would be available to WJRT, since applicant considers that network programming is essential to successful operation of a television station. As a result of these discussions, it has been learned that both CBS and ABC would be interested in affiliating with WJRT, but only if the WJRT transmitter is moved sufficiently to the northwest to avoid any substantial degree of overlap between WJRT and the networks' respective affiliates in Detroit.

Contrary to the foregoing representation, as shown by evidence adduced at the further hearing, the decision to contact other networks was WJR's. Both Patt and Kramer admitted that up until the time activities were halted at Clarkston on July 9, WJR could have affiliated with DuMont for the asking (Tr. 1012, 1064, 1070, 1071, 1425-1426, 1436). At the June 8, 1954 meeting with DuMont in New York, Lyford (although advising WJR that CKLW-TV was "angling" for a DuMont affiliation) frankly told Patt and Kramer that DuMont preferred WJR if it were on the air by fall as it then planned (Tr. 212, 295, 1070). But WJR made no offer, then or later, to enter into an affiliation agreement with DuMont (Tr. 1012). DuMont, on the other hand, tendered WJR a contract on or about June 22, 1954 (Butterfield Ex. G, pp. 35-37,

R. 5365-5367; Tr. 1430) which WJR never accepted. These last-mentioned facts were not divulged to the Commission until the protest hearing was held in 1956 and the instant further hearing in 1957.

Concealment of Changes in Transmitter Site. -- The length to which WJR went in concealing changes in its television proposal, while the original petitions of Trebit and Butterfield for rehearing were under consideration, is most flagrantly demonstrated in connection with its decision to move its transmitter site from Clarkston to Chesaning, a distance of 45 miles.

As early as June 9, 1954 Patt inquired of Washington counsel "what would happen if we were to propose a change of transmitter site" (Tr. 1281), an inquiry prompted by Patt's belief that by moving northward (away from Detroit) he might interest other networks (Tr. 1277, 1281). Immediately following the June 16 meeting of the Board, as heretofore noted, WJR got down to brass tacks in making a pitch for an affiliation with CBS, NBC, or ABC (Tr. 299). After their meetings with the networks on July 8, Patt and Kramer decided to halt any further "activities" at Clarkston, in order to take a new look at the over-all picture, including a site change (Tr. 1071, 1273). In a Memorandum of July 10 summarizing these matters, Kramer concluded that a "major network" was a must if the station was to operate in the black at the outset, and that the transmitter site should be changed so as to provide a Grade A signal "over Lansing, Saginaw and Bay City," as well as Flint (WJR Ex. 97, pp. 5-7, R. 5227-5229). Patt agreed with Kramer's recommendations and conclusions (Tr. 1250; cf. 1240, 1244-1245). From that date forward WJR concentrated on obtaining a new site which would enable it to obtain a major network affiliation (Tr. 1484). After further discussions with CBS, it was concluded at a meeting on August 24-27, 1954, that if WJR could acquire a site substantially northwest of Flint (Tr. 1080), from which it could place a city-grade service over Flint, a Grade A service in Lansing, and substantially eliminate any Grade B service in Detroit, WJR could have a CBS affiliation (Tr. 1080; cf. Tr. 365).

After further telephonic and other communications with CBS (cf. Tr. 1497; Butterfield Ex. G, pp. 55-56, R. 5397-5398), WJR officials met on September 8 and decided to file the necessary MP for a site in the vicinity of Chesaning (Tr. 365), "subject to our being able to find suitable property"[1] and "subject to receiving a favorable final decision by the Commission on the [rehearing] petition" (Tr. 1323).[2] But the Commission was not to be advised of the proposed changes until the then-pending petitions for rehearing were decided -- site or no site (Tr. 1331). In the words of Kramer, "we decided not to file until the Commission had decided . . . the petition for reconsideration" (Tr. 1031); that decision was "basic" (Tr. 1031); WJR had been thoroughly briefed on the "legal problems" which would arise if WJR's decision to move its site from Clarkston to Chesaning became known before the rehearing petitions were decided (Tr. 1081, 1099, 1321, 1451, 1491, 1492-1493, Butterfield Ex. G, pp. 41-42, R. 5371-5372).

Accordingly, in advising the Flint Committee (which had opposed the grant of Channel 12 to WJR because of the proximity of the Clarkston site to Detroit) of WJR's decision to shift to a new site northwest of Flint, Patt asked the Committee at a meeting of September 15, 1954 "not to make a public announcement of the matter" (Tr. 1307).[3] Or as

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[1] An option to the Chesaning site was obtained on or before September 24, 1954 (Tr. 1155).

[2] Kramer testified that by the time of the September 8 informal board meeting management had decided to shift the transmitter site to the Chesaning area which "meant an abandonment" of their Clarkston proposal (Tr. 1082), and that instructions were given to prepare an application (to be filed in due course at a proper time to be decided upon) for a change of site, network affiliation, etc. (Tr. 1082-1083, 1093, 1099, 1148). In view of discussions which had been had with counsel, it was not to be filed until the May 12 grant was reaffirmed (Tr. 1083, 1099). Everyone at the September 8 meeting was aware of a "timing" problem (Tr. 1083). Everyone in the WJR organization was alerted so that when the proper time arrived the application could be filed on short notice (Tr. 1099-1100).

[3] At that meeting Patt also told the Flint Committee that he had no objections if they withdrew their opposition to the WJR grant "without it being suspected that WJR had anything to do with it" (Tr. 1499).

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Faust reported it, "The wish was expressed that the proposed change not become public knowledge at this time" (Butterfield Ex. G, p. 59, R. 5401). In fact, in asking Faust to prepare a confidential interoffice memorandum on that meeting, Patt apparently took the precaution to tell Faust to keep the statement "concerning the transmitter move . . . as brief as possible" (Butterfield Ex. G, p. 60, R. 5402). Even as late as December 1 (no doubt with knowledge that the decision was about to be released) Patt was imploring Thomas of the Flint Committee not to breach the secrecy "understanding" of two months earlier (WJR Ex. 108, R. 11401-11404).

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In brief, WJR deliberately and successfully kept from the Commission information on matters (studio, programming and site) which were highly germane to the rehearing petitions, at a time when those petitions were under consideration by the Commission. WJR knew that many of the preferences found by the Commission in the May 12 Decision were no longer valid in the light of changes which had since occurred, e.g., the change from a Detroit-area station to a Flint-Saginaw-Bay City area station, the change in network programming (a new network service to 21,000 persons rather than to 4,300,000 persons), the change in studios (the substitution of abandoned UHF studios for a $776,000 structure), Leydorf's relative inactivity in the company, less coverage populationwise, with a site a greater distance from Flint and with a lower effective antenna height, etc. WJR management knew the preferences which it had asserted in the original hearing; they knew the preferences which had resulted in the May 12 grant. Concealment by WJR of these important intervening changes in its plans and setup was an imposition on the Commission and on the Commission's processes. The failure to reveal these facts was not an oversight -- it was part of a calculated plan to gain economic advantages and to minimize the legal dangers ensuing therefrom.

Accordingly, WJR stands convicted on the record developed at the further hearing of being willing to ignore and forget sworn commitments and representations made in the original hearing for selfish reasons of its own, but willing at the same time to retain the benefits of those commitments at a time it knew they had already been breached. WJR was willing to conceal pertinent facts from the Commission in order to keep a permit which would have been placed in grave jeopardy had the true facts been made known. Such a course of conduct adversely reflects on the character qualifications of WJR and its fitness to be a licensee -- to the point that no one can review the instant record in unbiased fashion and conclude that WJR is qualified to be a television licensee. Federal Communications Commission v. WOKO, Inc., 329 U. S. 223 (1946).

Although concluding in his Supplemental Initial Decision, under a narrow interpretation of the issues, to reaffirm the grant to WJR, the Examiner recognized that WJR's conduct in concealing information from the Commission did not "redound to its credit" (R. 6028, para. 11). In fact, but for a locus penitentiae on WJR's part, he would have held against WJR under the concealment issue (R. 6026-6027, para. 8). He found such a locus penitentiae in WJR's action in filing a 701 Form for an extension of its permit on December 1, 1954 (WJR Ex. 100, R. 5238-5240), the day before the Commission acted on the petitions for reconsideration (R. 6026-6029, paras. 8-11).

As recognized by the Commission's Broadcast Bureau, WJR's act in filing the 701 Form on December 1, 1954 was no locus penitentiae (R. 6069-6084). As WJR well knew, matters routinely disclosed on a 701 Form, shunted to one section of the Broadcast Bureau, would not be actual notice to the Commissioners themselves or to the Opinions and Review Section which was working on the petitions for rehearing. Even persons vitally interested in the 701 Form did not ascertain its contents until after it was granted by staff action on December 21, 1954, it being stipulated that inquiries by Trebit's counsel between December 1 and 21 had resulted in advice by Commission employees that no 701 Form had yet been filed by WJR (Tr. 396, 413).

Furthermore, as an examination of the 701 Form will disclose (WJR Ex. 100, R. 5238-5240), it contained an absolute minimum of damaging information; it was a Delphic masterpiece of ambiguity. Although the contemplated change in the transmitter site was concededly a major reason for not completing construction within the time allowed (Tr. 1473, 1474), this consideration was nowhere mentioned on the reverse side of the 701 Form where "other reasons" were discussed (WJR Ex. 100, p. 3, R. 5240). Patt professed not to know why this information was not included in the 701 Form (Tr. 1477). Elsewhere Patt admitted that information about the new site at Chesaning was kept from the Commission until the rehearing petitions were denied (Tr. 1311). That Patt did not construe the 701 Form (executed by him on November 30 and filed on December 1) as making public WJR's proposed change of transmitter site is apparent from the fact that on December 1 Patt asked Thomas (of the Flint Committee) not to make a public disclosure of the site change (Tr. 1306): "I respectfully request that you do not make any public statement with respect to this matter, in accordance with the understanding we had two months ago. We will make a full statement at the time we file an application for the new site" (WJR Ex. 108, R. 11401-11404).

That Patt knew that the 701 Form had revealed nothing concrete about the site change is apparent also from the press release which WJR issued when the Commission reaffirmed the May 12 grant on December 6. He was careful to delete from the release information contained in earlier drafts which would have disclosed the substantial nature of the proposed site change (Tr. 1094, 1096, 1097, 1518-1519, 1524, 1537; Butterfield Ex. G, pp. 74, 75, 134-135, 137, 139, 147, R. 5404, 5405, 5465-5466, 5468, 5470, 5478). From the 701 Form no one could tell whether the site change involved a shift of 45 feet or 45 miles (WJR Ex. 100, R. 5238-5240).

With the Broadcast Bureau recognizing that WJR had exercised "poor judgment" in not "more timely" disclosing the changed situation to the Commission (see R. 6028), the filing of the 701 Form, containing as it did innocuous statements, was indeed a slender reed on which to condone active and deliberate concealment of data highly pertinent to pleadings then pending before the Commission. It is little wonder, therefore, that the Commission rejected the Examiner's locus penitentiae concept.

However, the Commission's ultimate rationale, namely, that WJR was both a "permittee" and an "applicant", with "an excellent past broadcast record", was little better (R. 6367-6741). As either a permittee or an applicant WJR owed the Commission a duty of being candid and of not abusing its processes. Federal Communications Commission v. WOKO, Inc., supra. WJR could not have but known that its changed plans, which it deliberately sought to conceal from the Commission until the rehearing petitions were disposed of, were material to matters then being reviewed by the Commission. To condone a studied pattern of concealment, deliberately followed from the time the original grant was announced on May 14 until the MP was filed December 16, 1954, on the theory that such action merely flyspecked "an excellent past broadcast credit," is to accord to the new owners and management of WJR credit for a record developed under a different ownership and management -- in a decision which (in order to avoid problems of a different nature) refused to consider the intervening changes in WJR's ownership and management!

In short, the further record developed in this proceeding after remand fully supports this Court's original view that WJR had in fact concealed highly pertinent data from the Commission (99 U.S. App. D.C. 71, 74, fn. 7). WJR never deviated from this pattern of concealment until factors which it could not control required it to file a modification application on December 16, 1954. The consequences, namely, the loss of its construction permit, which the Examiner believed should be visited on WJR but for a locus penitentiae that never took place should, therefore, be visited on WJR under the WOKO and like precedents of the Commission. WJR's studied pattern of concealment, for its own private advantage, so reflects on WJR's qualifications as a television licensee that it was not entitled to comparative consideration on its revised proposals in the instant proceeding. WJR's modified proposal, with such a genesis, should "standing alone" have been denied. Simmons v. Federal Communications Commission, supra.

III

WJR'S MODIFIED PROPOSAL SHOULD BE DENIED BECAUSE OF ITS IMPACT ON OTHER SERVICES

Whatever be this Court's conclusion on matters urged by Lake Huron under Points I and II, there can be no question, we submit, that the Commission committed reversible error, in its decision in the protest hearing and more particularly in its decision in the comparative proceeding, in its cavalier treatment of evidence received in the protest hearing and proffered in the comparative proceeding showing that both Flint and Saginaw would have stations of their own if Channel 12 were granted to either Trebit or Butterfield or if WJR was refused permission to shift its transmitter location from Clarkston to Chesaning.

The net effect of the changes decided upon by WJR after receiving a grant on May 12, 1954, changes subsequently embodied in the modification application filed December 16, 1954 (BMPCT-2689), was to endanger needlessly the continuation of Saginaw's only television facility, namely station WKNX-TV which had been operating on UHF Channel 57 since April 5, 1953. We say "endanger needlessly", because (as the records in these two proceedings show) the Commission was not confronted with a situation where only one or the other of two communities (Flint or Saginaw) could have a television station. By awarding Channel 12 to either Trebit or Butterfield or by not permitting WJR to shift from Clarkston to the outskirts of Saginaw (as a CBS affiliate), the Commission was in a position to assure to the people of both Flint and Saginaw stations of their own.

In the protest hearing on the April 14, 1955 grant of BMPCT-2689, the Examiner and the Commission on the basis of uncontradicted evidence made the following findings regarding the impact of WJR's proposed operation at Chesaning as a CBS affiliate on Saginaw's only television station (WKNX-TV), likewise a CBS affiliate (R. 12873-12874):

> 74. Mr. Edwards testified that, in the event the WJR modification grant is affirmed, WKNX will cease operations immediately. He is of the view that WJR would get all the CBS programs because no advertiser would buy both stations if it was possible to get essentially the same coverage with WJR alone, and the station would therefore lose all its revenues from CBS. Additionally, as a result of the expected loss of CBS programming, he believed that WKNX would lose all of its spot advertisements from national advertisers because such business is dependent upon network adjacencies. In the 1954-55 fiscal year national spot announcements accounted for $91,566 in revenues to the station, the major part of this sum being attributable to spots adjacent to CBS programs. Mr. Edwards also stated that the expected loss of CBS programming would result in the loss of the bulk of the station's audience, thus making the station unattractive to local and regional advertisers. In Mr. Edwards' opinion, the only practical substitute for network programming would be syndicated film which would cost the station at least $142,000 a year. WKNX also introduced the testimony of its economic consultant who stated that he did not regard ABC programming as a feasible substitution for the present CBS programming, and if WKNX were to lose the CBS programs, he could not recommend its continued operation.

75. The attitude of WKNX, as set forth above, is based in part on the experiences of other communities where VHF stations commenced operation in competition with existing UHF stations, and in part on its own experiences at the advent of Station WNEM. The record indicated that in many, but not all intermixed markets, existing UHF stations have suspended operations because they lost their network affiliation to newly established VHF stations with a consequent loss of business of the type anticipated by WKNX, paragraph 74, supra. When Station WNEM commenced operation, it took over an ABC program which had been theretofore broadcast by WKNX, together with ten non-network programs. Three or four sponsors cancelled spot announcements on WKNX, and the total local business loss amounted to approximately $1,840 a week. In July of 1955, a series of spot announcements for a watch manufacturer carried by WKNX were cancelled in anticipation of the start of WJR's operation, and an advertising contract with a brewery is cancellable if WJR should secure a CBS affiliation.

76. The WKNX television operation lost approximately $40,000 for fiscal 1954-55, in part attributable to the cost of increasing power in the fall of 1954. The loss was small in May and June, 1954, large in July (attributed by Mr. Edwards to the competitive effect of the advent of WNEM), and gradually decreased until a seasonal post-Christmas decrease in business in January, 1955. In March and April of 1955, the last months reported in the record, the station achieved profitable operation for the first time. At least 78% of the TV homes in Saginaw and Bay Counties are capable of receiving UHF transmissions, and WKNX claims coverage of over 1,000,000 persons in a 23 county area.

As shown by the record in the further comparative hearing, none of the three major networks (NBC, CBS or ABC) was interested in affiliating with WJR operating from its Clarkston site and duplicating Detroit coverage which those three networks obtain from their present affiliates (Tr. 322, 323, 329). From that site WJR was a "misfit" as far as the networks (except DuMont) were concerned (WJR Ex. 97, p. 2, R. 5224). Because of WJR's desire "to operate in the black as soon after commencement date as possible" (WJR Ex. 97, p. 5, R. 5227), WJR management was unwilling to incur operating losses for the "two or three years" it would take to build up an independent operation from the Clarkston site (WJR Ex. 97, p. 4, R. 5226). WJR regarded a "major network" as "practically a must" (WJR Ex. 97, p. 5, R. 5227).

Not only was CBS not interested in WJR operating from Clarkston, but (as shown by the further comparative record) CBS was not interested in WJR operating from sites in the immediate vicinity of Flint or to the east or to the west of Flint (Tr. 1145, 1452; Butterfield Ex. G, p. 45, R. 5375). CBS was not interested in WJR unless and until it acquired a site substantially northwest of Flint (Tr. 1080) -- a location as far as could be had from Detroit and still satisfy the Commission's requirements regarding signal strength over Flint, and a location from which WJR could place a Grade A service in Lansing and a city-grade service in Saginaw and Bay City (cf. WJR Ex. 91, R. 5166). Even from such a site (Chesaning) WJR would bring a CBS network service to only 21,624 persons within its Grade B contour who do not presently receive a Grade B or better signal from existing stations affiliated with CBS (Tr. 1208; WJR Ex. 91, p. 4, R. 5159). It is thus clear from the further comparative record that neither Butterfield (with a site southeast of Flint) nor Trebit (with a site 4.4 miles north and east of Flint) could obtain a CBS affiliation.[1]

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[1] In fact, the instant record warrants the inference that CBS would not affiliate even at Chesaning with just "any grantee". It must be remembered that WJR has been an important "cog" in the CBS radio network since 1935, covering as it does a 5-state area with 16 million people. Patt has been a long-time member of the CBS (AM) advisory Board. By and large CBS is generally satisfied with its present television affiliation setup in Michigan (WJR Ex. 97, pp. 1-2, R. 5223-5224). Thus it is doubtful that a permittee with less "leverage" than WJR could have obtained a CBS affiliation at Chesaning, a site from which only 21,624 persons will receive their first CBS service.

It is likewise clear from the further comparative record that the only station (other than WKNX-TV) which presently places a Grade A signal in Saginaw is station WNEM-TV, on VHF Channel 5 in Bay City, and that the only other existing operation which places even a Grade B signal over Saginaw is station WJIM-TV, on VHF Channel 6 in Lansing (WJR Ex. 91, Figs. 4 and 5, R. 5168-5169). The further comparative record likewise shows that from its site at Chesaning, 11 miles south of Saginaw, WJR would place a city-grade signal over both Saginaw and Bay City (and in fact a stronger signal over Saginaw than Flint), as contrasted with only a Grade B signal over Saginaw from its Clarkston site (WJR Ex. 91, Figs. 4 and 5, R. 5168-5169). The record further shows that with the height and power proposed by WJR at Chesaning its service area will wholly encompass that of WKNX-TV (WJR Ex. 91, Fig. 5, R. 5169).

From data submitted to the Commission in so-called VHF-UHF deintermixture proceedings then under consideration by the Commission, it was apparent to Lake Huron that a UHF station affiliated with a major network (such as CBS) and serving a substantial population (as did WKNX-TV) could survive against one outside VHF station (such as WNEM, Bay City) rendering a city-grade service to the city to which the UHF station was licensed. It was equally clear from "deintermixture developments" that WKNX-TV could not survive against two VHF stations (affiliated with the two major networks) where each of those VHF stations placed a city-grade signal over Saginaw. It was thus evident, with WJR operating at Chesaning, affiliated with CBS, and completely encompassing WKNX-TV's service area, that WKNX-TV would lose the benefits of its affiliation with that network. National sponsors of CBS programs, and national and regional spot advertisers, aware of the fact that they could obtain all the coverage which they received on WKNX-TV (plus more on WJR) would no longer be interested in sponsoring CBS shows or placing spots on WKNX-TV. Without the audience which CBS network shows produce, WKNX-TV would in turn lose its local sponsors, and Saginaw would be left without a television station of its own.

Thus, one of the significant differences (resulting from the transmitter site change) between WJR's original proposal and its modified proposal was the consequences it would have in the Saginaw area -- it could mean that Saginaw would be left without a station of its own. Operating from the Clarkston site, WJR would not obtain a CBS affiliation; operating from that site as an independent, its Grade B coverage of Saginaw would not adversely affect the operations of Saginaw's local station (WKNX-TV) nor the ability of that station to obtain CBS programs. With WJR operating as a CBS affiliate from Chesaning, WKNX-TV would lose its CBS program sponsorship and Saginaw would be deprived of its only local outlet. Neither Trebit nor Butterfield proposed an affiliation with CBS, and hence a grant to either of those applicants would not affect the ability of WKNX-TV to procure CBS programs.

WJR's operation on Channel 12 at Clarkston would have no such impact on Saginaw's only television station. From Clarkston Channel 12 (as the Commission had heretofore concluded) would serve the public interest -- it would provide Flint with a city-grade service and a local outlet. Flint already received Grade B or better service from five other stations (WJR Ex. 91, Fig. 5, R. 5169). By the time the decisions here complained of were adopted Flint already had two studio facilities of its own -- furnished by station WJIM-TV, Lansing, and by station WNEM-TV, Bay City. If WJR were to operate from Chesaning, Saginaw would no longer have a station of its own (WKNX-TV) or a studio facility of any kind.

On the premise that the foregoing consequences all flowed from a change by WJR in its proposed transmitter site, with Issue No. 1 calling for differences between WJR's two proposals (particularly program, studio, and transmitter differences), Lake Huron sought leave to submit testimony substantiating its views on the impact of WJR's proposed Chesaning operation (as a CBS affiliate) on Saginaw's only television station. Although seemingly of the opinion that such evidence was pertinent to a proper public interest determination to whom Channel 12 should be awarded, the Examiner ruled that such data was not embraced within the issues set forth in the further hearing ordered October 19, 1956 and that he was precluded by the issues as thus framed from receiving such evidence (Tr. 1618-1625, 1664-1674, 1680-1681). A proffer of proof along the same lines was similarly rejected (Tr. 1680-1681). In the comparative decision adopted July 9 and released July 11, 1958, that action of the Examiner was sustained by the Commission on a different ground, namely, that the impact of WJR's proposed operation from Chesaning as a CBS affiliate on Saginaw's only television station was "irrelevant" (R. 6407, para. 24).[1]

The foregoing holding by the Commission is blatant nonsense -- from the standpoint of both reason and precedent. One of the Commission's top priorities, as evidenced by its Sixth Report, is at least one local service to as many communities as possible. Under the Commission's present allocation table and mileage separation requirements, we know of no way by which a VHF channel can be "dropped in" to Saginaw without disrupting existing allocations and assignments. In other words, for Saginaw to have an outlet of its own, it is presently dependent solely on UHF. WKNX-TV has been taking care of the needs of Saginaw and its environs since April 5, 1953. The Commission has found that operation to be in the "public interest" by repeatedly extending WKNX-TV's operating authority. As a CBS outlet for the area, WKNX-TV has been able to provide an excellent service and to build up a substantial and loyal audience. It could continue to provide that service under the existing allocation table if the Flint Channel 12 operation is used at Clarkston. As indicated by WJR's own station "rep" (WJR Ex. 97, R. 5226), WJR as an independent with its transmitter at Clarkston could build up a profitable operation within two or three years. It could bring to Flint on Channel 12 at Clarkston a heavy percentage of "local programs" which the Commission has found would serve the interests of Flint. WJR has adequate cash reserves to that end, including some $700,000 saved by not constructing the elaborate studios in Flint which it originally proposed. Thus, Flint and Saginaw would both have stations of their own, as would Bay City, Lansing, and Cadillac.

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[1] Ironically enough, though not shown by the certified record, the Commission originally adopted two decisions on July 9, 1958 -- a decision in the comparative proceeding and a decision in the protest proceeding (see Appendix C). On July 10, 1958 this Court handed down its decision in the Carroll case (103 U.S. App. D.C. 346). The comparative decision, holding that evidence of the impact of the Chesaning shift on Saginaw's only television station to be "irrelevant", was released July 11, apparently without change. However, the decision in the protest hearing was revised and a new decision (taking some notice of the Carroll case) was adopted July 15 and released July 16, 1958 (R. 12843-12889). The decision in the protest proceeding as originally adopted July 9, 1958 was never released.

Under these circumstances it is not in the public interest to authorize WJR to shift its operation (as a CBS affiliate) to Chesaning, a site from which it will needlessly endanger Saginaw's only television operation. "In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of the old license to carry on in the public interest, the application should be denied unless there are overweening reasons of a public nature for granting it." Great Western B. Ass'n. v. Federal Communications Commission, 68 U. S. App. D. C. 119, 123, 94 F. 2d 244 (1938).

The foregoing principle was not repudiated in the Sanders case, 309 U. S. 470 (1940). It is fully supported by dictum in that very decision (at p. 476). It has been reasserted by this Court since Sanders was decided. In Democrat Printing Co. v. Federal Communications Commission, 91 U. S. App. D. C. 71, 77, 202 F. 2d 298 (1952) the Court said:

> The mere loss of profit to an existing station would not, of course, be an adequate basis for denying a license to a proposed station. If, however, the result of the grant to the proposed station is to make it financially impossible for an existing station to continue its operations or maintain a high level of service, the resultant loss of service might be adverse to the public interest and therefore warrant denying the new license.

Likewise, in the *Network* case, 319 U. S. 190, 217 (1943), the Supreme Court recognized a similar concept:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Commission with comprehensive powers . . .
>
> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

Statements by this Court in the Cleveland, Tennessee and related cases pointedly emphasizes the fact, particularly in Section 307(b) situations, that the Commission cannot ignore the impact of a grant in one community on an existing operation in another community, where such grant (at a particular site) needlessly endangers that community's only outlet for local self-expression.

Finally, in Carroll Broadcasting Co. v. Federal Communications Commission, 103 U. S. App. D. C. 346, 258 F. 2d 440, decided by this Court one day after the ruling here complained of in the comparative hearing was adopted by the Commission, this Court made clear, we hope once and for all, that economic injury to an existing station, while itself of no moment, becomes important when on the facts it spells diminution or destruction of service to the public.

Where a grant of Channel 12 at one location (e.g., Clarkston) will enable Flint to have a station of its own and will not eliminate Saginaw's only television station, whereas a grant at a different location (e.g., Chesaning) will merely substitute a new station for an existing service and leave Saginaw without its only TV facility, it cannot be found that an application of the latter type will serve the "public interest, convenience and necessity." This adverse impact on the Saginaw area stems from the change in the transmitter site -- it represents one of the differences encompassed in the issues on which the instant proceeding was heard.

There was nothing in this Court's prior mandate, and there is nothing in 47 U.S.C. Sec. 402(h) which required the Commission to close its eyes to important public interest considerations. Under Section 307(b), 308, and 309 of the Act, the Commission was duty bound to consider the equitable needs of both Flint and Saginaw, and where (as here) those interests were not mutually exclusive, to reach a result which would best serve the public interest, convenience, and necessity. Certainly with alternative choices before it, where a grant to Trebit or

Butterfield or a grant to WJR at Clarkston would assure both Flint and Saginaw of stations of their own, whereas a decision allowing WJR to operate as a CBS affiliate at Saginaw's back door could well spell the demise of Saginaw's only station, the Commission's action refusing to even permit such evidence to be introduced in the comparative proceeding is indefensible.

The Commission's treatment of a similar (though by no means identical) problem in the protest hearing where evidence was received on the impact of WJR's operation from Chesaning as a CBS affiliate on Saginaw's only television station is equally unsound. Notwithstanding the uncontradicted experience of scores of UHF stations and its own repeated assertions that a UHF station cannot survive in a market which receives two city-grade VHF signals from outside stations affiliated with the two major networks (CBS and NBC),[1] the Commission concluded that "a large degree of speculation is also present as to whether Saginaw would in fact be deprived of its local television outlet," despite uncontradicted testimony by WKNX-TV "that immediately upon it becoming clear that the WJR grant [from Chesaning as a CBS affiliate] would be affirmed WKNX-TV would cease operations."[2]

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[1] ". . . our experience in other markets convinces us that the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of the existing UHF stations to continue to provide service in the area." Television Allocations in Albany-Schenectady-Troy, N. Y. Areas, 22 F.C.C. 293, 302 (1957).

[2] For the Court's information, even though WJR as the result of the actions here challenged is now on the air from Chesaning, WKNX-TV is still operating. But that fact in no way invalidates the factual data submitted in the protest hearing and proffered in the comparative proceeding, and in no way supports the legal validity of the Commission's rulings here under attack -- for a very simple reason. Although WJR, following the July grants here challenged, went on the air from its Chesaning site, it did not (as it proposed in BMPCT-2689 and in the further hearing) utilize CBS programs. Instead, by a volte face development, referred to the petitions for rehearing denied September 10, 1958, WJR shifted to ABC. This does not mean that WJR would not, if the Commission's two decisions of July 1958 are affirmed by this Court, shift back to CBS and thereby destroy Saginaw's only TV operation. Hence, the legal validity of the conclusions reached by the Commission in its July 1958 decisions must be tested on

(continued on page 43)

However, the basic fallacy in the Commission's reasoning in the protest hearing stems from its "either-Flint-or-Saginaw" approach, and then concluding that Flint (being larger than Saginaw) should have a VHF operation on Channel 12 whatever might happen to Saginaw's UHF operation on Channel 57. The Commission was confronted with no such Hobson's choice, in either the protest or the comparative proceeding. The protest hearing was on WJR's modification grant of April 14, 1955 -- which had authorized WJR to shift to Chesaning and to utilize CBS rather than DuMont programming. If that modification application was denied (under 47 U.S.C. 307(b), 308, and 309 of the Act) because of the impact it would have on Saginaw, WJR could still have operated on Channel 12 at Clarkston. WJR had adequate resources (e.g., the $700,000 studio saving) with which to operate as an independent from that site during the "two or three years" required to place it in the black (R. 5226). This would have meant that both Flint and Saginaw would be assured of stations of their own. The Commission was not confronted with an "either-or" proposition. It was this stubborn refusal of the Commission to consider the impact of the particular modification proposed by WJR on Saginaw's television operation, as distinguished from the impact of other available ways of using Channel 12 as a Flint outlet, which led the Commission into the erroneous legal conclusions here challenged.

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Up to this point we have urged that the WJR modification proposal should have been rejected on three noncomparative grounds:

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2 (continued from page 43)
the facts there developed and the rulings there made, and not on the basis of a happenstance post-decision development which has temporarily prolonged WKNX-TV's existence. The significance of this third volte face by WJR (first from CBS to DuMont, then from DuMont to CBS, and then from CBS to ABC) is twofold: (1) That WJR obtained a second reaffirmance of its grant on a program proposal on which no hearing has ever been held; and (2) that WJR's "temporary" shift to ABC forestalled a request which WKNX-TV would have filed in this Court for a stay pending review on the merits by eliminating the showing of irreparable injury which WKNX-TV could otherwise have made.

(1) Because tantamount to a new application not entitled to comparative consideration with those of Trebit and Butterfield; (2) because of WJR's lack of candor and successful concealment machinations while the original petitions for rehearing were being considered; and (3) because of the impact of this particular proposal by WJR on Saginaw's only television outlet. Even if it were to be concluded that WJR's modification proposal "standing alone" should not have been rejected on each of these grounds, there can be no question that the two last-mentioned considerations should have weighed heavily against WJR in any comparative consideration of WJR's proposal with those of Trebit and Butterfield. The Commission completely "ducked" any such comparison (1) by treating WJR as a "permittee" rather than as an "applicant"; (2) by holding that the "concealment" did not disqualify WJR; and (3) by treating the impact matter as "irrelevant." Therefore, since the Commission has not in fact compared the three applicants on the basis of all relevant factors, a request to remand these proceedings for that omission is not a request by Lake Huron to have this Court reweigh the evidence or to substitute its judgment for that of the Commission. It is a request to remand for plain legal error -- the Commission's failure to consider and weigh all relevant public interest factors on which evidence was adduced and proffered. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U. S. App. D. C. 40, 175 F. 2d 351 (1949).

CONCLUSION

For each of the foregoing reasons, Lake Huron Broadcasting Corporation respectfully requests this Court to reverse the Commission's actions here complained of and to remand this case to the Commission for further proceedings in accordance with law.

Respectfully submitted,

By JAMES A. McKENNA, JR.

VERNON L. WILKINSON

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1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for

LAKE HURON BROADCASTING
CORPORATION

May 19, 1959

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

September 2, 1958

8820

Lake Huron Broadcasting Corporation
221 South Washington Avenue
Saginaw, Michigan

Gentlemen:

This is in reference to your application for a construction permit for a television broadcast station to operate on Channel 12 in Flint, Michigan, which was tendered for filing on October 29, 1956.

In submitting the aforementioned application, you requested that it be designated, pursuant to Commission's Rules, for comparative consideration with the then pending applications for Flint Channel 12 in the further hearing ordered by the Commission on October 19, 1956, following remand in the original comparative proceeding by the Court of Appeals. You requested also that, if the Commission should construe its rules as not authorizing the acceptance of your application, then it should waive the requirements and accept the application as one entitled to comparative hearing in the remanded Channel 12 proceeding.

In addition to requesting the acceptance of your application, you also stated:

> "Applicant construes the decision of the Court in the Butterfield case to show clearly that the changes in the WJR application are fundamental and basic. Applicant has therefore concluded that, for the reasons set out above, the filing of the attached application is timely and appropriate. If, however, the Commission construes the forthcoming hearing pursuant to its October 19, 1956

> Order to be for the purpose of determining whether such changes are in fact basic and fundamental, applicant respectfully requests that (1) the Commission retain the enclosed application in its pending file until a determination on this point is made, and (2) grant the petition for intervention filed this date."

On December 17, 1956, you were admitted as an intervenor in the proceeding after remand. However, your request for acceptance of your application either under the Rules or by Waiver of the Rules was not granted, and your application has been retained in the pending file until the outcome of the further hearing.

The Commission on July 8, 1958, adopted a final decision in the comparative proceeding on Flint Channel 12 affirming its original grant of the application of WJR, the Goodwill Station, Inc. In its decision the Commission held (25 F.C.C. 185):

> "This proceeding, under the court's remand, is not a comparative proceeding, ab initio. Rather its scope and purpose is to receive evidence as to the matters raised in the petition of Trebit and Butterfield for rehearing. These matters go to the character and fitness of WJR as a licensee, and a determination as to whether the changes proposed by WJR in its modification application materially affect the decisional basis of the Commission's preference of the WJR application. In the light of such evidence, the question to be resolved is whether the public interest would be better served by setting aside the grant to WJR of the construction permit here involved and its award to one of the other applicants. The changes in the WJR proposal requiring rehearing were limited by the court's order to programing, studio building, and transmitter site."

In a subsequent decision adopted on July 15, 1958, dismissing your protest, among others, against Commission action of April 14, 1955, granting the application of WJR the Goodwill Station, Inc. for modification of construction permit for the Channel 12 television station, the Commission noted (25 F.C.C. 229):

> "8. Section 1.319(b) of the Commission's rules and the doctrine of Ashbacker Radio Corporation v. FCC, 326 U.S. 327 ..., relate to the requirement that mutually exclusive applications must be accorded comparative consideration. Protestants contend that the WJR modification application constitutes a totally new proposal which must be the subject of a comparative hearing with the applications of Trebit and Butterfield. Our determinations in the comparative proceeding released July 11, 1958, to which reference is made, fully dispose of that issue in the instant proceeding."

In view of the Commission's above-cited rulings denying in effect your request for comparative consideration of your application in the further hearing and the Commission's recent final decision in the comparative proceeding preferring the modified application of WJR, your application is returned herewith as not acceptable for filing under the Commission's Rules.

Very truly yours,
/s/ Mary Jane Morris
Secretary

Enclosures
cc: McKenna & Wilkinson, Esqs.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

REPORT NO.
5849

PUBLIC NOTICE - B
63190
September 8, 1958

BROADCAST APPLICATIONS ACCEPTED AND TENDERED FOR FILING

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COMMERCIAL TELEVISION BROADCAST APPLICATION RETURNED AS NOT ACCEPTABLE FOR FILING UNDER COMMISSION'S RULES:

FILE NO.	APPLICANT & LOCATION	CALL LETTERS	NATURE OF APPLICATION
	Lake Huron Broadcasting Corporation Saginaw, Michigan	WKNX-TV	Modification of Construction Permit (BPCT-1200 as modified, which authorized a new Commercial Television Broadcast Station) to change Station Location from Saginaw, Michigan to Flint, Michigan; change Frequency from Channel 57, 728-734 Mcs. to Channel 12, 204-210 Mcs.; ERP from Visual 178 kw, Aural 93.3 kw to Visual 316 kw; Aural 158 kw; change Studio Location and Transmitter Location from Bradley Street at City Limits, Saginaw, Michigan to Studio Location To be determined within city limits, Flint, Michigan; and Transmitter Location to Chesaning Road and Gasper Road, 3.5 miles NE of Chesaning, Michigan; install new transmitters and antenna system and make other equipment changes. (973 feet). RETURNED 9-2-58 as NOT ACCEPTABLE FOR FILING UNDER COMMISSION'S RULES.

APPENDIX B

STATUTES AND RULES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended (47 U.S.C. Sec. 151 et seq) and the Commission's Rules are as follows:

Section 307(b) (47 U.S.C. Sec. 307(b):

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 308 (47 U.S.C. Sec. 308):

Sec. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate, the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communications between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

Section 309(a) and (b) (47 U.S.C. Sec. 309(a) and (b)):

Sec. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

Section 402(b) (1) and (6) (47 U.S.C. Sec. 402(b) (1) and (6)):

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> . . . .
>
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

Section 402(h) (47 U.S.C. Sec. 402(h)):

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

Rule 1.373(h), as amended March 7, 1956, effective March 16, 1956 (21 F. R. 1594), was worded as follows:

> (h) An application will continue to be carried under the same file number unless a major amendment is made which involves the substitution of a different application. (Examples: Change in station location so that essentially a new service area is involved; substitution of new parties in the application so that the original applicant no longer holds a majority control.)

[Effective February 4, 1958 (22 F.R. 11002) Rule 1.373(h) became Rule 1.354(h) without changes. Subsequent to the instant appeals the rule has been twice amended.]

Rule 1.724(b), as amended December 31, 1955 (20 F.R. 10161), and until further amended in December 1957, was worded as follows:

> (b) Any application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the application in question is filed at least 30 days before the date on which the hearing on the prior application or applications is scheduled provided, however, that in broadcast matters a mutually exclusive application will be consolidated for hearing with such other application or applications only if the later application has been filed not later than ten days after public notice has been given by the Commission of its order designating a prior application of applications for hearing. If the later application is filed after said ten days it will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket. If, in nonbroadcast matters the scheduled date is changed, the date last set shall govern in determining the timeliness of an application.

Rule 3.613(b), since its adoption in 1952 has read as follows:

> (b) In cases where an adequate showing is made that there is good cause for locating a main studio outside the principal community to be served and that to do so would not be inconsistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in paragraph (a) of this section. The licensee or permittee of a television broadcast station shall not move his main studio outside the principal community in which it is located without first securing a modification of construction permit or license. Such licensee or permittee shall notify the Commission promptly of any change of the location of the main studio within the community. In any case where the main studio is located outside the principal community to be served, the licensee or permittee of a television broadcast station shall not move his main studio without first securing a modification of construction permit or license.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
PUBLIC NOTICE - G
61229

Report No. 1477 ACTIONS IN DOCKET CASES July 9, 1958

The Commission en banc, by Commissioners Doerfer (Chairman), Hyde, Bartley, Lee, Craven, Ford and Cross, took the following actions on July 9:

By Decision, the Commission affirmed its May 12, 1954 Decision granting application of WJR, The Goodwill Station, Inc., for a new TV station (WJRT) to operate on Channel 12 in Flint, Mich., as modified by application BMPCT-2689 filed Dec. 16, 1954 changing transmitter site, programming, etc. The May 12, 1954 Decision denied competing applications of Trebit Corp. and W. S. Butterfield Theaters, Inc. (Dockets 10268-70). A Supplemental Initial Decision of Sept. 12, 1957 looked toward this action. Commissioner Lee dissented; Commissioners Craven, Ford and Cross not participating. (Text to be printed by GPO in weekly pamphlet.)

By separate Decision, the Commission affirmed, and made effective immediately, its April 14, 1955 grant to WJR, Inc., for Mod. of CP (BMPCT-2689) of station WJRT (TV station Channel 12), Flint, Mich., to move transmitter site from a point southeast of Flint (Clarkston) to a point northwest of Flint (Chesaning), make antenna changes and change studio location in Flint; terminated June 8, 1955 action staying effective date of grant; dismissed protests by Lake Huron B/cg Corp. (WKNX-TV, Channel 57), Saginaw, Inland B/cg Co. (WTOM-TV, Channel 54), Lansing, and Sparton B/cg Co. (WWTV, Channel 13), Cadillac, all Mich.; and terminated proceeding in Docket 11412; also denied petition by Sparton to reopen the record. A Supplemental Initial Decision of April 5, 1956 looked toward this action. Commissioner Lee dissented; Commissioners Craven, Ford and Cross not participating. (Text to be printed by GPO in weekly pamphlet.)

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10-7-59
(2)

United States Court of Appeals
For the
District of Columbia Circuit

FILED SEP 4 1959

Joseph W. Stewart
CLERK

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,717

LAKE HURON BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WJR, THE GOODWILL STATION, INC.,
Intervenor.

APPEAL FROM DECISIONS AND ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

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September 4, 1959

Washington, D. C. ROBERT I. THIEL EX 3-0625

UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR APPELLANT

Evidence proffered in the comparative proceeding by Lake Huron Broadcasting Corporation designed to show that a grant to WJR, using a proposed site at Chesaning and operating as a CBS affiliate, would deprive Saginaw of its only television station, whereas a grant to either Trebit or Butterfield, from the sites they proposed and as NBC affiliates, would mean that both Flint and Saginaw would have television stations of their own, was rejected by the Examiner as not within the scope of the issues (Tr. 1618-1625, 1664-1674, 1680-1681). The Examiner's action was affirmed by the Commission on a different ground, namely, that such evidence was "irrelevant" in the comparative proceeding (R. 6407, para. 24).

In the protest hearing, where somewhat comparable testimony was admitted, the Commission concluded, with Flint being the larger city, that a grant of WJR's application for a modification of its permit (to operate from Chesaning rather than Clarkston) would serve the public interest even if it meant the demise of Saginaw's only television station, without considering whether Flint and Saginaw would each be assured of stations of their own if WJR were refused permission to shift its transmitter site to the outskirts of Saginaw (R. 12884-12887, paras. 11-16).

In our view, each of the foregoing rulings of the Commission was plainly erroneous. Even Commission counsel, if we read their answering brief aright (cf. pp. 55-56), have no particular zest for defending the outright exclusion of all such evidence in the comparative proceeding. To their attempted defense of the foregoing rulings, Lake Huron Broadcasting Corporation replies as follows:

I

Section 402(h) Of The Communications Act

Because of Section 402(h) and the limited issues specified in its Order of October 17, 1956, the argument is made that the Commission was "prohibited" from considering in the comparative proceeding "the effect of WJR's operation as a CBS affiliate from Chesaning would have on Lake Huron's operation from Saginaw, Michigan" (FCC Br. pp. 14, 23, 55-56). We disagree.

In its decision on the first appeal (99 U.S. App. D.C. 71, 73, 79), this Court held that the Commission erred in denying Trebit's and Butterfield's joint petition to reopen the record (filed after WJR's disclosure of its plans to shift from Clarkston to Chesaning and to affiliate with CBS rather than DuMont), and directed the Commission to "conduct further hearings on the question of the differences between WJR's original and modified proposals" and to "reconsider its grant in the light of the differences thus disclosed." Pursuant to that mandate, the Commission in its Order of October 17, 1959 "reopened" the record and ordered a further hearing to determine the site, studio, and program differences between the original and modified proposals (21 F.R. 8152; R. 4736-4737).

Lake Huron Broadcasting Corporation thereupon sought leave to intervene in the further hearing, with a view to showing the adverse impact which the 45-mile shift in WJR's transmitter site from Clarkston to Chesaning, and its affiliation with CBS rather than DuMont, would have on Saginaw's only television facility, pointing out that a grant of WJR's original application or those of Trebit and Butterfield would have had no such consequences. Despite arguments by the Commission's Broadcast Bureau, similar to those now made by its General Counsel concerning 47 U.S.C. Sec. 402(h) and the limited character of the issues specified in the October 17, 1956 Order, the Commission granted Lake Huron's petition to intervene (14 RR 905, R. 4955-4957).

In their subsequent request for mandamus, both Trebit and Butterfield argued, inter alia, that Section 402(h) precluded a grant of Lake Huron's petition to intervene. WJR joined in this contention and moved to strike Lake Huron's notice of intervention in the mandamus proceeding in this Court -- which Lake Huron opposed. In subsequently denying the Trebit and Butterfield mandamus request, this Court continued to list Lake Huron as a party intervenor. In short, despite arguments to the contrary, this Court apparently saw nothing in 47 U.S.C. Sec. 402(h) which precluded the Commission from allowing Lake Huron to participate in the further hearing and to point up the public interest consequences of WJR's transmitter site and program changes.

The Commission, realizing that the addition of Section 402(h) to the Communications Act in 1952 was a mild rebuke by Congress of the procedures utilized by the Commission after being reversed by this Court in the first Pottsville case,[1] now contends that its hands are tied by the amendment of the statute. But the Commission is not so hamstrung. On remand the Commission is only required by Section 402(h) to decide a case on the record already compiled, "unless otherwise ordered" by this Court. Here, on the first appeal this Court "otherwise ordered" by directing the Commission to reopen the record, to conduct further hearings on the differences between the original and modified proposals, and to reconsider its grant in the light of the differences thus disclosed (99 U.S. App. D.C. 71, 79).

Clearly one of the most significant differences between WJR's original and modified proposals, one which stemmed directly from the proposed 45-mile shift of its transmitter site and its proposed affiliation with CBS rather than DuMont, was the impact which that particular proposal would have on an existing facility in Saginaw (see Lake Huron's opening brief, pp. 14, 37-42). There was nothing in this Court's first decision, nothing in its order of remand, and nothing in the subsequent issues specified in the October 17, 1956 Order, which precluded the Commission from comparing those three applications "in the light of the differences" flowing from WJR's requested change in its transmitter site and network affiliation.[2]

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[1] See Pottsville Broadcasting Co. v. Federal Communications Commission, 69 U.S. App. D.C. 7, 98 F. 2d 288 (1938); cf. Pottsville Broadcasting Co. v. Federal Communications Commission, 70 U.S. App. D.C. 157, 105 F. 2d 36 (1939), reversed 309 U.S. 134 (1940).

[2] At the same time that it sought leave to intervene, Lake Huron (out of an abundance of caution) requested a clarification or enlargement of the previously stated issues to avoid any subsequent contention that data on the public interest consequences of the Chesaning as distinguished from the other two proposals was not germane. This request, like the petition to intervene, was opposed by the Broadcast Bureau on the same ground, namely, Section 402 (h) of the Act. Curiously enough, though holding that Lake Huron was a party in interest by reason of the alleged impact which WJR's new site would have on Saginaw and that Section 402 (h) was no bar to a grant of leave to intervene, the Commission nevertheless ruled that Section 402 (h) was a bar to any expansion or clarification of the issues. Confronted with this ruling, and although seemingly of the view that the impact of a Flint grant proposing a site on the outskirts of Saginaw, as contrasted with a grant of other applications proposing sites which would not preclude the continuation of an existing service in Saginaw, was a pertinent public interest consideration, the Examiner (Cont'd. p. 5)

To assert that evidence proffered with a view to showing that a grant to WJR as a CBS affiliate at Chesaning (on the outskirts of Saginaw) would deprive that city of its only television outlet, whereas a grant to either Trebit or Butterfield would mean that both Flint and Saginaw would have stations of their own, is "irrelevant" to a proper public interest determination to whom Channel 12 should be awarded, is completely untenable, and seeks to place on this Court's original decision and on Section 402(h) of the Act a construction which produces an absurd result.

II

Post-Grant Developments

Apparently fearful lest this Court not agree with the construction which the Commission thus seeks to place on Section 402(h) and on this Court's earlier mandate, counsel for the Commission next argues that nothing would be gained by reopening the record because after the action here complained of WJR again modified its proposal -- by affiliating with ABC rather than CBS, with the result that Lake Huron's UHF station in Saginaw is still on the air. (FCC Br. pp. 23, 56). This is adding insult to injury, (1) because the appellants in their petitions for reconsideration complained of this third shift by WJR in its program plans on which no hearing was held; (2) because, as Commission counsel elsewhere argues (FCC Br. p. 37 and fn. 15), the validity of an administrative decision must be determined on the basis of the facts then before it and not on the basis of subsequent happenstances; and (3) because, as Commission counsel elsewhere observes (FCC Br. p. 6 and fn. 1), WJR is hereafter free, in the event the instant decision is affirmed, to affiliate at some subsequent date with CBS and thereby destroy Saginaw's only television facility -- a consequence which would not have been visited on Lake Huron and Saginaw if WJR had not obtained permission to operate at Chesaning, on the outskirts of Saginaw.

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2 (Cont'd.)
had no choice but to reject such data at the subsequent hearing (Tr. 1618-1625, 1664-1674, 1680-1681). The Commission itself, at the time of the final decision, was free to reconsider its prior ruling to which Lake Huron had duly excepted, in the light of this Court's action at the time of the mandamus request and in the light of the legislative history of Section 402(h). Instead, it chose to assert that such evidence was "irrelevant," because Congress in enacting Section 402(h) and this Court in reversing the earlier decision had tied the Commission's hands.

III

The Ruling In The Protest Proceeding

Not unaware of the weakness in their attempts to sustain the outright exclusion in the *comparative* proceeding of all evidence dealing with the impact on Saginaw of WJR's modified proposal vis-a-vis those of Trebit and Butterfield, Commission counsel seeks to confuse matters by arguing that similar evidence received in the *protest* hearing was subsequently found by the Commission to be inconclusive. This argument is likewise untenable.

1. In the *protest* proceeding the ultimate issue was whether a grant of WJR's application to change site, network affiliation, etc. would serve the public interest. The Commission in that proceeding did not have before it the question whether a different proposal by another applicant would *better* serve the public interest. However, in the *comparative* proceeding, the Commission had before it three different proposals. Relevant to a comparative evaluation of each of those proposals was the impact each would have on existing services (see Lake Huron opening brief, pp. 39-41). That the Commission, in noncomparative proceedings frequently finds it in the public interest to grant an application to a nonlocal, nonintegrated, absentee group with other mass media interests, does not mean that such factors are irrelevant or without weight in a comparative proceeding where the Commission is called upon to determine which grant, among a choice of several, would *best* serve the public interest.

2. The Commission's treatment of the evidence concerning the impact of WJR's Chesaning proposal on Saginaw's only station manifests a determination to reaffirm at all costs its prior grant which this Court had reversed. In the protest proceeding it was shown that Lake Huron's UHF station in Saginaw was a CBS affiliate; that it was already competing with a VHF station in Bay City which placed a city-grade service over Saginaw (with a transmitter midway between those cities): that WJR

proposed a site at Chesaning, closer to Saginaw than to Flint, from which it too would place a city-grade service over Saginaw; that WJR proposed to affiliate with CBS; and that WJR's service area from its site at Chesaning would completely encircle the service area of Saginaw's UHF operation. To brand as "speculative" whether the UHF station in Saginaw would be forced to sign off the air in the light of this uncontradicted showing that Saginaw would receive city-grade service from two VHF stations affiliated with the two major networks (NBC and CBS) is to ignore seven years of uniform experience. The Commission itself is elsewhere on record that "our experience in other markets convinces us that the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of the existing UHF stations to continue to provide service in the area." Television Allocations in Albany-Schenectady-Troy, N.Y. Areas, 22 FCC 293, 302 (1957).

The Commission knows full well that where national and regional advertisers have a choice between UHF and VHF they choose the latter, that a network affiliation agreement is a useless scrap of papers unless advertisers order the station,[1] that without network shows a UHF station soon loses its audience, that without audience it cannot keep local advertisers, and that without revenues it cannot operate. The Commission's speculation about Lake Huron getting an affiliation with ABC on UHF is wholly unrealistic. With two city-grade VHF signals in Saginaw, most of ABC's sponsors would prefer delayed broadcasts of their programs on the VHF stations, as uniformly borne out by ABC's experience in St. Louis and like markets. The Commission's further speculation whether Lake Huron had fully developed Saginaw's advertising potential on UHF, in a much smaller city than Albany-Schenectady-Troy where no such speculation was indulged in, ignores its conclusions in 22 FCC 293, 302 (1957).

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[1] Commission counsel seeks to leave the impression that WJR did not intend to carry CBS shows which were already on WKNX-TV (FCC Br. p. 51, fn. 24). That WJR, as a CBS affiliate, would in fact carry substantially all network shows for which it was ordered is patent: "For the present we are including only those [CBS] network programs shown on WJIM-TV (not WKNX-TV)" (T. 1504, Butterfield Ex. G, p. 62).

No doubt aware of the "tongue-in-cheek" character of the foregoing assertions, the Commission then concluded that even if the WJR grant meant the demise of Saginaw's only station, a grant of a wide-coverage VHF facility would better serve the public interest than the continuation of the UHF station in Saginaw, inasmuch as Flint was a substantially larger city than Saginaw. In some situations this might be true, but not on the record here developed.

The foregoing conclusion ignores the fact that Flint already had six VHF services, whereas Saginaw had only two, with WJIM-TV blotted out of Saginaw by reason of adjacent-channel interference (see WJR Ex. 91). It ignored the fact that Flint, by the time this case was decided, had local studio facilities, supplied by WJIM-TV, Lansing, and WNEM-TV, Bay City, whereas Saginaw would have none if WJR operated from Chesaning as a CBS affiliate.

But the more basic and fundamental error in this reasoning by the Commission was its "either-or" approach. This was not a situation where only one of these cities (Flint or Saginaw) could have a station of its own. By rejecting in the protest proceeding the modification request to shift its transmitter site from Clarkston to the outskirts of Saginaw, WJR would still have been free to build at Clarkston; WJR's own advisers recognized that the station would become a profitable operation as an independent within two or three years; WJR had adequate reserves for that purpose; Flint would thus have had its own station on Channel 12 and Saginaw would have been assured of its own station on UHF. That alternative was nowhere considered in the protest decision -- even though the ultimate issue in that case was whether the public interest would be served by allowing WJR to shift its transmitter site from Clarkston to Chesaning (see Lake Huron opening brief, pp. 42-44).

IV

Conclusion

After noting in this and other cases the length to which the Commission has gone to sustain its original action, where it has been reversed on appeal, this Court could be pardoned for wondering what another reversal and remand would accomplish. However, where as here the Commission has committed plain error, (a) by refusing to receive in the comparative proceeding any evidence whatever regarding the impact onan existing service of a grant to WJR, as contrasted with a grant to either of the other competitors, and (b) by failing to consider in the protest proceeding the public interest benefits which would accrue from a denial of WJR's shift to the outskirts of Saginaw, this Court would be abdicating its functions were it not to remand this case again for further proceedings in accordance with law.

Respectfully submitted,

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September 4, 1959